

Report | Pūrongo 144

# **The Use of DNA in Criminal Investigations**

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## **Te Whakamahi i te Ira Tangata i ngā Mātai Taihara**



Te Aka Matua o te Ture | Law Commission is an independent, publicly funded, central advisory body established by statute to undertake the systematic review, reform and development of the law of New Zealand. Its purpose is to help achieve law that is just, principled, and accessible, and that reflects the heritage and aspirations of the people of New Zealand.

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Hon Andrew Little  
Minister Responsible for the Law Commission  
Parliament Buildings  
WELLINGTON

**President**

Amokura Kawharu

30 October 2020

**Commissioners**

Donna Buckingham

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(Deputy President)

Dear Minister

**NZLC R144 – The Use of DNA in Criminal Investigations |  
Te Whakamahi i te Ira Tangata i ngā Mātai Taihara**

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New Zealand  
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I am pleased to submit to you the above Report under section 16 of the Law Commission Act 1985.

[lawcom.govt.nz](http://lawcom.govt.nz)

Yours sincerely,

A handwritten signature in blue ink that reads 'Amokura Kawharu'.

**Amokura Kawharu**

Tumu Whakarae | President



# Foreword

Aotearoa New Zealand was the second country to create a legislative regime for DNA sample collection and profiling for criminal justice purposes.

The Criminal Investigations (Bodily Samples) Act 1995 focuses on the use of a DNA profile to identify an individual offender – either by offering an investigative lead in relation to unsolved criminal offending or by providing evidence in the prosecution of an offence.

For that reason, a DNA profile has sometimes been referred to as the ‘modern fingerprint’ in terms of the function it performs in the criminal justice context.

But while fingerprints are literally unique, DNA by its very nature is shared with ancestors, siblings and children, and the science has now surpassed that concept of individual identification that underpinned the legislation.

For example, DNA profiling can provide information that goes beyond identification of an individual person via the technique of familial searching – looking for a near match as an investigative lead where a direct match is not able to be obtained.

The paths to using DNA profiling as a criminal investigative tool are also becoming more varied.

The legislation is silent on, for example, drawing inferences as to the ethnicity of an unknown offender by matching a profile obtained from a crime scene sample to an ethnicity databank. It provides no guidance on other paths to genetic profiles yet to be taken in Aotearoa New Zealand – such as accessing public genealogical databases to provide investigative leads.

Nor does it say how we should approach the prospect that whole genome sequencing may ultimately become the standard method of analysing a DNA sample in criminal investigations, generating a complete genetic picture of a person.

The original legislative challenge was how best to support the value of DNA profiling in the law enforcement context and, at the same time, address the significant privacy and human rights concerns that arise.

Twenty-five years on, the challenge must be approached more broadly – not only to address the science that has developed and will continue to develop but also the need for the recognition of tikanga Māori and for consistency with te Tiriti o Waitangi | the Treaty of Waitangi.

This Report therefore makes the case for new legislation that comprehensively addresses the use of DNA in criminal investigations.

**Amokura Kawharu**

Tumu Whakarae | President

# Acknowledgements

The Law Commission is grateful to all those who have assisted during the course of this review. In particular, we acknowledge the generous contributions of time and expertise from our expert advisory group and officials' advisory group. These groups provided guidance on the issues we selected for our Issues Paper and also engaged in rigorous discussion of the preliminary policy proposals.

Our advisory group members offered expertise in legal, scientific and tikanga Māori issues:

- Vanessa Blackwood
- Emily Bruce
- Judge Denise Clark
- Jonathan Eaton QC
- Jo Hayward
- Associate Professor Māui Hudson
- Joy Liddicoat
- Associate Professor Nessa Lynch
- Paige McElhinney
- Sue Petricevic
- Dr Anna Sandiford
- Dr Armon Tamatea
- Judge Arthur Tompkins

The officials' group included representatives of New Zealand Police, the Institute of Environmental Science and Research (ESR), Crown Law, the Public Defence Service and the Ministry of Justice.

We thank the National Forensic Services Centre of New Zealand Police, and ESR and the Independent Police Conduct Authority for their ongoing cooperation.

We acknowledge the guidance of Associate Professor Māmari Stephens from the Faculty of Law, Victoria University of Wellington and we are grateful for the advice and assistance of the Commission's Māori Liaison Committee.

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The Commissioner responsible for this reference is Donna Buckingham, who led the reference after the departure of Commissioner Wayne Mapp in mid-2017.

The legal and policy advisers who worked on this Report are Sam Coad, Nichola Lambie, Kate McKenzie-Bridle, Samuel Mellor, Kate Slankard-Stone, Clair Trainor and Jesse Watts.

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# Contents

Foreword.....	IV
Acknowledgements.....	V
Glossary .....	6
Executive summary.....	8
Recommendations .....	14
<b>Chapter 1: Introduction .....</b>	<b>45</b>
The origins of our review.....	45
Our review .....	47
Our process.....	48
Matters addressed in this Report.....	49
<b>PART A: A NEW REGULATORY FRAMEWORK</b>	
<b>Chapter 2: Constitutionally sound DNA legislation.....</b>	<b>52</b>
Introduction .....	52
Te Tiriti o Waitangi   the Treaty of Waitangi.....	53
Tikanga Māori.....	59
Human rights values .....	66
Conclusion.....	74
<b>Chapter 3: A new Act.....</b>	<b>75</b>
Introduction .....	75
Fundamental problems with the CIBS Act .....	75
Results of consultation.....	88
Recommendations .....	91
<b>Chapter 4: A new DNA databank .....</b>	<b>95</b>
Introduction .....	95
The use of DNA in criminal investigations.....	95
DNA databanks in comparable jurisdictions.....	98
Broad issues with the DNA databanks in Aotearoa New Zealand .....	99
Recommendations .....	102
<b>Chapter 5: Oversight of the DNA regime.....</b>	<b>105</b>
Introduction .....	105
Background .....	105
Issues with the existing oversight arrangements .....	110

Options for reform .....	116
Results of consultation.....	117
Oversight in comparable jurisdictions.....	122
Recommendations .....	127
<b>Chapter 6: Regulating DNA analysis.....</b>	<b>141</b>
Introduction .....	141
Current law and practice.....	141
Future analysis techniques.....	151
Issues .....	154
Options for reform .....	161
Results of consultation.....	162
DNA analysis in comparable jurisdictions.....	165
Recommendations .....	167
<b>Chapter 7: The forensic services provider.....</b>	<b>174</b>
Introduction .....	174
Current law and practice.....	174
Regulation of forensic services providers in comparable jurisdictions.....	182
Issues .....	183
Options for reform .....	185
Results of consultation.....	185
Recommendations .....	187
<b>PART B: DNA IN CRIMINAL CASEWORK</b>	
<b>Chapter 8: Suspect sampling.....</b>	<b>192</b>
Introduction .....	192
Current law and practice.....	192
Issues with a consent-based regime.....	198
Issues with the offence threshold.....	204
Options for reform .....	205
Results of consultation.....	206
Suspect sampling in comparable jurisdictions .....	212
Recommendations .....	216
<b>Chapter 9: Elimination sampling.....</b>	<b>230</b>
Introduction .....	230
Current law and practice.....	230
Issues with the current elimination sampling regime.....	233
Options for reform .....	238
Results of consultation.....	238
Elimination sampling in comparable jurisdictions.....	240
Recommendations .....	241



<b>Chapter 10: Mass screening</b> .....	<b>254</b>
Introduction .....	254
Current law and practice.....	255
Issues .....	256
Mass screens in comparable jurisdictions .....	259
Options for reform .....	260
Results of consultation.....	261
Recommendations .....	262
<b>Chapter 11: Casework sampling procedures</b> .....	<b>269</b>
Introduction .....	269
Current law and practice.....	269
Issues with current sampling procedures.....	271
Options for reform .....	272
Results of consultation.....	272
Suspect sampling procedures in comparable jurisdictions .....	275
Recommendations .....	275
<b>Chapter 12: Indirect sampling</b> .....	<b>280</b>
Introduction .....	280
Current law and practice.....	281
Issues with indirect sampling .....	289
Options for reform .....	293
Results of consultation.....	293
Indirect sampling in comparable jurisdictions .....	298
Recommendations .....	301
<b>Chapter 13: Crime scene examinations</b> .....	<b>308</b>
Introduction .....	308
Current law and practice.....	308
Issues .....	316
Crime scene examinations in comparable jurisdictions .....	317
Options for reform .....	319
Recommendations .....	320
<b>Chapter 14: Forensic DNA phenotyping</b> .....	<b>323</b>
Introduction .....	323
Current law and practice.....	323
Issues .....	331
Options for reform .....	335
Results of consultation.....	336
Phenotyping in comparable jurisdictions.....	338
Recommendations .....	340

<b>Chapter 15: Genetic genealogy searching.....</b>	<b>343</b>
Introduction .....	343
Current law and practice.....	344
Issues with genetic genealogy searching.....	348
Options for reform .....	351
Results of consultation.....	351
Genetic genealogy searching in comparable jurisdictions .....	352
Recommendations .....	353
<b>Chapter 16: Management of casework and crime scene samples.....</b>	<b>358</b>
Introduction .....	358
Casework samples .....	358
Recommendations .....	372
Crime scene samples.....	378
Recommendations .....	386
<b>PART C: THE PROPOSED DNA DATABANK</b>	
<b>Chapter 17: The crime scene index .....</b>	<b>389</b>
Introduction .....	389
Current law and practice.....	389
Issues .....	397
Options for reform .....	402
Results of consultation.....	403
Crime scene databanks in comparable jurisdictions.....	407
Recommendations .....	409
<b>Chapter 18: Databank sampling.....</b>	<b>419</b>
Introduction .....	419
Current law and practice.....	419
Issues with the databank sampling regime.....	426
Databank sampling in comparable jurisdictions .....	432
Options for reform .....	436
Results of consultation.....	437
Recommendations .....	441
<b>Chapter 19: Databank sampling procedures.....</b>	<b>455</b>
Introduction .....	455
Current law and practice.....	455
Issues with databank sampling procedures.....	457
Use of reasonable force in comparable jurisdictions .....	458
Options for reform .....	460
Recommendations .....	461

<b>Chapter 20: Storage and retention of databank samples and profiles .....</b>	<b>465</b>
Introduction .....	465
Storage and retention of databank samples .....	465
Recommendations .....	467
Retention of databank profiles on the proposed DNA databank.....	467
Recommendations .....	475
<b>Chapter 21: Children and young people and the databank.....</b>	<b>479</b>
Introduction .....	479
Current law and practice.....	479
Issues.....	489
Results of consultation.....	499
Approach in comparable jurisdictions .....	503
Recommendations .....	505
<b>Chapter 22: Investigating missing and unidentified people .....</b>	<b>509</b>
Introduction .....	509
Current law and practice.....	509
Issues.....	512
Approach in comparable jurisdictions .....	513
Results of consultation.....	515
Recommendations .....	516
<b>Chapter 23: Other uses of the proposed DNA databank.....</b>	<b>521</b>
Introduction .....	521
Familial searching .....	521
Recommendations .....	531
Searching on behalf of foreign countries.....	535
Recommendations .....	540
Research on the proposed DNA databank .....	543
Recommendations .....	551
<b>Appendix 1: Terms of reference.....</b>	<b>554</b>
<b>Appendix 2: List of submitters .....</b>	<b>556</b>
<b>Appendix 3: DNA statistics.....</b>	<b>557</b>
<b>Appendix 4: DNA databanks in other jurisdictions.....</b>	<b>564</b>
<b>Appendix 5: Proposed matching rules.....</b>	<b>566</b>

# Glossary

Key abbreviations and terms used in this Report are set out below. Key Māori terms and concepts are described in Chapter 2.

<b>casework comparison</b>	A one-to-one comparison of a DNA profile to another DNA profile to determine, using statistical calculations, how likely it is the two profiles are from the same person. For this comparison to be conducted, the profiles need to have been analysed in the same way. Casework comparison usually involves comparing a DNA profile generated from a casework sample and a DNA profile generated from a DNA sample collected from a crime scene.
<b>casework samples</b>	DNA samples obtained from known people in a criminal investigation for the purpose of casework comparison. These are referred to by others as “casework reference samples”.
<b>CIBS Act</b>	Criminal Investigations (Bodily Samples) Act 1995.
<b>Crime Sample Databank (CSD)</b>	A databank established to store DNA profiles generated from DNA samples collected from crime scenes. The CSD is maintained by ESR on behalf of Police.
<b>databank searching</b>	The process used to identify potential suspects in unsolved crimes by comparing a crime scene profile against a DNA databank of profiles from known people. A match between a crime scene profile and a known person profile indicates that the profiles are likely to be from the same person. This can be confirmed by a casework comparison to determine the strength of the match using statistical calculations. Databank searching can also be used to identify links between unsolved crimes by comparing a crime scene profile to crime scene profiles from other unsolved crimes.
<b>DNA</b>	DNA (deoxyribonucleic acid) is the hereditary material found in humans and nearly all living organisms. In humans, DNA is organised into 46 chromosomes, with a person receiving 23 chromosomes from each of their biological parents. Two chromosomes are sex determining, and the rest are autosomal chromosomes. DNA is made up of four chemical bases or nucleotides (adenine (A), thymine (T), cytosine (C) and guanine (G)). These bases pair up to make the ‘rungs’ of the ladder-shaped DNA double helix. A pairs with T and C pairs with G. The human genome (the complete set of genetic information contained in DNA) contains 3 billion base pairs spread across the 46 chromosomes. The arrangement of base pairs is 99.9 per cent the same across all human beings. However, the remaining 0.1 per cent is so variable that every individual has a unique DNA sequence.
<b>DNA databank</b>	A DNA databank in the criminal investigation context is a collection of DNA profiles from known people or from crime scenes. In Aotearoa New Zealand, the DNA databanks comprise the Crime Sample Databank (CSD), the DNA Profile Databank (DPD) and the Temporary Databank.

<b>DNA profile</b>	Information generated from DNA analysis recorded as a series of numbers and letters that can accurately identify an individual. When using single tandem repeat (STR) profiling, the standard DNA analysis technique, the numbers represent measurements taken at specific places (or loci) on the non-coding regions of a person's genome. The letters reflect a sex test and are usually XX or XY.
<b>DNA Profile Databank (DPD)</b>	A databank authorised by section 25 of the CIBS Act to store the DNA profiles of known persons obtained from DNA samples taken under Parts 2 and 3 of the Act.
<b>DNA sample</b>	Any sample of human biological material, such as saliva, semen, blood or skin cells, that has been collected for the purpose of scientifically analysing the DNA contained within that sample. A DNA sample can be obtained directly or indirectly from a person whose identity is already known or it could be collected from a crime scene.
<b>ESR</b>	Institute of Environmental Science and Research Limited, a Crown Research Institute that provides science services and research capability across several science disciplines. ESR is Police's sole provider of forensic services, and its responsibilities include analysing DNA samples, conducting casework comparisons, administering the DNA databanks, databank searching and managing the storage, return or destruction of samples and profiles.
<b>Issues Paper</b>	Te Aka Matua o te Ture   Law Commission <i>The Use of DNA in Criminal Investigations</i>   <i>Te Whakamahi i te Ira Tangata i ngā Mātai Taihara</i> (NZLC IP43, 2018). This is available at our website: <a href="http://www.lawcom.govt.nz">www.lawcom.govt.nz</a> .
<b>Police</b>	Ngā Pirihimana o Aotearoa   New Zealand Police.
<b>police officer</b>	In Aotearoa New Zealand, a police officer means a Police employee who holds the office of constable, including a constable who holds any level of position within Police.
<b>qualifying offence</b>	An offence that meets the relevant offence threshold for obtaining a DNA sample or retaining a profile from a known person under the CIBS Act. In most cases, the offence threshold captures all imprisonable offences and the non-imprisonable offence of peeping or peering into a dwellinghouse. The one exception is where a police officer requires a DNA sample from a young person arrested or intended to be charged. In that situation, only a smaller group of "relevant offences" meet the offence threshold.
<b>related offence</b>	Two offences are related to one another if the elements of the two offences comprise substantially the same act or omission.
<b>Temporary Databank</b>	A databank authorised by section 24O of the CIBS Act to store the DNA profiles of known persons obtained from DNA samples obtained under Part 2B of the Act.

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# Executive summary

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## 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.
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# Recommendations

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## 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 to 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:
- databank searching; and
  - 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:
- available for databank searching; or
  - limited to casework comparison.

- R122** A crime scene profile should be classified as available for databank searching if:
- the crime scene profile only contains the DNA of one person;
  - a comparison to any profiles on the elimination index that relate to that investigation does not result in a match; and
  - 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 be 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 suitably 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).

## CHAPTER 1

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# Introduction

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- 1.1 DNA analysis is an important law enforcement tool. When DNA is found at a crime scene, DNA analysis can help confirm or exclude the involvement of a known suspect. With the establishment of DNA databanks, DNA can also be used to identify suspects in unsolved crimes.
- 1.2 However, the collection and use of DNA in criminal investigations raises some important constitutional issues. Te Tiriti o Waitangi | the Treaty of Waitangi (the Treaty), tikanga Māori and human rights values must be considered, particularly given the rapid pace of scientific advances. Much more information can be derived from DNA now compared to the mid-1980s, and this trend is likely to continue in future. Ultimately, the question is not whether DNA should be used in law enforcement but *when* and *how* it should be used.
- 1.3 In July 2016, the Government asked Te Aka Matua o te Ture | Law Commission (the Commission) to review the law governing the collection and use of DNA in criminal investigations in Aotearoa New Zealand. Our review has focused primarily on the Criminal Investigations (Bodily Samples) Act 1995 (CIBS Act).
- 1.4 This Report sets out our findings and recommendations for change.

## THE ORIGINS OF OUR REVIEW

### Early use of DNA in criminal investigations

- 1.5 DNA first started being used in criminal investigations in the mid-1980s through a technique known as DNA profiling.<sup>1</sup> This technique involves analysing biological material found at crime scenes, such as blood, saliva or skin cells, to generate a DNA profile, which is a unique series of numbers and letters. If that DNA profile (the crime scene profile) matches a DNA profile generated from a DNA sample taken from a known person, it is probable that the known person was the source of the DNA found at the crime scene.

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<sup>1</sup> The first reported use of DNA profiling in a serious criminal investigation was in the “Pitchfork case” in the United Kingdom in 1986. The Pitchfork case involved the rape and murder of two 15-year-old girls, three years apart, and other serious and violent offending. DNA was used to exonerate the person originally arrested for one of the murders and to implicate Colin Pitchfork. The police had organised mass screening of local males in 1987 and later discovered that Mr Pitchfork had bribed another person to provide a blood sample on his behalf. Mr Pitchfork was arrested, confessed and pleaded guilty to the murders and other charges. A summary of the facts is contained in *R v Pitchfork* [2009] EWCA Crim 963 at [4]–[11].

- 1.6 Initially, DNA profiling was only used within the confines of individual cases. Investigators needed to first identify a suspect and obtain a DNA sample from them to compare their DNA profile against the crime scene profile.
- 1.7 However, from 1995, several countries, including Aotearoa New Zealand, established DNA “databanks” to capitalise on the developing science.<sup>2</sup> By creating databanks of crime scene profiles and DNA profiles from known people (often those convicted of serious offending), investigators could conduct wide-ranging comparisons and identify suspects in unsolved crimes.
- 1.8 DNA databanks have continued to expand worldwide in three ways:
- (a) More information is being included in each DNA profile as DNA analysis techniques improve.
  - (b) The number of crime scene profiles in DNA databanks has increased, as scientists can now generate crime scene profiles from a broader range of samples of biological material and can do so at a lower cost.
  - (c) The number of DNA profiles from known people in DNA databanks has increased as countries enable the collection and use of DNA samples for databank purposes from a wider range of known people, such as people convicted of less serious offending, people who are suspects or those who are arrested.
- 1.9 Aotearoa New Zealand has followed this expansion trend. In respect of DNA profiles from known people, the CIBS Act established the DNA Profile Databank (DPD) in 1996 and legislative amendments in 2003 and 2009 considerably expanded the collection criteria.<sup>3</sup>

### Expanding use of DNA in Aotearoa New Zealand: the 2009 amendments

- 1.10 The 2009 amendments to the CIBS Act were significant. They granted police officers wide powers to require DNA samples for the DPD from any person convicted of an imprisonable offence and established a new DNA databank, named the Temporary Databank, to store DNA profiles of adults who are arrested or intended to be charged with any imprisonable offence.<sup>4</sup> This covers a very wide range of behaviour. The European Court of Human Rights, in a decision released earlier this year, observed that regimes like these “could be characterised as applying whatever the nature or seriousness of the offence”.<sup>5</sup>
- 1.11 The 2009 amendments progressed quickly through Parliament as part of the Government’s post-election 100-day reform programme. At the time, the Attorney-

<sup>2</sup> There are now at least 69 countries that have operational forensic DNA databases, and 34 other countries are in the process of implementation. See Helena Machado and Rafaela Granja *Forensic Genetics in the Governance of Crime* (Palgrave Pivot, Singapore, 2020) at 58.

<sup>3</sup> The Criminal Investigations (Blood Samples) Act 1995 was enacted in 1995 and amended by the Criminal Investigations (Bodily Samples) Amendment Act 2003 and the Criminal Investigations (Bodily Samples) Amendment Act 2009.

<sup>4</sup> Criminal Investigations (Bodily Samples) Act 1995, ss 24J and 39. These sections also authorise collecting samples in relation to the non-imprisonable offence of peeping or peering into a dwellinghouse. The 2009 amendments also introduced new powers to obtain DNA samples from a young person on arrest or intention to charge in relation to a smaller range of more serious offences: s 24K.

<sup>5</sup> *Gaughran v The United Kingdom* ECHR 45245/15, 13 February 2020 at [83]. This comment was made in relation to the United Kingdom’s regime, which permits taking of DNA samples from people convicted of offences punishable by a term of imprisonment.

General reported to Parliament that, in his view, the amendments would be inconsistent with the right to be secure against unreasonable search and seizure, affirmed in section 21 of the New Zealand Bill of Rights Act 1990 (Bill of Rights Act).<sup>6</sup> Parliament passed the amendments in any event.

- 1.12 However, the Attorney-General's concerns, as well as general concerns about the speed with which the amendments had been passed and their cost implications, prompted Cabinet to agree to a future review of the CIBS Act's operation by the Ministry of Justice.<sup>7</sup> This review was ultimately referred to the Commission as part of its work programme.

## OUR REVIEW

- 1.13 Our review has been comprehensive. The terms of reference are set out in Appendix 1 and required consideration of whether the CIBS Act is fit for purpose and whether it is keeping pace with developments in forensic science, international best practice and public attitudes. We also had to examine whether the CIBS Act gives appropriate recognition to both law enforcement values and human rights values and whether Māori interests, including in relation to tikanga Māori, are appropriately recognised.

- 1.14 The terms of reference are focused on the use of DNA in criminal investigations and do not extend to the subsequent use of DNA analysis as evidence in criminal proceedings. However, the use of DNA evidence in proceedings is an implicit and often vital part of the criminal justice process. In Chapter 6 of this Report, we address some of the issues with relying on DNA evidence in proceedings and make recommendations in relation to the DNA analysis techniques that might assist in moderating those issues.

## Our objectives

- 1.15 Our objectives in this review have been to ensure that the law governing the collection and use of DNA in criminal investigations has the following attributes:<sup>8</sup>
- (a) **Fit for purpose.** To achieve this objective, legislation must have a clear purpose and provide certainty as to rights and obligations. The legislation must also be sufficiently flexible to enable the law to last and comprehensively address likely scenarios. Finally, to be fit for purpose, the legislation must work effectively with interrelated law in the wider criminal justice system.
  - (b) **Constitutionally sound.** The law should reflect fundamental constitutional principles and values of Aotearoa New Zealand law. This requires consistency with the Treaty, recognising and providing for tikanga Māori, and consistency with human rights values.
  - (c) **Accessible for users.** The law should be able to be easily found by individuals and easy to navigate and understand. This is particularly important for legislation like

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<sup>6</sup> Christopher Finlayson *Report of the Attorney-General under the New Zealand Bill of Rights Act 1990 on the Criminal Investigations (Bodily Samples) Amendment Bill* (10 February 2009).

<sup>7</sup> Tāhū o te Ture | Ministry of Justice *Criminal Investigations (Bodily Samples) Amendment Bill: Regulatory Impact Statement* (10 February 2009) at 5.

<sup>8</sup> These objectives are adopted from the *Legislation Guidelines* approved by Cabinet and are considered the "core objectives for high quality law": Legislation Design and Advisory Committee *Legislation Guidelines* (March 2018) at 8.

the CIBS Act that deals directly with the relationship between the State and individuals.

- 1.16 These objectives form the basis of our framework for reviewing the CIBS Act and underpin the recommendations made in this Report.

## OUR PROCESS

- 1.17 Throughout the course of this project, we engaged with a wide range of stakeholders and experts both within Aotearoa New Zealand and overseas, including organisations, lawyers, forensic scientists and academics.
- 1.18 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 visited the ESR laboratories in Auckland to understand the physical context and process of forensic DNA analysis, and we observed the operation of Biotrak, the Police software tool for tracking the collection and analysis of DNA samples.
- 1.19 We received advice from two specially constituted advisory groups, one of experts and one of officials, with whom we met on several occasions throughout the project. Our Māori Liaison Committee<sup>9</sup> 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. We also engaged Associate Professor Māmari Stephens from Te Kauhanganui Tātai Ture | Faculty of Law, Victoria University of Wellington to peer review our approach to the question, stated in our terms of reference, of whether Māori interests, including in relation to tikanga Māori, were appropriately recognised in our research and writing.

## Public consultation

- 1.20 In October 2017, we launched an educational website designed to engage the public in some of the broader public interest issues arising in our review. We invited general comment from website visitors and offered the opportunity to be contacted individually by email when the Issues Paper was published.
- 1.21 In December 2018, we published our Issues Paper,<sup>10</sup> following extensive research and engagement with stakeholders and experts. The purpose of the Issues Paper was to facilitate consultation and foster public debate. Many of the issues and options we identified were legally and scientifically technical so our target audience was primarily those who worked in the criminal justice sector or a related legal, scientific or academic field.
- 1.22 At the same time, we launched a consultation website that built on our educational website and invited members of the public to have a say on the review. People could make a submission (anonymously, if they preferred) and answer some questions or

<sup>9</sup> The Māori Liaison Committee supports the Commission in taking into account Māori perspectives in its work. See Te Aka Matua o te Ture | Law Commission “Engaging with Māori” <[www.lawcom.govt.nz](http://www.lawcom.govt.nz)>.

<sup>10</sup> Te Aka Matua o te Ture | Law Commission *The Use of DNA in Criminal Investigations* | *Te Whakamahi i te Ira Tangata i ngā Mātai Taihara* (NZLC IP43, 2018).

simply provide some general comments or feedback on their personal experience with DNA collection and use.

- 1.23 The Commission received 88 submissions on the Issues Paper, including 32 submissions through the consultation website. This included 16 submissions from organisations and 72 submissions from individuals. The organisations and lawyers, academics, researchers, ethicists and scientists who submitted on the Issues Paper are listed in Appendix 2. In addition to submissions, the Commission also received comments from Judges of the District Court and the Youth Court.
- 1.24 All submissions have been prepared for proactive release on the Commission website at the time of the publication of this Report. In accordance with the Privacy Act 1993, personal information has been redacted or the name of the submitter anonymised where necessary.

### Preparing this Report

- 1.25 After the formal consultation period closed in March 2019, we analysed submissions and held further meetings with key stakeholders and our advisory groups. We also obtained advice from the Legislation Design and Advisory Committee on some legislative design aspects of our terms of reference.
- 1.26 To obtain the views of young people with experience in the criminal justice system, we visited Korowai Manaaki Youth Justice Residence in Auckland in October 2019. We presented a workshop on collection of DNA samples and retention of DNA profiles to each of the six units and recorded young people's comments. The feedback we received from these young people is explored throughout this Report, in particular in Chapter 8 and Chapter 21.

### MATTERS ADDRESSED IN THIS REPORT

- 1.27 We make 193 recommendations in this Report, addressing a wide range of matters. Our recommendations do not address every aspect of the DNA regime. Many aspects of the current law remain satisfactory and should continue. Our approach has been to make recommendations only where we consider that reform is required or where we think it is helpful to positively endorse the current law on key aspects of the DNA regime.
- 1.28 In developing these recommendations, we have drawn on the findings of our own research into how the DNA regime is operating in practice, the results of our consultation, and international developments both in forensic DNA analysis and in the regulation of DNA regimes. We have drawn in particular on the experiences in those jurisdictions that Aotearoa New Zealand is often compared with and which have similar constitutional arrangements (Australia, England and Wales, Scotland, Ireland and Canada).
- 1.29 This Report is divided into three parts:
- (a) In Part A, we set out our recommendations for a new regulatory framework. We address the constitutional context of the CIBS Act, the case for new DNA legislation and a new DNA databank to replace the existing DNA databanks. We also address the need to improve oversight of the DNA regime and regulate important aspects of the DNA regime, including the use of DNA analysis techniques and the role of Police's forensic services provider.

- (b) In Part B, we examine the use of DNA in criminal casework. We consider the regimes for obtaining samples from suspects, obtaining samples for elimination purposes from people who are not suspects and conducting mass screens. We also consider emerging issues including indirect sampling, forensic DNA phenotyping and genetic genealogy searching.
- (c) In Part C, we outline in detail our recommendations for the proposed DNA databank. We consider the crime scene index that should store crime scene profiles and the criteria for obtaining DNA samples from known people for databank purposes. We also explore other uses of the proposed DNA databank, including when investigating missing and unidentified people, familial searching, searching the databank on behalf of foreign countries and using the proposed DNA databank for research.

### Terminology and other matters

- 1.30 In this Report, we refer to “the collection and use of DNA” and “the DNA regime” as umbrella terms that include:
- (a) the criteria and process for collecting DNA samples;
  - (b) the analysis of DNA samples; and
  - (c) the storage, retention and destruction of DNA samples and the results of any analysis (including DNA profiles generated from DNA samples).
- 1.31 When discussing te Tiriti o Waitangi | the Treaty of Waitangi in this Report, we use “the Treaty” as a generic term that is intended to capture both the Māori text (te Tiriti o Waitangi) and the English text (the Treaty of Waitangi). When we are referring to the Māori text only, we either use the term “te Tiriti”, refer to “the Māori text” or make this clear in the context. When we are referring to the English text only, we refer to the “English text” or we make this clear in the context. To the extent that the principles of the Treaty, which have developed through jurisprudence, substantively reflect the rights and obligations arising from the texts, the principles may also be captured by the term “the Treaty”. Otherwise, we specifically refer to “the principles of the Treaty” or to specific principles. The Treaty and key Māori terms and concepts used in this Report are described in Chapter 2.
- 1.32 We make extensive references to the *Police Manual* throughout this Report. The *Police Manual* consolidates Police rules and policy, including relevant law, and contains chapters on each aspect of policing. The *Police Manual* contains the standard operating practice, principles and procedure that should be followed, although Police may work outside this standard operating practice where it is justified. The *Police Manual* is in the form of an electronic database and is not publicly available. In this Report, we cite the chapter name and page reference from the electronic database.
- 1.33 Much of our research has been informed by information and documentation provided to us by Police and ESR, including information set out in the Forensic Science Services Agreement between Police and ESR. As some of these documents have been provided to us on a confidential basis, we have not directly quoted from them.
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**PART A**

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# **A NEW REGULATORY FRAMEWORK**



## CHAPTER 2

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# Constitutionally sound DNA legislation

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## INTRODUCTION

- 2.1 As we explain in Chapter 1, this review has three objectives: to ensure the law governing the collection and use of DNA criminal investigations is fit for purpose, constitutionally sound and accessible. In this chapter, we explore the objective of constitutionally sound legislation. The *Legislation Guidelines*, approved by Cabinet, define “constitutionally sound” legislation as that which “should reflect the fundamental values and principles of a democratic society”.<sup>1</sup>
- 2.2 We consider that, for legislation governing the DNA regime to be constitutionally sound, it should provide for the collection and use of DNA in the investigation and prosecution of offending in a manner that:
- (a) is consistent with te Tiriti o Waitangi | the Treaty of Waitangi (the Treaty);
  - (b) recognises and provides for tikanga Māori; and
  - (c) is consistent with human rights values.
- 2.3 Below, we discuss the relevant constitutional values and principles arising from the Treaty, tikanga Māori and human rights that are engaged by the DNA regime and their implications for this review. In Chapter 3, we then consider the performance of the CIBS Act against these values and principles.

### The Commission’s previous work

- 2.4 Our discussion of tikanga Māori in this chapter draws on the Commission’s earlier work in its Study Paper on Māori custom and values in the law, published in 2001.<sup>2</sup> Since then, there have been important developments in the recognition of tikanga Māori by the

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<sup>1</sup> Legislation Design and Advisory Committee *Legislation Guidelines* (March 2018) at 8. The Legislation Design and Advisory Committee (LDAC) is a government committee, and its mandate is to promote quality legislation. LDAC is responsible for the *Legislation Guidelines* as part of its role in setting standards for good legislation: Legislation Design and Advisory Committee “The Role of the LDAC” (20 April 2020) <[www.ldac.org.nz](http://www.ldac.org.nz)>. The *Legislation Guidelines* are “the government’s key point of reference for assessing whether draft legislation conforms to accepted legal and constitutional principles”: Cabinet Office Circular “Legislation guidelines – Cabinet requirements and expectations” (20 July 2018) CO (18) 1 at [1].

<sup>2</sup> Te Aka Matua o te Ture | Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9, 2001). See also Te Aka Matua o te Ture | Law Commission *Converging Currents: Custom and Human Rights in the Pacific* (NZLC SP17, 2006).

courts, Parliament and the community. There have also been important developments in the application of the Treaty, particularly in the criminal justice context. We reflect these developments in our discussion below.

- 2.5 This chapter also builds on the Commission’s previous work in its 2007 Report on search and surveillance powers and in its 2017 Report on its review of the Search and Surveillance Act 2012.<sup>3</sup> These reports articulated a framework of law enforcement and human rights values that underpin Police’s investigative powers. As we explain below, the collection of DNA in criminal investigations is a form of “search”, and the retention of DNA on DNA databanks “enables the state to conduct ongoing surveillance ... with molecular precision”.<sup>4</sup> Therefore, the values framework articulated in these earlier reports provides an appropriate framework for analysing the human rights and law enforcement values underpinning the DNA regime.

## TE TIRITI O WAITANGI | THE TREATY OF WAITANGI

- 2.6 The Treaty is a foundation of government in Aotearoa New Zealand<sup>5</sup> and has been described as “... simply the most important document in New Zealand’s history”.<sup>6</sup> As recorded in Cabinet guidance:<sup>7</sup>

The Treaty creates a basis for civil government extending over all New Zealanders, on the basis of protections and acknowledgements of Maori rights and interests within that shared citizenry.

- 2.7 The Treaty was signed in 1840 by representatives of the British Crown and rangatira, representing many, but not all, hapū.<sup>8</sup> It comprises a Māori text and an English text and there are differences between them, as we explain below. The meaning and significance of each text, the relationship between them and whether they can be reconciled through interpretation and the elaboration of Treaty principles are the subject of significant debate, scholarship and judicial consideration.<sup>9</sup> This chapter does not seek to resolve these issues but rather endeavours to acknowledge these ongoing debates as necessary context for considering a constitutionally sound DNA regime.
- 2.8 Our discussion below draws on some of this scholarship and judicial consideration, as well as the findings of the Waitangi Tribunal (the Tribunal). The Tribunal was established under the Treaty of Waitangi Act 1975, and its functions include inquiring into and

<sup>3</sup> Te Aka Matua o te Ture | Law Commission *Search and Surveillance Powers* (NZLC R97, 2007); and Te Aka Matua o te Ture | Law Commission *Review of the Search and Surveillance Act 2012 | Ko te Arotake i te Search and Surveillance Act 2012* (NZLC R141, 2017).

<sup>4</sup> *R v Toki* [2017] NZCA 513, [2018] 2 NZLR 362 at [15] and [23].

<sup>5</sup> Kenneth Keith “On the Constitution of New Zealand: An Introduction to the Foundations of the Current Form of Government” in Cabinet Office *Cabinet Manual 2017* at 1.

<sup>6</sup> Robin Cooke “Introduction” (1990) 14 NZULR 1 at 1.

<sup>7</sup> Cabinet Office Circular “Te Tiriti o Waitangi/Treaty of Waitangi Guidance” (22 October 2019) CO (19) 5 at [7].

<sup>8</sup> Te Puni Kōkiri | Ministry of Māori Development *He Tirohanga o Kawa ki te Tiriti o Waitangi: A Guide to the Principles of the Treaty of Waitangi as expressed by the Courts and the Waitangi Tribunal* (2001) at 14.

<sup>9</sup> See, for example, Carwyn Jones *New Treaty, New Tradition: Reconciling New Zealand and Māori Law* (Victoria University Press, Wellington, 2016); Margaret Mutu “Constitutional Intentions: The Treaty of Waitangi Texts” in Malcolm Mulholland and Veronica Tawhai (eds) *Weeping Waters – The Treaty of Waitangi and Constitutional Change* (Huia Publishers, Wellington, 2010) 13; Ani Mikaere *Colonising Myths: Māori Realities – He Rukuruku Whakaaro* (Huia Publishers, Wellington, 2011); and Ned Fletcher “A Praiseworthy Device for Amusing and Pacifying Savages? What the Framers Meant by the English Text of the Treaty of Waitangi” (PhD Thesis, University of Auckland, 2014). See also the Waitangi Tribunal reports referred to in the following discussion.

making recommendations on claims that acts or omissions of the Crown are inconsistent with “the principles of the Treaty”.<sup>10</sup> In performing this function, the Tribunal must have regard to the texts and, for the purposes of the Treaty of Waitangi Act, has exclusive authority to determine the meaning and effect of the texts and issues raised by the differences between them.<sup>11</sup>

## The Treaty texts

- 2.9 In the Māori text, article 1 provides that Māori rangatira grant the Crown kāwanatanga, the right to govern. Article 2 provides that the Crown will protect the unqualified exercise of tino rangatiratanga, which has been variously described as chieftainship,<sup>12</sup> paramount authority<sup>13</sup> or absolute authority<sup>14</sup> of rangatira over their lands, villages and “taonga katoa”.
- 2.10 Article 1 of the English text provides that Māori rangatira cede the sovereignty they exercise over their respective territories to the Crown, while article 2 guarantees to Māori full exclusive and undisturbed possession of their lands and other properties.<sup>15</sup>
- 2.11 Under article 3 of the English text, the Crown’s protection and the rights and privileges of British subjects were imparted to Māori. A similar undertaking was conveyed in article 3 of the Māori text, which provides that the Crown would care for Māori and give them the same rights and duties of citizenship as the people of England.<sup>16</sup> Article 3 has been understood as a guarantee of equity between Māori and other New Zealanders.<sup>17</sup>
- 2.12 At the time of signing the Treaty, Crown representatives made oral undertakings and assurances to Māori, including an undertaking to respect Māori customs and law.<sup>18</sup> The Tribunal has held that these also form part of the agreement reached.<sup>19</sup>

## Interpreting the meaning of the Treaty texts

- 2.13 The overwhelming majority of Māori signatories signed the Māori text rather than the English text.<sup>20</sup> As a result, the Tribunal has said that considerable weight should be given to the Māori text when there is a difference between them.<sup>21</sup>

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<sup>10</sup> Treaty of Waitangi Act 1975, ss 5(1) and 6(1).

<sup>11</sup> Preamble and s 5(2).

<sup>12</sup> IH Kawharu (ed) *Waitangi: Māori and Pākehā Perspectives of the Treaty of Waitangi* (Oxford University Press, Auckland, 1989) at 319.

<sup>13</sup> Margaret Mutu “Constitutional Intentions: The Treaty of Waitangi Texts” in Malcolm Mulholland and Veronica Tawhai (eds) *Weeping Waters – The Treaty of Waitangi and Constitutional Change* (Huia Publishers, Wellington, 2010) 13 at 19–22.

<sup>14</sup> Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Whaia te Mana Motuhake | In Pursuit of Mana Motuhake: Report on the Māori Community Development Act Claim* (Wai 2417, 2015) at 26.

<sup>15</sup> Article 2 also gave the Crown an exclusive right of pre-emption over any land Māori wanted to “alienate”.

<sup>16</sup> IH Kawharu (ed) *Waitangi: Māori and Pākehā Perspectives of the Treaty of Waitangi* (Oxford University Press, Auckland, 1989) at 321.

<sup>17</sup> Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Tū Mai te Rangī! Report on the Crown and Disproportionate Reoffending Rates* (Wai 2540, 2017) at 27.

<sup>18</sup> Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Muriwhenua Land Report* (Wai 45, 1997) at 114.

<sup>19</sup> Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *He Whakaputanga me te Tiriti | The Declaration and the Treaty: Report on Stage 1 of the Te Paparahi o Te Raki Inquiry* (Wai 1040, 2014) at 526–527.

<sup>20</sup> Carwyn Jones *New Treaty, New Tradition: Reconciling New Zealand and Māori Law* (Victoria University Press, Wellington, 2016) at 7.

- 2.14 With respect to articles 1 and 2, the Tribunal has described the Treaty as a fundamental exchange of *kāwanatanga*, or the right of the Crown to govern and make laws for the country, for protection by the Crown of the right of Māori to exercise *tino rangatiratanga* over their land, resources and *taonga*. It is inherent in the nature of this exchange that the Crown's right of *kāwanatanga* is not unfettered. It is qualified by the retention of *tino rangatiratanga*.<sup>22</sup> As the Tribunal has observed:<sup>23</sup>

The guarantee of *tino rangatiratanga* requires the Crown to acknowledge Māori control over their *tikanga*, resources, and people and to allow Māori to manage their own affairs in a way that aligns with their customs and values.

- 2.15 The Tribunal has also found that the article 2 guarantee of *tino rangatiratanga* over “*taonga katoa*” includes all highly prized things, both tangible and intangible, like values, traditions and customs.<sup>24</sup> *Mātauranga* (the system of Māori knowledge that underpins Māori society and *tikanga* practices)<sup>25</sup> is considered *taonga*,<sup>26</sup> and *te ira tangata*, the essence of life, has been described by the Tribunal as “the ultimate *taonga*”.<sup>27</sup>
- 2.16 *Tino rangatiratanga* is exercised within *te ao Māori* every day and independently of state law, in accordance with *tikanga Māori*. However, in some situations, consistency with the Treaty may require that provision for its exercise be made in legislation.

### The Treaty principles

- 2.17 The Tribunal has explained that, although its statutory role is to inquire into the consistency of the Crown's acts and omissions against the Treaty principles, this “does not mean that the terms [of the Treaty] can be negated or reduced”.<sup>28</sup> Rather, the principles “enlarge the terms, enabling the Treaty to be applied in situations that were

<sup>21</sup> Consistent with the *contra proferentem* rule of the law of treaties, where there is ambiguity, a provision should be construed against the party that drafted or proposed the relevant provision. See *Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal Report of The Waitangi Tribunal on The Orakei Claim* (Wai 9, 1987) at 180.

<sup>22</sup> *Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal Tū Mai te Rangī! Report on the Crown and Disproportionate Reoffending Rates* (Wai 2540, 2017) at 21. See also *Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal He Aha i Pērā Ai? The Māori Prisoners' Voting Report* (Wai 2870, 2020) at 11–12; *Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity – Te Taumata Tuarua* (Wai 262, 2011) at 78; and *Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal Te Whanau o Waipareira Report* (Wai 414, 1998) at 27.

<sup>23</sup> *Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal Hauora: Report on Stage One of the Health Services and Outcomes Kaupapa Inquiry* (Wai 2575, 2019) at 28. See also *Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal Tū Mai te Rangī! Report on the Crown and Disproportionate Reoffending Rates* (Wai 2540, 2017) at 21; and *Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal Whaia te Mana Motuhake | In Pursuit of Mana Motuhake: Report on the Māori Community Development Act Claim* (Wai 2417, 2015) at 26.

<sup>24</sup> For example, the Tribunal has found that *te reo Māori*, as an essential part of the culture, is a *taonga*, and this has also been recognised in legislation. See *Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal Report of The Waitangi Tribunal on The Te Reo Māori Claim* (Wai 11, 1986) at 20; and *Te Ture mō Te Reo Māori Act 2016 | Māori Language Act 2016*, s 4. The Tribunal defined *taonga* as things “possessed by or related to Māori that are valued or treasured” in *Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal Tū Mai te Rangī! Report on the Crown and Disproportionate Reoffending Rates* (Wai 2540, 2017) at 22.

<sup>25</sup> Suzanne Duncan and Poia Rewi “*Tikanga: How Not to Get Told Off!*” in Michael Reilly and others (eds) *Te Kōparapara: An Introduction to the Māori World* (Auckland University Press, Auckland, 2018) 12 at 33 (“*Tikanga Māori* is ... procedural knowledge, which is the practice of the ideas, beliefs and knowledge of *mātauranga Māori*”).

<sup>26</sup> *Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity – Te Taumata Tuarua* (Wai 262, 2011) at 15.

<sup>27</sup> *Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal Tū Mai te Rangī! Report on the Crown and Disproportionate Reoffending Rates* (Wai 2540, 2017) at 28.

<sup>28</sup> *Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal Muriwhenua Land Report* (Wai 45, 1997) at 385–386.

not foreseen or discussed at the time”.<sup>29</sup> However, it should be noted that some regard the Treaty principles as distorting or diminishing the clear terms of the Māori text.<sup>30</sup>

2.18 The principles of the Treaty have been described by the Privy Council as follows:<sup>31</sup>

... the “principles” are the underlying mutual obligations and responsibilities which the Treaty places on the parties. They reflect the intent of the Treaty as a whole and include, but are not confined to, the express terms of the Treaty.

2.19 Given the Treaty’s constitutional significance, in the absence of clear words to the contrary, the courts will presume that Parliament intends to legislate in a manner that is consistent with the principles of the Treaty and will interpret legislation accordingly.<sup>32</sup>

2.20 In several landmark cases, the courts have identified three broad Treaty principles: the principles of partnership, active protection and redress.<sup>33</sup> However, the nature of the Treaty as a living document means that Treaty principles are constantly evolving as the Treaty is applied to new issues and situations.<sup>34</sup> Neither the courts nor the Tribunal have sought to produce a definitive list of Treaty principles.<sup>35</sup> As the Court of Appeal has observed, “[t]he Treaty obligations are ongoing. They will evolve from generation to generation as conditions change”.<sup>36</sup>

2.21 Consequently, over time, other principles and duties associated with these three broad principles have been developed by the Tribunal and the courts. The principles of partnership and active protection and the related principle of equity are particularly relevant to this review and are discussed below.

## Partnership

2.22 The Treaty established a relationship akin to a partnership and imposed on both Treaty partners the duty “to act towards each other reasonably and with the utmost good faith”.<sup>37</sup> The partnership should be founded on “reasonableness, mutual cooperation and trust” and is imbued with the notion of reciprocity and “the acknowledgement that neither kāwanatanga nor tino rangatiratanga was unqualified or absolute”.<sup>38</sup> The principle of partnership requires Māori participation in decision making that impacts on the lives of Māori.<sup>39</sup> The Tribunal has found that partnership can mean many things. The

<sup>29</sup> At 386.

<sup>30</sup> For example, see Ani Mikaere *Colonising Myths: Māori Realities – He Rukuruku Whakaaro* (Huia Publishers, Wellington, 2011) at 263–264.

<sup>31</sup> *New Zealand Maori Council v Attorney-General* [1994] 1 NZLR 513 (PC) [*Broadcasting Assets*] at 517 per Lord Woolf.

<sup>32</sup> *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (CA) [*Lands*] at 655–656 per Cooke P.

<sup>33</sup> See *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (CA) [*Lands*]; *New Zealand Maori Council v Attorney-General* [1994] 1 NZLR 513 (PC) [*Broadcasting Assets*]; and *Te Runanga o Wharekauri Rekohu Inc v Attorney-General* [1993] 2 NZLR 301 (CA).

<sup>34</sup> Te Puni Kōkiri | Ministry of Māori Development *He Tirohanga o Kawa ki te Tiriti o Waitangi: A Guide to the Principles of the Treaty of Waitangi as expressed by the Courts and the Waitangi Tribunal* (2001) at 77.

<sup>35</sup> At 77.

<sup>36</sup> *Te Runanga o Muriwhenua Inc v Attorney-General* [1990] 2 NZLR 641 (CA) at 656 per Cooke P.

<sup>37</sup> *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (CA) [*Lands*] at 667 per Cooke P.

<sup>38</sup> Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Report on the Crown’s Review of the Plant Variety Rights Regime: Stage 2 of the Trans-Pacific Partnership Agreement Claims* (Wai 2522, 2020) at 11.

<sup>39</sup> This is also required by the principle of equity discussed below and derives from the guarantees contained in articles 2 and 3. See Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Te Whanau o Waipareira Report* (Wai 414, 1998) at 231–232; and Mānuka Henare and Edward Douglas “Support for Māori Social Organisations especially

starting point should be shared decision making, but the form partnership takes will depend on what the rights and interests of the Treaty partners require in the circumstances. Both partners should participate in identifying the nature and extent of the rights and interests engaged and how they may be protected through the partnership.<sup>40</sup>

- 2.23 The Crown is subject to a related duty to make informed decisions on matters that affect Māori interests.<sup>41</sup> This requires the Crown to be fully informed of the rights and interests of Māori, other New Zealanders and the nation as a whole and the impact of its proposed course of action on these rights and interests so that those interests may be protected and balanced appropriately (although a conflict between the interests of Māori and others should not be assumed).<sup>42</sup> The Tribunal has observed that, in making decisions on matters that may impact on the exercise of rangatiratanga over taonga, it is essential that the Crown engage with Māori in order to fully understand the nature of those interests.<sup>43</sup>

### Active protection

- 2.24 The principle of active protection emerges from the relationship between kāwanatanga and tino rangatiratanga in articles 1 and 2 of the Treaty.<sup>44</sup> It encompasses an obligation to actively protect tino rangatiratanga, including the exercise of authority in accordance with tikanga and over taonga.<sup>45</sup> As discussed in relation to the principle of partnership and the associated duty of informed decision making, to ascertain what the obligation of active protection requires in the given circumstances, the Crown must inform itself of

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Whanaunga, Hapū, Iwi” in *Report of the Royal Commission on Social Policy | Te Kōmihana A Te Karauna Mō Āhuratanga-Ā-Iwi: The April Report – Future Directions* (Associated Papers, Volume III, Part One, April 1998) 172 at 173.

<sup>40</sup> Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity – Te Taumata Tuarua* (Wai 262, 2011) at 341. See also Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Report on the Crown’s Review of the Plant Variety Rights Regime: Stage 2 of the Trans-Pacific Partnership Agreement Claims* (Wai 2522, 2020) at 12.

<sup>41</sup> This duty is also engaged by the principle of active protection discussed below. See Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Whakatōhea Mandate Inquiry Report* (Wai 2662, 2018) at 21–22.

<sup>42</sup> Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *He Aha i Pērā Ai? The Māori Prisoners’ Voting Report* (Wai 2870, 2020) at 12. See also *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (CA) [Lands] at 683 per Richardson J; Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Tū Mai te Rangī! Report on the Crown and Disproportionate Reoffending Rates* (Wai 2540, 2017) at 23; Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity – Te Taumata Tuarua* (Wai 262, 2011) at 86; and Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity – Te Taumata Tuatahi* (Wai 262, 2011) at 237.

<sup>43</sup> Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Ngawha Geothermal Resource Report 1993* (Wai 304, 1993) at 101–102.

<sup>44</sup> Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Report on the Crown’s Review of the Plant Variety Rights Regime: Stage 2 of the Trans-Pacific Partnership Agreement Claims* (Wai 2522, 2020) at 13; and Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *He Aha i Pērā Ai? The Māori Prisoners’ Voting Report* (Wai 2870, 2020) at 12. See also Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Tū Mai te Rangī! Report on the Crown and Disproportionate Reoffending Rates* (Wai 2540, 2017) at 26. In the English text of the Treaty, it is article 2 that provides that the Crown “guarantees” Māori the continued possession of their lands and other resources. Article 3 of both texts also includes an undertaking by the Crown to protect Māori rights and interests.

<sup>45</sup> Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *He Aha i Pērā Ai? The Māori Prisoners’ Voting Report* (Wai 2870, 2020) at 13; Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Report on the Crown’s Review of the Plant Variety Rights Regime: Stage 2 of the Trans-Pacific Partnership Agreement Claims* (Wai 2522, 2020) at 13; and Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Ngāpuhi Mandate Inquiry Report* (Wai 2490, 2015) at 30–31.

the nature of the Māori rights and interests engaged.<sup>46</sup> In this respect, the Tribunal has observed:<sup>47</sup>

The Crown obligation actively to protect Māori Treaty rights cannot be fulfilled in the absence of a full appreciation of the nature of the taonga including its spiritual and cultural dimensions. This can only be gained from those having rangatiratanga over the taonga.

## Equity

- 2.25 The principle of equity arises from article 3 of the Treaty and imposes an obligation on the Crown to act fairly between Māori and non-Māori.<sup>48</sup> In addition to the Crown's duty to guarantee Māori freedom from discrimination, the principle of equity in conjunction with the principle of active protection imposes a duty on the Crown to act fairly to reduce inequities between Māori and non-Māori, which includes an obligation to positively promote equity.<sup>49</sup>
- 2.26 In the criminal justice context, the Tribunal has held that this imposes an obligation on the Crown to take reasonable steps to reduce Māori reoffending to address current inequities between Māori and non-Māori reoffending rates.<sup>50</sup> This is significant for the purposes of our review given the over-representation of Māori in the collection and use of DNA, which we discuss in Chapter 3.

## Implications of the Treaty for this review

- 2.27 This review engages the Treaty guarantee of tino rangatiratanga, because the collection and use of DNA samples impacts on Māori rights, interests and taonga, including te ira tangata, described by the Tribunal as “the ultimate taonga”. As we explain below, DNA contains whakapapa (genealogy) information, which is considered taonga,<sup>51</sup> and some consider human tissue and DNA themselves to be taonga.<sup>52</sup> The

<sup>46</sup> Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *He Aha i Pērā Ai? The Māori Prisoners' Voting Report* (Wai 2870, 2020) at 13; and Waitangi Tribunal *Ngawha Geothermal Resource Report 1993* (Wai 304, 1993) at 101–102. See also Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Tū Mai te Rangi! Report on the Crown and Disproportionate Reoffending Rates* (Wai 2540, 2017) at 22.

<sup>47</sup> Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Ngawha Geothermal Resource Report 1993* (Wai 304, 1993) at 102. See also Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity – Te Taumata Tuatahi* (Wai 262, 2011) at 188, where the Tribunal emphasised that Māori are the kaitiaki of their own mātauranga and that the Crown should not assume that role for itself, but “[r]ather, the Crown must support Māori leadership of the effort to preserve and transmit mātauranga Māori, with both parties acting as partners in a joint venture”.

<sup>48</sup> Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Tū Mai te Rangi! Report on the Crown and Disproportionate Reoffending Rates* (Wai 2540, 2017) at 27.

<sup>49</sup> Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *He Aha i Pērā Ai? The Māori Prisoners' Voting Report* (Wai 2870, 2020) at 14; and Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *He Kura Whenua ka Rokohanga: Report on Claims about the Reform of Te Ture Whenua Māori Act 1993* (Wai 2478, 2016) at 195.

<sup>50</sup> Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Tū Mai te Rangi! Report on the Crown and Disproportionate Reoffending Rates* (Wai 2540, 2017) at 60.

<sup>51</sup> IH Kawharu (ed) *Waitangi: Māori and Pākehā Perspectives of the Treaty of Waitangi* (Oxford University Press, Auckland, 1989) at 320–321. See also Manatū Taonga | Ministry for Culture and Heritage “Read the Treaty” (18 June 2020) New Zealand History <<https://nzhistory.govt.nz>>; Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity – Te Taumata Tuarua* (Wai 262, 2011) at 537–538; and Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (rev ed, Huia Publishers, Wellington, 2016) at 47 and 53–54.



over-representation of Māori in the collection and use of DNA also engages the Treaty, including the guarantee of equity.

- 2.28 Constitutionally sound DNA legislation requires consistency with the guarantees under the Treaty and its principles.<sup>53</sup> Our approach in this review is to focus on providing a framework that will enable the Crown, in exercising kāwanatanga, to act in a manner consistent with its Treaty obligations. As a minimum, we consider that legislation governing the DNA regime should:
- (a) provide for ongoing Māori participation in oversight of the DNA regime to enable Māori to exercise tino rangatiratanga in accordance with applicable tikanga (discussed below);<sup>54</sup>
  - (b) enable Māori to articulate how their rights and interests are engaged by the DNA regime to ensure the Crown can act in accordance with its duty to make informed decisions on matters that affect Māori and to ensure the protection of Māori rights, interests and taonga (including Māori DNA, whakapapa information and applicable mātauranga Māori); and
  - (c) provide the means for the Crown, working in partnership with Māori, to meet its obligations to take active steps to reduce inequities and positively promote equity in the DNA regime.
- 2.29 Below, we explore the tikanga that is said to be engaged by the collection and use of DNA.

## TIKANGA MĀORI

- 2.30 The place of tikanga in New Zealand’s constitutional arrangements is the subject of ongoing debate.<sup>55</sup> For present purposes, tikanga is constitutionally significant to the development of the law in four respects:
- (a) First, as an independent source of rights and obligations in te ao Māori and the first law of Aotearoa.<sup>56</sup>

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<sup>52</sup> Maui Hudson and others *He Tangata Kei Tua: Guidelines for Biobanking with Māori* (Te Mata Hautū Taketake | Māori and Indigenous Governance Centre, October 2016) at 8. This accords with the views expressed by some in the context of our review – that DNA is a taonga. Others, however, considered that it is the whakapapa information contained within DNA that is a taonga: Issues Paper at [2.47(b)]. DNA was described as taonga in two submissions we received on the Issues Paper, including by Karaitiana Taiuru and one member of the public.

<sup>53</sup> For discussion of current government expectations regarding the Treaty in government policy and legislation, see Cabinet Office Circular “Te Tiriti o Waitangi/Treaty of Waitangi Guidance” (22 October 2019) CO (19) 5; and Legislation Design and Advisory Committee *Legislation Guidelines* (March 2018) at 23. See also Cabinet Office *Cabinet Manual 2017* at [7.65]–[7.66].

<sup>54</sup> In Chapter 3, we explore recent initiatives to work in partnership with Māori to reduce over-representation in the criminal justice system.

<sup>55</sup> See, for example, Matike Mai Aotearoa | Independent Working Group on Constitutional Transformation *He Whakaaro Here Whakaamu mō Aotearoa: The Report of Matike Mai Aotearoa – The Independent Working Group on Constitutional Transformation* (January 2016); Joseph Williams “Lex Aotearoa: An Heroic Attempt to Map the Māori Dimension in Modern New Zealand Law” (2013) 21 Wai L Rev 1; Christian Whata “The Evolution of Legal Issues Facing Māori” (paper presented to Māori Legal Issues Conference, Legal Research Foundation, Auckland, 29 November 2013); Robert Joseph “Re-Creating Legal Space for the First Law of Aotearoa-New Zealand” (2009) 17 Wai L Rev 74; and Ani Mikaere *Colonising Myths: Māori Realities – He Rukuruku Whakaaro* (Huia Publishers, Wellington, 2011).

<sup>56</sup> See Joseph Williams “Lex Aotearoa: An Heroic Attempt to Map the Māori Dimension in Modern New Zealand Law” (2013) 21 Wai L Rev 1 at 2–5.

- (b) Second, where tikanga values comprise a source of the New Zealand common law<sup>57</sup> or have been integrated into law by statutory reference.<sup>58</sup>
  - (c) Third, in terms of the Treaty rights and obligations that pertain to tikanga.
  - (d) Fourth, to give effect to New Zealand’s international obligations in relation to Māori as indigenous people, including under the United Nations Declaration on the Rights of Indigenous Peoples.<sup>59</sup>
- 2.31 Tikanga includes a body of norms and values that guides and directs behaviour. Tikanga governs relationships by providing a “koru ... of ethics”<sup>60</sup> and a shared basis for “doing things right, doing things the right way, and doing things for the right reasons”.<sup>61</sup> Like the common law, tikanga has evolved over time and continues to adapt to accommodate developments in society and technology. While each tribal grouping will have its own variations, it is considered that there are some central values that underpin tikanga Māori as a whole, including whanaungatanga, mana, tapu, utu and kaitiakitanga.<sup>62</sup>

### Tikanga values engaged in the DNA regime

- 2.32 The collection and use of DNA is said to engage several core aspects of tikanga Māori. We introduce these values below and explain their implications for this review. This discussion is based on our research and consultation with Māori.<sup>63</sup> We draw in particular on the *Principles of Māori Data Sovereignty* articulated by Te Mana Raraunga | Māori Data Sovereignty Network, which are designed to guide the collection, management and use of Māori data.<sup>64</sup> We also refer to *He Tangata Kei Tua: Guidelines for Biobanking*

<sup>57</sup> As recognised by the Supreme Court in *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733 at [94]–[95]. In *Ellis v R* [2020] NZSC 89, submissions were sought on the application of tikanga on the question of whether the Court has jurisdiction to hear an appeal against conviction after the death of the appellant. The Court issued its judgment allowing the appeal to proceed, but reasons for that decision are to be provided with the judgment on the substantive appeal: at [5].

<sup>58</sup> Statutes referencing tikanga include the Oranga Tamariki Act 1989 (see s 2 definitions of “tikanga Māori” and “mana tamaiti (tamariki)”); the Resource Management Act 1991; and Taumata Arowai – the Water Services Regulator Act 2020. See also Christian Whata “The Evolution of Legal Issues Facing Māori” (paper presented to Māori Legal Issues Conference, Legal Research Foundation, Auckland, 29 November 2013).

<sup>59</sup> New Zealand affirmed the *United Nations Declaration on the Rights of Indigenous Peoples* GA Res 61/295 (2007) (UNDRIP) in 2010. UNDRIP recognises the importance of protecting the collective rights of indigenous peoples and contains various protections for indigenous customs. New Zealand courts have recognised the need to develop the law, so far as reasonably possible, consistently with both the Treaty and international human rights obligations: *Takamore v Clarke* [2011] NZCA 587, [2012] 1 NZLR 573 at [16] and [253]; *Tavita v Minister of Immigration* [1994] 2 NZLR 257 (CA) at 266; and *New Zealand Air Line Pilots’ Association Inc v Attorney-General* [1997] 3 NZLR 269 (CA) at 289. See also Susan Glazebrook “The Declaration on the Rights of Indigenous Peoples and the Courts” (2019) 25 Auckland U L Rev 11 at 23–25.

<sup>60</sup> Te Aka Matua o te Ture | Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9, 2001) at [126].

<sup>61</sup> Bishop Manuhuia Bennett “Pū Wānanga Seminar” (presented with Te Mātāhauariki Institute) as cited in Richard Benton, Alex Frame and Paul Meredith *Te Mātāpunenga: A Compendium of References to the Concepts and Institutions of Māori Customary Law* (Victoria University Press, Wellington, 2013) at 431.

<sup>62</sup> Te Aka Matua o te Ture | Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9, 2001) at [125].

<sup>63</sup> This discussion collates the results of initial consultation with Māori prior to the Issues Paper (outlined at [2.51] of the Issues Paper), submissions received from Māori during consultation and feedback received on this draft Report from Associate Professor Māmari Stephens from Te Kauhanganui Tātai Ture | Faculty of Law, Victoria University of Wellington.

<sup>64</sup> Te Mana Raraunga | Māori Data Sovereignty Network *Principles of Māori Data Sovereignty* (October 2018). The principles are rangatiratanga, whakapapa, whanaungatanga, kotahitanga, manaakitanga and kaitiakitanga. Māori data

with *Māori* (Biobanking Guidelines), which articulate values and practices in tikanga Māori engaged by the use of human tissue, DNA and associated information in health research.<sup>65</sup>

### Whakapapa

- 2.33 Genetic material, DNA and genomes have all been described to us as “biological whakapapa”.<sup>66</sup> Whakapapa literally means “to place in layers”.<sup>67</sup> It describes the connections between people and their responsibilities to past, present and future generations. It is the key to identity and belonging in te ao Māori.<sup>68</sup> Whakapapa reflects the social component of ira (genes). Ira tangata refers specifically to a human life that has inherited a collection of genes from its parents.<sup>69</sup> Ira tangata descend from ira atua, the gods.<sup>70</sup> Thus ira represent a spiritual inheritance as well as a biological or physical inheritance. Put another way, an individual’s body can be conceived of as a physical manifestation of their whakapapa.<sup>71</sup>
- 2.34 At a physical and spiritual level, whakapapa is considered to be embodied within a person’s DNA, and therefore the storage and use of human tissue for genetic research becomes a “culturally significant activity”, as does the giving of consent to the storage of biological material and personal information in a biobank.<sup>72</sup> Consequently, in the health research context, the Biobanking Guidelines explain that whānau, hapū and iwi have a responsibility to protect whakapapa when engaging with biobanking, which is exercised partly by managing the taking and use of human tissue and genetic information.<sup>73</sup> Aroha Mead explains the implications of whakapapa for human genetic research as follows:<sup>74</sup>

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refers to data produced by Māori or that is about Māori and the environments Māori have relationships with: Te Mana Raraunga | Māori Data Sovereignty Network *Charter* (2016) at 1.

<sup>65</sup> Maui Hudson and others *He Tangata Kei Tua: Guidelines for Biobanking with Māori* (Te Mata Hautū Taketake | Māori and Indigenous Governance Centre, October 2016). Hudson explains, at 1–2, that biobanking refers to collections of biospecimens used for health research and can include human biological material and/or genetic information generated from their analysis and extensive associated demographic and health information. See also Maui Hudson and others *Te Mata Ira: Guidelines for Genomic Research with Māori* (Te Mata Hautū Taketake | Māori and Indigenous Governance Centre, October 2016).

<sup>66</sup> Karaitiana Taiuru Submission to Law Commission at 4.

<sup>67</sup> Richard Benton, Alex Frame and Paul Meredith *Te Mātāpunenga: A Compendium of References to the Concepts and Institutions of Māori Customary Law* (Victoria University Press, Wellington, 2013) at 504.

<sup>68</sup> Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (rev ed, Huia Publishers, Wellington, 2016) at 47.

<sup>69</sup> At 46.

<sup>70</sup> For a discussion of ira tangata and ira atua, see Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (rev ed, Huia Publishers, Wellington, 2016) at 46.

<sup>71</sup> Robert Webb and Rhonda Shaw “Whanau, Whakapapa and Identity in Experiences of Organ Donation and Transplantation” (2011) 8(1) SITES: New Series 40 at 44.

<sup>72</sup> Maui Hudson and others *He Tangata Kei Tua: Guidelines for Biobanking with Māori* (Te Mata Hautū Taketake | Māori and Indigenous Governance Centre, October 2016) at 7.

<sup>73</sup> At 7. For example, the Guidelines provide examples of iwi, hapū, whānau, kaumātua and kuia providing guidance to researchers on the development of kawa around the entry of human tissue into the laboratory environment (at 11), and iwi that have iwi entities with responsibility for consultation with health researchers to ensure research is “ethically sound and culturally appropriate” (Ngāti Porou at 12; and Ngāi Tahu at 13).

<sup>74</sup> Aroha Te Pareake Mead “Human Genetic Research and Whakapapa” in Pania Te Whāiti, Marie McCarthy and Aroha Durie *Mai i Rangiatea: Māori Wellbeing and Development* (Auckland University Press and Bridget Williams Books, Auckland, 1997) 126 at 128–129.

In stark contrast to the Western concept of isolating a human gene from any broader identity, for Māori, the physical human gene is inextricably linked to the metaphysical whakapapa, that is, the direct heritage from ancestors which must be transmitted to descendants. The general perception would be of considering human genes as collective cultural property and not the property of an individual.

- 2.35 Te Hunga Rōia Māori o Aotearoa | The Māori Law Society observed that the lack of clarity about the storage, retention and disposal of DNA samples and profiles under the current regime can be highly distressing to many Māori because of the connection to whakapapa, which is a taonga in relation to which the individual has a responsibility to the collective to protect.
- 2.36 Te Mana Raraunga identified some practical consequences for the DNA regime. It submitted that legislation and policies governing the use of bodily samples in criminal investigations need to include strong provisions requiring agencies to provide detailed documentation of the process and context of data collection and use, including transparency over what demographic details are collected and stored in the DNA databanks. In relation to whakapapa, Te Mana Raraunga's *Principles of Māori Data Sovereignty* state that “[a] key goal of Māori data governance should be to protect against future harm”.<sup>75</sup> It submitted that legislation needs to be clear about what is acceptable future use of DNA and to consider the potential future harm for Māori, particularly in light of new DNA analysis methods such as forensic DNA phenotyping (discussed in Chapter 14).

### Whanaungatanga

- 2.37 Whanaungatanga is linked to whakapapa and traditionally refers to the rights and responsibilities associated with being a relative.<sup>76</sup> These days, whanaungatanga is also used more widely to refer to other kin-like relationships when appropriate.<sup>77</sup> It denotes the ideas that, in te ao Māori, relationships among people and with the natural and spiritual worlds are fundamental to communal wellbeing, and all individuals owe certain responsibilities to the collective.<sup>78</sup> Maintaining whanaungatanga is fundamental to the framework for addressing wrongs and restoring balance according to tikanga.<sup>79</sup> Whanaungatanga is one of the principles of Māori data sovereignty articulated by Te Mana Raraunga. It explains that whanaungatanga involves balancing individuals' rights (including privacy rights), risks and benefits in relation to Māori data with those of the groups of which they are a part. In some contexts, collective Māori rights will prevail over those of individuals.

<sup>75</sup> Te Mana Raraunga | Māori Data Sovereignty Network *Principles of Māori Data Sovereignty* (October 2018) at principle 2.

<sup>76</sup> Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (rev ed, Huia Publishers, Wellington, 2016) at 32.

<sup>77</sup> Richard Benton, Alex Frame and Paul Meredith *Te Mātāpunenga: A Compendium of References to the Concepts and Institutions of Māori Customary Law* (Victoria University Press, Wellington, 2013) at 524.

<sup>78</sup> Te Aka Matua o te Ture | Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9, 2001) at [130]. See Māmari Stephens “Fires Still Burning? Māori Jurisprudence and Human Rights Protection in Aotearoa New Zealand” in Kris Gledhill, Margaret Bedgood and Ian McIntosh (eds) *International Human Rights Law in Aotearoa New Zealand* (Thomson Reuters, Wellington, 2017) 99 at [3.3.02], which suggests that the broader base of whanaungatanga has enabled the development of a sense of civic obligations whereby Māori individuals and collectives began to accept that decisions could be made for and on behalf of their groups outside of immediate kin-based connections.

<sup>79</sup> Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (rev ed, Huia Publishers, Wellington, 2016) at 35.

- 2.38 In its submission on the Issues Paper, Te Mana Raraunga observed that familial searching raises particular issues in relation to the balance of individual and collective rights because of the potential for discriminatory impacts on a particular community.
- 2.39 Te Mana Raraunga also considers that whanaungatanga means that individuals and organisations responsible for the creation, collection, analysis, management, access, security or dissemination of Māori data are accountable to the communities, groups and individuals from whom the data derives.<sup>80</sup> Consideration must be given to how these accountabilities are incorporated into legislation and into the functioning of the relevant agencies and should include regular reporting back to Māori on how these accountabilities are being met.<sup>81</sup>

### *Personal tapu and mana*

- 2.40 Tapu has been variously described as “sacred, under ritual restriction, prohibited”.<sup>82</sup> Every Māori individual inherits personal tapu, which is their most important spiritual attribute. This attribute can be traced back to the divine primeval parents Ranginui and Papa-tū-ā-nuku.<sup>83</sup> Personal tapu is closely linked to mana, a social quality reflecting how people and their achievements are recognised and respected in society.<sup>84</sup> Thus tapu can fluctuate, depending on the actions of an individual and what happens to them. It reflects the state of the whole person.<sup>85</sup>
- 2.41 The notion of the tapu of the person requires respect for an individual’s personal space and for their body.<sup>86</sup> Some parts of the body are more tapu than others. The head and blood are considered particularly tapu.<sup>87</sup> However, anything that comes from the body, like fingernails, hair and skin, is considered to have a mauri (often described as “life spark” or “essence”).<sup>88</sup> Maintaining the mauri can be thought of as maintaining the genetic or biological integrity of an organism or system.<sup>89</sup> Also relevant is the concept of wairua, which refers to the spiritual dimension as distinct from the physical body and the mauri of the person. Some consider that taking a biological sample involves taking wairua and that storing information derived from a biological sample involves storing wairua in a foreign system.<sup>90</sup>

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<sup>80</sup> Te Mana Raraunga | Māori Data Sovereignty Network *Principles of Māori Data Sovereignty* (October 2018) at principle 3.

<sup>81</sup> Te Mana Raraunga Submission to Law Commission at [27].

<sup>82</sup> Richard Benton, Alex Frame and Paul Meredith *Te Mātāpunenga: A Compendium of References to the Concepts and Institutions of Māori Customary Law* (Victoria University Press, Wellington, 2013) at 404.

<sup>83</sup> Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (rev ed, Huia Publishers, Wellington, 2016) at 49–50.

<sup>84</sup> At 56.

<sup>85</sup> At 51.

<sup>86</sup> At 43.

<sup>87</sup> At 53–54; and Te Rangi Hiroa “Medicine Amongst the Maoris in Ancient and Modern Times” (Thesis for the degree of Doctor of Medicine, University of Otago, 1910). See also the discussion of hauora in Elsdon Best *The Maori: Volume I* (Board of Maori Ethnological Research, Wellington, 1924) at 308. Hauora denotes vital, physical and intellectual wellbeing. Best notes that a person who has infringed tapu cannot be in a hauora state.

<sup>88</sup> Karaitiana Taiuru also considers that genomic data derived from a biological sample also contains mauri, although he observes that not all Māori agree that genomes have mauri: Karaitiana Taiuru Submission to Law Commission at 3.

<sup>89</sup> Maui Hudson and others *He Tangata Kei Tua: Guidelines for Biobanking with Māori* (Te Mata Hautū Taketake | Māori and Indigenous Governance Centre, October 2016) at 13.

<sup>90</sup> Karaitiana Taiuru Submission to Law Commission at 4. The Biobanking Guidelines state that wairua is a concept to consciously address when using Māori human tissue, DNA and data in health research, as it could both influence

- 2.42 Human tissue used in DNA sampling (including blood and mucus) and DNA profiles (that connect to whakapapa, as discussed above) have been described as taonga imbued with tapu.<sup>91</sup> This status invokes an obligation of active protection and management.<sup>92</sup> As discussed elsewhere in relation to whakapapa, whanaungatanga and kaitiakitanga, this gives rise to individual and collective responsibilities of Māori to protect these taonga and gives rise to questions about how informed consent can be obtained from Māori and effective governance exercised by Māori in this context.<sup>93</sup>
- 2.43 Where an individual's personal mana is diminished, this is understood to impact negatively on the wellbeing of the person and the collective and may require some action to be taken to restore balance in relationships between individuals, communities and their environments and ensure their wellbeing as a consequence.<sup>94</sup> As noted in relation to manaakitanga below, the issue of consent to the collection of Māori data is also considered relevant to upholding the mana of the person.
- 2.44 It has also been explained to us that, in certain circumstances, the state may be justified in intruding upon personal tapu, for example, where a person has driven while intoxicated<sup>95</sup> or is seeking to avoid their obligations as a parent.<sup>96</sup> In such cases, it remains important from a tikanga perspective that there is a good reason for the intrusion and that those affected understand what is happening and why. In the context of our review, this would include an explanation of what will happen to any DNA sample and any DNA profile. This dialogue may demonstrate respect for the person and can lessen the impact on personal tapu and mana. There is also scope to restore a measure of balance by complying with tikanga during the process of destroying the sample.

### Manaakitanga

- 2.45 Manaakitanga describes the process of showing and receiving care, respect, kindness and hospitality.<sup>97</sup> It applies to all people, regardless of whether or especially when there is no pre-existing relationship. Thus, whanaungatanga may start with manaakitanga. This duty to nurture relationships, look after people and be very careful about how others are treated underpins all tikanga.<sup>98</sup>

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relationships and outcomes of genomic research as well as be impacted by them: Maui Hudson and others *He Tangata Kei Tua: Guidelines for Biobanking with Māori* (Te Mata Hautū Taketake | Māori and Indigenous Governance Centre, October 2016) at 10.

<sup>91</sup> See, for example, Aroha Te Pareake Mead "Genealogy, Sacredness, and the Commodities Market" *Cultural Survival Quarterly Magazine* (online ed, Cambridge (Mass), June 1996).

<sup>92</sup> Maui Hudson and others *He Tangata Kei Tua: Guidelines for Biobanking with Māori* (Te Mata Hautū Taketake | Māori and Indigenous Governance Centre, October 2016) at 7–8.

<sup>93</sup> At 7. See also Aroha Te Pareake Mead "Genealogy, Sacredness, and the Commodities Market" *Cultural Survival Quarterly Magazine* (online ed, Cambridge (Mass), June 1996).

<sup>94</sup> Suzanne Duncan and Poia Rewi "Tikanga: How Not to Get Told Off!" in Michael Reilly and others (eds) *Te Kōparapara: An Introduction to the Māori World* (Auckland University Press, Auckland, 2018) 12 at 37–42; and Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (rev ed, Huia Publishers, Wellington, 2016) at 51.

<sup>95</sup> Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (rev ed, Huia Publishers, Wellington, 2016) at 252 discussing *Police v Cooper* DC Papakura CRN9055011094, 1 July 1999. See also *Raharaha v New Zealand Police* HC Whangarei CRI-2008-488-23, 31 July 2008.

<sup>96</sup> *B v T (Paternity)* (1997) 16 FRNZ 175 (DC).

<sup>97</sup> Richard Benton, Alex Frame and Paul Meredith *Te Mātāpunenga: A Compendium of References to the Concepts and Institutions of Māori Customary Law* (Victoria University Press, Wellington, 2013) at 205.

<sup>98</sup> Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (rev ed, Huia Publishers, Wellington, 2016) at 33.

- 2.46 Te Mana Raraunga identifies two important applications of manaakitanga in Māori data management. First, the collection, use and interpretation of data should uphold the dignity of Māori communities, groups and individuals.<sup>99</sup> Te Mana Raraunga notes the risk of collective harm of forensic DNA phenotyping, where statements or assumptions may be made about ethnic communities.<sup>100</sup> Second, free, prior and informed consent should underpin the collection and use of all data from or about Māori.<sup>101</sup> Where consent is not present, including in the collection of DNA for criminal investigations, Te Mana Raraunga considers that strong governance and ethical arrangements must be in place, including independent oversight with Māori governance strongly embedded in that oversight.<sup>102</sup>

### Kaitiakitanga

- 2.47 Kaitiakitanga is a form of guardianship and has also been identified as a relevant value in tikanga Māori.<sup>103</sup> As Aroha Mead writes, commenting on human genetic research and whakapapa:<sup>104</sup>

The most fundamental concern for Māori is to maintain the exclusive ‘guardianship’ rights and responsibilities of individuals to ensure the ‘safety’ of and non-interference with their multi-generational whakapapa.

- 2.48 In this context, kaitiakitanga also implies respectful conduct in relation to the use of biospecimens and all forms of information.<sup>105</sup> Te Mana Raraunga supports the exercise of kaitiakitanga by Māori over Māori data, including in stewardship arrangements for the collection, transfer and storage of data derived from Māori DNA.<sup>106</sup> It submits that Māori should have control over deciding the protocols and policies around Māori data, including control over deciding appropriate tikanga and kawa around bodily samples and derived data.<sup>107</sup>

### Recognising and providing for tikanga Māori in the DNA regime

- 2.49 Māori have an interest in common with all New Zealanders in the investigation and prosecution of crime in a manner that is fair, effective and proportionate. The responsibility of the individual to the collective, and the responsibility of the collective for addressing wrongs committed by an individual underpin the whanaungatanga-based system of tikanga and are also central to Pākehā notions of justice. Broadly, therefore,

<sup>99</sup> Te Mana Raraunga | Māori Data Sovereignty Network *Principles of Māori Data Sovereignty* (October 2018) at principle 5.1.

<sup>100</sup> Te Mana Raraunga Submission to Law Commission at [31].

<sup>101</sup> Te Mana Raraunga | Māori Data Sovereignty Network *Principles of Māori Data Sovereignty* (October 2018) at principle 5.2.

<sup>102</sup> Te Mana Raraunga Submission to Law Commission at [29]–[31].

<sup>103</sup> See Maui Hudson and others *He Tangata Kei Tua: Guidelines for Biobanking with Māori* (Te Mata Hautū Taketake | Māori and Indigenous Governance Centre, October 2016) at 26; and Te Mana Raraunga Submission to Law Commission at [33]–[34].

<sup>104</sup> Aroha Te Pareake Mead “Human Genetic Research and Whakapapa” in Pania Te Whāiti, Marie McCarthy and Aroha Durie *Mai i Rangiatea: Māori Wellbeing and Development* (Auckland University Press and Bridget Williams Books, Auckland, 1997) 126 at 130.

<sup>105</sup> Maui Hudson and others *He Tangata Kei Tua: Guidelines for Biobanking with Māori* (Te Mata Hautū Taketake | Māori and Indigenous Governance Centre, October 2016) at 26.

<sup>106</sup> Te Mana Raraunga | Māori Data Sovereignty Network *Principles of Māori Data Sovereignty* (October 2018) at principle 6.1; and Te Mana Raraunga Submission to Law Commission at [33].

<sup>107</sup> Te Mana Raraunga Submission to Law Commission at [34].

the objective of recognising and providing for tikanga Māori supports the adoption of a regime for the collection and use of DNA in criminal investigations as part of wider efforts to improve the criminal justice system and to deliver a fairer and safer community for all.

- 2.50 There are, however, some important differences between tikanga Māori and Pākehā values and concepts as they relate to the collection and use of DNA. Within the DNA regime, consideration needs to be given to how to address impacts on tapu, mana and whakapapa and, in this context, to provide for Māori to exercise tino rangatiratanga in accordance with tikanga, including whanaungatanga, manaakitanga and kaitiakitanga.
- 2.51 As we observed in the Issues Paper, tikanga Māori has much in common with human rights values.<sup>108</sup> In the next section, we consider the human rights values that are engaged in the collection and use of DNA in criminal investigations.

## HUMAN RIGHTS VALUES

- 2.52 The third requirement of constitutionally sound law is consistency with human rights values. All law is made against a matrix of values and principles that are regarded as fundamentally important to our legal system.<sup>109</sup> This includes a broad range of human rights values that can be expressed in different ways but at their core are concerned with human dignity and liberty.<sup>110</sup> Many human rights values are affirmed in the New Zealand Bill of Rights Act 1990 (Bill of Rights Act), while others are affirmed in the common law or in international instruments.<sup>111</sup> An important principle of statutory interpretation is the presumption that Parliament will intend to legislate consistently with fundamental human rights and New Zealand's international obligations.<sup>112</sup>
- 2.53 The collection and use of DNA in criminal investigations engages several fundamental human rights values, which are:<sup>113</sup>
- (a) the protection of privacy;
  - (b) the protection of bodily integrity;

<sup>108</sup> Issues Paper at [2.52]–[2.57]. For an extensive discussion of the overlap between custom law in the Pacific and human rights values, see Te Aka Matua o te Ture | Law Commission *Converging Currents: Custom and Human Rights in the Pacific* (NZLC SP17, 2006) at chs 4–6.

<sup>109</sup> Legislation Design and Advisory Committee *Legislation Guidelines* (March 2018) at 23–25.

<sup>110</sup> For example, the preamble to the *Universal Declaration of Human Rights* GA Res 217A (1948) begins: “Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world”.

<sup>111</sup> Including the following instruments: *Universal Declaration of Human Rights* GA Res 217A (1948); International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976); Convention on the Rights of the Child 1577 UNTS 3 (opened for signature 20 November 1989, entered into force 2 September 1990) (discussed in Chapter 21); and *United Nations Declaration on the Rights of Indigenous Peoples* GA Res 61/295 (2007) (discussed above).

<sup>112</sup> See *Ngati Apa Ki Te Waipounamu Trust v The Queen* [2000] 2 NZLR 659 (CA) at [82]; *Cropp v Judicial Committee* [2008] NZSC 46, [2008] 3 NZLR 774 at [26]–[27]; *New Health New Zealand Inc v South Taranaki District Council* [2018] NZSC 59, [2018] 1 NZLR 948 at [292]–[308]; *Tavita v Minister of Immigration* [1994] 2 NZLR 257 (CA) at 266; and *Helu v Immigration and Protection Tribunal* [2015] NZSC 28, [2016] 1 NZLR 298 at [144].

<sup>113</sup> The Law Reform Commission of Ireland, in its consideration of the establishment of a DNA databank for criminal investigations, also identified the rights to privacy and bodily integrity as being engaged, in addition to the privilege against self-incrimination, which we address at [2.76]. See Law Reform Commission of Ireland *The Establishment of a DNA Database* (LRC 78, 2005) at [1.16]; and Law Reform Commission of Ireland *Consultation Paper on the Establishment of a DNA Database* (LRC CP29, 2004) at ch 3.



- (c) freedom from discrimination; and
  - (d) the rule of law.
- 2.54 We discuss these values below and how they must be accommodated alongside law enforcement values.

## Privacy

- 2.55 Privacy is not a stand-alone statutory right in New Zealand law.<sup>114</sup> Rather, privacy values underpin important rights and freedoms affirmed in the Bill of Rights Act, including the right to be secure against unreasonable search and seizure, discussed below.<sup>115</sup> Privacy also informs the law in other ways. The Privacy Act 1993 (and its successor, the Privacy Act 2020) governs how agencies collect, use, disclose, store and give access to personal information.<sup>116</sup> The common law tort of privacy enables a person to claim damages from another person for breaching their privacy.<sup>117</sup> At an international level, Aotearoa New Zealand is committed to ensuring that no one is subjected to “arbitrary or unlawful interference with his privacy” and that everyone has the “right to the protection of the law against such interference or attacks”.<sup>118</sup>
- 2.56 Privacy “is an elastic and complex concept that is notoriously difficult to define”.<sup>119</sup> The Law Commission, in 2008, observed that there are two dimensions to privacy:<sup>120</sup>
- (a) **Informational privacy**, which is concerned with control over access to private information or facts about ourselves.

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<sup>114</sup> The right to privacy is not affirmed in the New Zealand Bill of Rights Act 1990. However, s 28 of that Act states that existing rights and freedoms “shall not be held to be abrogated or restricted by reason only that the right or freedom is not included in this Bill of Rights”. Privacy is discussed in detail in *Te Aka Matua o te Ture | Law Commission Privacy Concepts and Issues: Review of the Law of Privacy Stage 1* (NZLC SP19, 2008).

<sup>115</sup> Privacy values also underpin the right to freedom of thought, conscience and religion, the right to freedom of association, the right not to be subjected to medical experimentation and the right to refuse to undergo medical treatment: New Zealand Bill of Rights Act 1990, ss 10, 11, 13 and 17.

<sup>116</sup> The Privacy Act 1993 will be replaced by the Privacy Act 2020 on 1 December 2020. In this Report, we refer to both statutes for completeness.

<sup>117</sup> In *Hosking v Runting* [2005] 1 NZLR 1 (CA) at [117] per Gault P, the Court recognised the existence of a common law remedy for breach of privacy where there exists facts in respect of which there is a reasonable expectation of privacy and publicity is given to those private facts that would be considered “highly offensive to an objective reasonable person”. See discussion in *Te Aka Matua o te Ture | Law Commission Invasion of Privacy: Penalties and Remedies – Review of the Law of Privacy Stage 3* (NZLC R113, 2010) at ch 7.

<sup>118</sup> International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976), art 17. New Zealand ratified the ICCPR on 28 December 1978, and the long title of the New Zealand Bill of Rights Act 1990 states that it is an Act to affirm New Zealand’s commitment to the ICCPR. See also *Universal Declaration of Human Rights* GA Res 217A (1948), art 12.

<sup>119</sup> *Te Aka Matua o te Ture | Law Commission Review of the Search and Surveillance Act 2012 | Ko te Arotake i te Search and Surveillance Act 2012* (NZLC R141, 2017) at [2.11]. See also *Te Aka Matua o te Ture | Law Commission Search and Surveillance Powers* (NZLC R97, 2007) at [2.12]–[2.18].

<sup>120</sup> *Te Aka Matua o te Ture | Law Commission Privacy Concepts and Issues: Review of the Law of Privacy Stage 1* (NZLC SP19, 2008) at [3.15]–[3.25]. For further discussion, see *Te Aka Matua o te Ture | Law Commission Review of the Search and Surveillance Act 2012 | Ko te Arotake i te Search and Surveillance Act 2012* (NZLC R141, 2017) at [2.13]. A similar approach is adopted in Canadian case law, recognising three categories of protection: informational privacy, bodily privacy and territorial privacy. For the Canadian position, see *R v Spencer* 2014 SCC 43, [2014] 2 SCR 212 at [35]. The Privacy Commissioner observes that a common understanding about privacy is that people need to be able to protect information about themselves, and people need the opportunity to withdraw – physically or mentally – from society. See *Te Mana Mātāpono Matatapu | Office of the Privacy Commissioner “About Privacy”* <[www.privacy.org.nz/](http://www.privacy.org.nz/)>.

- (b) **Local or spatial privacy**, which is concerned with control over access to our persons and to private spaces.
- 2.57 Both dimensions are engaged by the collection and use of DNA in criminal investigations.<sup>121</sup> Obtaining DNA samples under the CIBS Act, even with a person's informed consent, is recognised as a "substantial intrusion into an individual's privacy"<sup>122</sup> as DNA "contains a wealth of genetic information about a person with unlimited future utility".<sup>123</sup> It is "capable of revealing the most intimate details of a person's biological makeup"<sup>124</sup> such as information about a person's health, ethnicity and family and whānau. Informational privacy rights are, therefore, clearly engaged. So too are local privacy rights or, as we describe it below, the right to bodily integrity.
- 2.58 The use of DNA might also engage collective privacy interests. This is because "genetic data, while a blueprint for an individual, are also representative of the collective".<sup>125</sup> DNA can reveal information not just about an individual but about their wider family, whānau and ancestors. In tikanga Māori, collective privacy interests arise because DNA contains information about whakapapa.<sup>126</sup> The use of familial searching to identify a suspect through a relative's DNA clearly illustrates the need to consider collective privacy interests in DNA.

### Bodily integrity

- 2.59 Closely related to privacy is the concept of bodily integrity.<sup>127</sup> As Richardson J observed in *R v B*, "freedom from invasion of physical privacy and bodily integrity is a fundamental human right".<sup>128</sup> Bodily integrity underpins rights affirmed in the Bill of Rights Act, but it is also broader than these rights.<sup>129</sup>
- 2.60 Obtaining a DNA sample intrudes on a person's bodily integrity. The degree of interference will vary depending on the sampling method used and whether the sample

<sup>121</sup> Te Aka Matua o te Ture | Law Commission *Privacy Concepts and Issues: Review of the Law of Privacy Stage 1* (NZLC SP19, 2008) at [6.91].

<sup>122</sup> *R v Toki* [2017] NZCA 513, [2018] 2 NZLR 362 at [15]. See also *Butland v R* [2019] NZCA 376 at [50]; and *R v Hoare* CA310/04, 21 April 2005 at [42].

<sup>123</sup> *R v Toki* [2017] NZCA 513, [2018] 2 NZLR 362 at [24].

<sup>124</sup> *R v RC* 2005 SCC 61, [2005] 3 SCR 99 at [27].

<sup>125</sup> Maui Hudson, Dickie Farrar and Lesley McLean "Tribal data sovereignty: Whakatōhea rights and interests" in Tahu Kukutai and John Taylor (eds) *Indigenous Data Sovereignty: Toward an Agenda* (Australian National University Press, Canberra, 2016) 157 at 164.

<sup>126</sup> Te Aka Matua o te Ture | Law Commission *Privacy Concepts and Issues: Review of the Law of Privacy Stage 1* (NZLC SP19, 2008) at [5.28]–[5.30]; and Khylee Quince "Māori Concepts and Privacy" in Stephen Penk and Rosemary Tobin (eds) *Privacy Law in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2016) 29 at 43.

<sup>127</sup> Also referred to as personal or physical integrity or as local privacy in Te Aka Matua o te Ture | Law Commission *Privacy Concepts and Issues: Review of the Law of Privacy Stage 1* (NZLC SP19, 2008). Bodily integrity can be regarded as a stand-alone human right or as an aspect of privacy: Te Aka Matua o te Ture | Law Commission *Search and Surveillance Powers* (NZLC R97, 2007) at [2.19]–[2.20].

<sup>128</sup> *R v B* [1995] 2 NZLR 172 (CA) at 182 per Richardson J. Affirmed in *A v Council of the Auckland District Law Society* [2005] 3 NZLR 552 (HC) at [26]. See also *Naysmith v Accident Compensation Corporation* [2006] 1 NZLR 40 (HC) at [80], where the Court observed that "the law has always afforded the highest protection to the physical integrity of the person; a lower protection to property rights; and still less protection to economic interests".

<sup>129</sup> *R v B* [1995] 2 NZLR 172 (CA) at 177 per Cooke P. In that case, the complainant's right to have her privacy, dignity and bodily integrity protected from non-consensual medical procedure was:

... a right which may be wider than those assured by ss 10 and 11 of the Bill of Rights and which is certainly, having regard to s 28, not abrogated or restricted by those provisions.

is given by consent or is compulsorily acquired.<sup>130</sup> However, even if the physical intrusion is minimal, the very fact that information is being collected about a person's body may feel like an intrusion into control over access to their body.<sup>131</sup>

- 2.61 Cultural beliefs about the sacred or restricted nature of the body or of certain parts of the body play an important role in determining the degree to which DNA sampling is considered intrusive.<sup>132</sup> In tikanga Māori, the concept of personal tapu is engaged, which requires respect for an individual's personal space and their body. It is important from a tikanga perspective that intrusions upon personal tapu are for good reasons and that those affected understand what is happening and why.
- 2.62 The greatest intrusions on bodily integrity will occur where force is used to take a sample from someone who is being detained in police custody. This also constitutes a grave intrusion on personal tapu. A person's movement and use of their body is being restricted in order to obtain material that may incriminate that person and be used as evidence against them.<sup>133</sup>

### Freedom from discrimination

- 2.63 The right to equality and freedom from discrimination are core human rights values with a long history in international law.<sup>134</sup> In Aotearoa New Zealand, the Human Rights Act 1993 and the Bill of Rights Act affirm the right to be free from discrimination on prohibited grounds, including the grounds of race, ethnic origin, age (in respect of anyone aged 16 years or over) and family status (including being related to a particular person or class of people).<sup>135</sup> The courts have established that, for an act or omission to amount to discrimination on a prohibited ground, it must create a distinction (in the sense of treating a group of people differently from a comparator group) and the distinction must cause a material disadvantage.<sup>136</sup>
- 2.64 Discrimination on prohibited grounds is a real risk in law enforcement and unconscious bias against Māori is a particular concern.<sup>137</sup> In 2019, Te Uepū Hāpai i te Ora | Safe and Effective Justice Advisory Group reported that a consistent message throughout its conversations with New Zealanders was that racism is embedded in every part of the criminal justice system and that individuals operating within the system hold biases

<sup>130</sup> In *Butland v R* [2019] NZCA 376 at [48], the Court observed that an “unlawful and coercive obtaining of a bodily sample involves an intrusion on a person's bodily integrity of the highest order”.

<sup>131</sup> Te Aka Matua o te Ture | Law Commission *Privacy Concepts and Issues: Review of the Law of Privacy Stage 1* (NZLC SP19, 2008) at [6.91].

<sup>132</sup> At [6.91].

<sup>133</sup> Sampling methods and the use of reasonable force are discussed in Chapters 11 and 19.

<sup>134</sup> See the *Universal Declaration of Human Rights* GA Res 217A (1948), arts 1, 2 and 7; International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976), arts 2 and 26; and International Convention on the Elimination of All Forms of Racial Discrimination 660 UNTS 195 (opened for signature 7 March 1966, entered into force 4 January 1969).

<sup>135</sup> New Zealand Bill of Rights Act 1990, s 19(1); and Human Rights Act 1993, s 21(1).

<sup>136</sup> *Ministry of Health v Atkinson* [2012] NZCA 184, [2012] 3 NZLR 456 at [55].

<sup>137</sup> Bias in policing was explored in a survey of frontline police officers in the late 1990s. The resulting report concluded that, while cultural awareness was improving, bias continued to be an issue for some officers: Gabrielle Maxwell and Catherine Smith *Police Perceptions of Maori – A Report to the New Zealand Police and the Ministry of Maori Development: Te Puni Kokiri* (Institute of Criminology, Victoria University of Wellington, March 1998) at 36. While that survey is now over 20 years old, its ongoing relevance was recognised by the Court of Appeal in 2017, observing that the disparity in criminal justice outcomes that triggered the survey “remains unchanged, and in some respects has become worse”: *Kearns v R* [2017] NZCA 51, [2017] 2 NZLR 835 at [25].

against Māori, whether consciously or unconsciously.<sup>138</sup> Unconscious bias has been acknowledged by Police, who have observed that “structural and system bias within the justice system cannot be ruled out as an influence on the current levels of ethnic disparity”.<sup>139</sup> Police policies and decision making under the DNA regime must therefore actively protect against unlawful discrimination to ensure consistency with human rights values as well as with Treaty obligations, discussed above.

### The rule of law

2.65 The rule of law is another fundamental principle underlying New Zealand’s constitutional arrangements. It is an expansive concept with many varying definitions and descriptions.<sup>140</sup> However, the *Legislation Guidelines* identify three core principles:<sup>141</sup>

- (a) Everyone is subject to the law, including the government.
- (b) The law should be clear and clearly enforceable.
- (c) There should be an independent, impartial judiciary responsible for making certain decisions.

2.66 In its 2007 review of search and surveillance powers, the Commission identified the maintenance of the rule of law as a principal human rights value in operation when the regulation of search powers is in issue.<sup>142</sup> The Commission observed that the rule of law requires that search powers be regulated “in such a manner as will best ensure that they are only exercised where they are genuinely required to be deployed”.<sup>143</sup> The Commission observed that search powers should:<sup>144</sup>

- (a) be expressed in objective, rather than subjective terms;
- (b) be clearly expressed so that the person who is being subjected to a search and the law enforcement officer undertaking it can both understand whether there is in fact authority to undertake the search or seizure and what it is that the enforcement officers are entitled to search for and seize;
- (c) be subject to judicial supervision, preferably in advance of the powers being exercised; and
- (d) only be exercisable reasonably.

<sup>138</sup> Te Uepū Hāpai i te Ora | Safe and Effective Justice Advisory Group *He Waka Roimata: Transforming Our Criminal Justice System* (9 June 2019) at 9.

<sup>139</sup> Ngā Pirihimana o Aotearoa | New Zealand Police *Te Huringa o Te Tai: A Whānau Ora Crime and Crash Prevention Strategy* (November 2019) at 10. See also Interview with Mike Bush, Commissioner of Police (Lisa Owen, The Nation, Newshub, 28 November 2015) transcript provided by Scoop Independent News (Wellington). See also Nicholas Jones “Police Commissioner: Racial Profiling Perception ‘Concern We Need to Address’” *The New Zealand Herald* (online ed, Auckland, 8 June 2018).

<sup>140</sup> Te Aka Matua o te Ture | Law Commission *Review of the Search and Surveillance Act 2012 | Ko te Arotake i te Search and Surveillance Act 2012* (NZLC R141, 2017) at [15.16]. See also Legislation Design and Advisory Committee *Legislation Guidelines* (March 2018) at 22; and Te Kāhui Tika Tangata | Human Rights Commission *Human Rights in New Zealand | Ngā Tika Tangata o Aotearoa* (2010) at 89. For general discussion, see also Brian Tamanaha *On the Rule of Law* (Cambridge University Press, Cambridge, 2012).

<sup>141</sup> Legislation Design and Advisory Committee *Legislation Guidelines* (March 2018) at 23.

<sup>142</sup> Te Aka Matua o te Ture | Law Commission *Search and Surveillance Powers* (NZLC R97, 2007) at [2.11].

<sup>143</sup> At [2.22]–[2.23].

<sup>144</sup> At [2.23].

2.67 The Commission explained that:<sup>145</sup>

The overall aim of these measures is to prevent unreasonable searches and seizures occurring in the first place and ensuring that both before and after intrusive search and seizure powers are exercised they are subject to a transparent and accountable form of public review.

2.68 As the collection and use of DNA for criminal investigations is a “search and seizure”,<sup>146</sup> we consider these principles apply equally to the DNA regime.

### Providing for human rights values in the DNA regime

2.69 Human rights values, like other constitutional values and principles discussed in this chapter, are not absolute rights. They are “necessarily limited by membership of society and by the rights of others and the interests of the community”.<sup>147</sup> This is evident in the Bill of Rights Act, which only protects against “unreasonable” search and seizure and recognises that other rights and freedoms, including freedom from discrimination, can be subject to reasonable limits if they are “demonstrably justified in a free and democratic society”.<sup>148</sup>

2.70 In 2007, the Commission observed that both human rights values and law enforcement values arise in the context of authorising and regulating search powers.<sup>149</sup> We consider that similar sets of values arise within the DNA regime. The relevant law enforcement values were summarised by the Commission then as follows:<sup>150</sup>

The law enforcement values reflect the public interest in the detection and prosecution of crime. They include the principles of effectiveness (fitness for purpose); simplicity (search powers should be devoid of unnecessary complexity and simply expressed); certainty (enforcement officers should be able to exercise the powers with confidence); responsiveness (powers need to be able to meet the exigencies that arise from different operational circumstances); and the need for consistency with human rights (enforcement agencies exist ultimately to protect rather than to control the community).

2.71 In the search context, the Commission did not see law enforcement values and human rights values as necessarily competing with one another:<sup>151</sup>

[W]hile there is a balance to be struck, there is also a good degree of complementarity between the two sets of values, particularly in a strong democratic state such as New Zealand. Search powers that encroach too far on human rights values are unlikely to gain legislative or community support. Similarly, investigative powers that are too tightly controlled and that prevent law enforcement officers from doing their job effectively will bring human rights norms into disrepute.

2.72 We consider the same view holds true in the context of the DNA regime.

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<sup>145</sup> At [2.23].

<sup>146</sup> See, for example, *R v Toki* [2017] NZCA 513, [2018] 2 NZLR 362 at [15]. The Court of Appeal in *R v Toki* also cited the following two judgments: *R v T* [1999] 2 NZLR 602 (CA) at 613; and *R v Shaheed* [2002] 2 NZLR 377 (CA) at [166]. See also *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305 at [165] per Blanchard J who gave “any physical examination of a person” and “the taking of bodily samples” as examples of actions that would qualify as searches.

<sup>147</sup> *R v B* [1995] 2 NZLR 172 (CA) at 182 per Richardson J.

<sup>148</sup> New Zealand Bill of Rights Act 1990, ss 5 and 21. Similarly, the International Covenant on Civil and Political Rights only protects against “arbitrary or unlawful” interference with privacy: International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976), art 17.

<sup>149</sup> *Te Aka Matua o te Ture | Law Commission Search and Surveillance Powers* (NZLC R97, 2007) at [2.6].

<sup>150</sup> At [5].

<sup>151</sup> At [2.7].

### Right against unreasonable search and seizure

2.73 Section 21 of the Bill of Rights Act is the principal expression of human rights values in the law enforcement investigative context.<sup>152</sup> Section 21 guarantees the right of everyone “to be secure from unreasonable search and seizure, whether of the person, property, or correspondence, or otherwise”. A section 21 inquiry is an exercise “in balancing legitimate state interests against intrusions on individual interests”.<sup>153</sup> In *R v Grayson and Taylor*, the Court of Appeal said:<sup>154</sup>

The guarantee under s 21 to be free from unreasonable search and seizure reflects an amalgam of values. A search of premises is an invasion of property rights and an intrusion on privacy. It may also involve a restraint on individual liberty and an affront to dignity. Any search is a significant invasion of individual freedom. How significant it is will depend on the circumstances. There may be other values and interests, including law enforcement considerations, which weigh in the particular case.

2.74 In *Hamed v R*, Chief Justice Elias also explained the role of section 21 as follows:<sup>155</sup>

The right protects privacy but, more fundamentally, it holds a constitutional balance between the State and citizen by preserving space for individual freedom and protection against unlawful and arbitrary intrusion by State agents.

2.75 Section 21 applies where there is an intrusion upon a “reasonable expectation of privacy”.<sup>156</sup> In *R v Alsford*, the Supreme Court described this concept as follows:<sup>157</sup>

The reasonable expectation of privacy is directed at protecting “a biographical core of personal information which individuals in a free and democratic society would wish to maintain and control from dissemination by the state” and includes information “which tends to reveal intimate details of the lifestyle and personal choices of the individual”.

2.76 The collection and use of DNA samples in criminal investigations clearly engages reasonable expectations of privacy. As the Court of Appeal noted in *R v Williams*, “the highest expectation of privacy relates to searches of the person and particularly intimate searches ... or invasive procedures, such as DNA testing”.<sup>158</sup> The Court of Appeal has also observed that issues about self-incrimination might arise if the strict procedural requirements under the CIBS Act relating to the DNA profile databank are not followed, as the databank grants law enforcement an “enduring ability” to identify a person’s presence at a particular place.<sup>159</sup> For these reasons, non-compliance with the

<sup>152</sup> At [2.10].

<sup>153</sup> *R v Jefferies* [1994] 1 NZLR 290 (CA) at 302 per Richardson J.

<sup>154</sup> *R v Grayson and Taylor* [1997] 1 NZLR 399 (CA) at 407 as cited in *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305 at [161].

<sup>155</sup> *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305 at [10] (citations omitted).

<sup>156</sup> *R v Alsford* [2017] NZSC 42, [2017] 1 NZLR 710 at [63]–[64]; and *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305 at [160] and [163]. The concept of “reasonable expectations of privacy” also informed the Law Commission’s recommendations on search and surveillance powers, which were largely adopted in the Search and Surveillance Act 2012. See *Te Aka Matua o te Ture* | Law Commission *Search and Surveillance Powers* (NZLC R97, 2007) at [2.46]–[2.49]; and Search and Surveillance Bill 2009 (45-1) (explanatory note) at 1.

<sup>157</sup> *R v Alsford* [2017] NZSC 42, [2017] 1 NZLR 710 at [63] (citations omitted).

<sup>158</sup> *R v Williams* [2007] NZCA 52, [2007] 3 NZLR 207 at [113]. See also our discussion at [2.57].

<sup>159</sup> *R v Toki* [2017] NZCA 513, [2018] 2 NZLR 362 at [24]. See also *Butland v R* [2019] NZCA 376 at [49]–[50]. In *Butland*, the Court of Appeal observed that the values underpinning s 36 of the Criminal Investigations (Bodily Samples) Act 1995, which concerns the right to withdraw consent to the retention of a DNA profile on the databank, “are those of privacy and also the right of a person not to incriminate himself or herself”: at [49]. However, while the right against self-incrimination might underpin some aspects of the CIBS Act, it does not appear that obtaining a DNA sample

“comprehensive and prescriptive” regime for obtaining DNA samples under the CIBS Act has been held to amount to an unreasonable search and seizure under section 21.<sup>160</sup>

- 2.77 In our view, in order for legislation governing the regime to be constitutionally sound, any intrusions on human rights values, including in particular privacy and bodily integrity, should be reasonable and proportionate to the law enforcement value and public interest in the collection and use of DNA in criminal investigations.

### Are property rights engaged?

- 2.78 It is unclear whether the collection and use of DNA samples also engage property rights.<sup>161</sup> As the Law Commission observed in 2007, where interferences with privacy encroach on a person’s property rights, “values additional to purely privacy interests are implicated”.<sup>162</sup>
- 2.79 Property interests in human tissue have been recognised in some jurisdictions in limited contexts.<sup>163</sup> In Aotearoa New Zealand, however, it is a long-standing principle of the common law that “there can be no property in the dead body of a human being”.<sup>164</sup> In *Re Lee*, the High Court held that this includes genetic material extracted from a dead body.<sup>165</sup> It remains uncertain whether a person retains a property interest in their human tissue samples while they are alive.<sup>166</sup>
- 2.80 In our view, recognising a property interest in human tissue would be out of step with contemporary emphasis on human dignity, which underpins the current judicial approach in relation to genetic material extracted from a dead body and the treatment of human tissue in other legislation.<sup>167</sup> The Human Tissue Act 2008, for example, is

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interferes with the privilege against self-incrimination in s 60 of the Evidence Act 2006 or the right to refuse to make a statement in s 23(4) of the New Zealand Bill of Rights Act 1990. Those rights are focused on oral or written statements rather than physical evidence such as DNA samples, as we discussed in the Issues Paper at 50. See also *Cropp v Judicial Committee* [2008] NZSC 46, [2008] 3 NZLR 774 at [47]. This is consistent with the approach in England and Wales, as described in the Law Reform Commission of Ireland *Consultation Paper on the Establishment of a DNA Database* (LRC CP29, 2004) at [3.33]. However, in that paper, the Law Reform Commission of Ireland observed that issues of self-incrimination may arise if there is reliance on a person’s refusal to consent to provide a DNA sample: at [3.34]. See also *Data Banks, Criminal Investigations, and Civil Liberties* (Columbia University Press, New York, 2011) at 50–52; and Jeremy Gans “Something to Hide: DNA, Surveillance and Self-Incrimination” (2001) 13 CICJ 168.

<sup>160</sup> *R v Toki* [2017] NZCA 513, [2018] 2 NZLR 362 at [15] and [23]–[24]. See also *R v Shaheed* [2002] 2 NZLR 377 (CA) at [6], [166]–[167] and [194]; *R v T* [1999] 2 NZLR 602 (CA) at 613–614; and *R v Hoare* CA310/04, 21 April 2005 at [34]–[42]. Although as *Shaheed* also held, non-compliance may not necessarily lead to exclusion of the evidence under s 30 of the Evidence Act 2006.

<sup>161</sup> See discussion in Issues Paper at ch 9.

<sup>162</sup> Te Aka Matua o te Ture | Law Commission *Search and Surveillance Powers* (NZLC R97, 2007) at [2.21].

<sup>163</sup> Most case law focuses on the extent of property interests in sperm. For example, in Australia a deceased’s sperm may be treated as property, “at least to the extent that there is an entitlement to possession”: *Re H, AE (No 2)* [2012] SASC 177 at [58]. In England and Wales, the Court of Appeal held that, for the purposes of claims in negligence and bailment following damage to sperm maintained in a storage bank, the sperm donors had a property interest in their sperm: *Yearworth v North Bristol NHS Trust* [2009] EWCA Civ 37, [2010] QB 1. Similarly, in Canada sperm was held to constitute property in the context of a division of relationship property following separation: *JCM v ANA* 2012 BCSC 584, (2012) 349 DLR (4th) 471.

<sup>164</sup> *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733 at [113] citing *Williams v Williams* (1882) 20 Ch D 659.

<sup>165</sup> *Re Lee* [2017] NZHC 3263, [2018] 2 NZLR 731 at [83]–[90].

<sup>166</sup> Whether a property interest might be recognised in genetic material extracted from a body while that person is still alive was left as an open question in *Re Lee* [2017] NZHC 3263, [2018] 2 NZLR 731 at [91].

<sup>167</sup> In *Re Lee* [2017] NZHC 3263, [2018] 2 NZLR 731 at [82], the High Court expressly rejected the earlier line of authority established by *Doodeward v Spence* (1908) 6 CLR 40 that there could be property in a dead body if it has been the

premised on “the gift status of human tissue”,<sup>168</sup> and its purpose is to help ensure that the collection or use of human tissue occurs only with proper recognition of and respect for “the autonomy and dignity of the individual”.<sup>169</sup> Accordingly, the Human Tissue Act prohibits a person from selling their own tissue or tissue from a body they are responsible for.<sup>170</sup>

- 2.81 Recognising property interests in human tissue also risks conflicting with tikanga Māori. The Biobanking Guidelines discussed above explain that Māori consider human tissue to be a taonga and is tapu.<sup>171</sup> In the context of health research, the donation of human tissue to be stored on a biobank engages tākoha (a gifting of responsibility rather than a gifting of the human tissue itself) and kaitiakitanga (a form of guardianship with a responsibility to look after specific resources).<sup>172</sup> These concepts are difficult to reconcile with traditional understandings of property rights such as rights of ownership, possession and quiet enjoyment of property.<sup>173</sup>
- 2.82 Given the legal uncertainty and the significant implications of recognising property interests in DNA samples, we prefer to frame our analysis of the DNA regime through the lenses of privacy and bodily integrity.

## CONCLUSION

- 2.83 This review raises important constitutional values and principles. In the discussion above, we have highlighted the implications arising from the Treaty, tikanga Māori and human rights values for our review. In the following chapter, we consider the CIBS Act against these values and principles. In the remainder of this Report, we then explore the implications of the Treaty, tikanga and human rights values for specific aspects of the DNA regime and make recommendations to ensure that the collection and use of DNA in criminal investigations is facilitated in a manner that is constitutionally sound.

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subject of work and skill (that case concerned a dispute over whether the preserved body of a still-born baby, born 40 years earlier, was “property” in respect of which an action for detinue could be brought). The Court observed that “contemporary society views the use of human remains very differently”, and that comments made by the Court in *Doodeward* “insult ... the dignity of the still-born child” and “represent a view that differs significantly from modern New Zealand Law”: at [85] and [88]. The Court also observed that *Doodeward* is inconsistent with the scheme and purpose of the Human Assisted Reproductive Technology Act 2004: at [89] (see n 170 below).

<sup>168</sup> Human Tissue Bill 2006 (82-2) (select committee report) at 6.

<sup>169</sup> Human Tissue Act 2008, s 3(a)(i).

<sup>170</sup> Sections 3(c) and 56. See also the Human Assisted Reproductive Technology Act 2004, which protects and promotes the dignity and rights of all individuals in the use of assisted reproductive procedures and human reproductive research (ss 3(a) and 4(b)) and prohibits certain commercial transactions in relation to human reproduction (s 3(c)).

<sup>171</sup> Maui Hudson and others *He Tangata Kei Tua: Guidelines for Biobanking with Māori* (Te Mata Hautū Taketake | Māori and Indigenous Governance Centre, October 2016) at 8.

<sup>172</sup> At 25–26. Under kaitiakitanga, individuals and/or communities should retain veto rights over how human tissue or data are used.

<sup>173</sup> In a submission to the Law Commission on its review of the Coroners Act 1988, Te Mana Hauora o Te Arawa submitted that “Māori will not agree to anyone lawfully possessing their body” and raised the common Māori unease about notions of “ownership”: Te Aka Matua o te Ture | Law Commission *Coroners* (NZLC R62, 2000) at [217].



## CHAPTER 3

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# A new Act

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## INTRODUCTION

- 3.1 In this chapter, we outline the fundamental problems with the CIBS Act and propose a new comprehensive statute to regulate the collection and use of DNA in criminal investigations.
- 3.2 The rest of this Report considers in detail each aspect of the DNA regime and makes recommendations for reform to ensure the new statute meets our objectives of being fit for purpose, constitutionally sound and accessible.

## FUNDAMENTAL PROBLEMS WITH THE CIBS ACT

- 3.3 There are six fundamental problems with the CIBS Act.<sup>1</sup> An underlying theme of these problems is the rapid pace of scientific development in DNA technology over the last 25 years. This has seen the utility of DNA in criminal investigations grow exponentially in ways not anticipated by the drafters of the original Act.
- 3.4 The fundamental problems are that the CIBS Act:
- (a) lacks a clear, robust purpose;
  - (b) fails to recognise and provide for tikanga Māori and te Tiriti o Waitangi | the Treaty of Waitangi (the Treaty);
  - (c) fails to properly accommodate human rights values;
  - (d) is not comprehensive;
  - (e) is confusing and complex; and
  - (f) makes no provision for independent oversight.
- 3.5 In light of these problems, we have formed the view that the CIBS Act is no longer fit for purpose, constitutionally sound or accessible. We discuss these problems below.

### The CIBS Act lacks a clear, robust purpose

- 3.6 If legislation is to be fit for purpose, it must have a clearly defined and robust purpose, and its operative provisions should reflect the policy objectives that underpin that purpose.<sup>2</sup> Our view is that the purpose of the CIBS Act and its underpinning policy objectives are unclear.

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<sup>1</sup> The discussion in this section reflects and builds on our discussion of the fundamental problems identified in ch 4 of the Issues Paper.

<sup>2</sup> Legislation Design and Advisory Committee *Legislation Guidelines* (March 2018) at 8.

- 3.7 There is no purpose provision in the CIBS Act that explains what Parliament intended to achieve in passing the legislation.<sup>3</sup> Our review of the parliamentary debates and surrounding policy documents indicates that the original policy objectives of the CIBS Act were to:<sup>4</sup>
- (a) improve the identification and prosecution of offenders in sexual and serious violent offending;
  - (b) enable early elimination of suspects and exoneration of innocent people;
  - (c) deter criminal offending; and
  - (d) reduce policing costs.
- 3.8 These policy objectives are problematic for several reasons. The first objective does not reflect the changing role of DNA in criminal investigations over the past 25 years, which we explore below. In relation to the second objective, the early elimination of suspects is difficult to separate from the objective of identifying and prosecuting offenders (for example, suspect samples may be obtained to “confirm or disprove” a suspect’s involvement).<sup>5</sup> These objectives are, in effect, different sides of the same coin rather than separate objectives. In relation to exoneration, it is unclear whether Parliament intended the CIBS Act to promote the exoneration of people wrongly convicted if new DNA evidence comes to light. If this was an objective, the CIBS Act fails to provide for this in its operative provisions.<sup>6</sup> Finally, we have concerns regarding the merit of deterrence and reduced policing costs as stand-alone objectives for the reasons we explore further below.

### *The changing role of DNA in criminal investigations*

- 3.9 There is no doubt that DNA has been used to identify and prosecute sexual and serious violent offenders who might otherwise not have been apprehended.<sup>7</sup> However, what was not anticipated in 1995 is how instrumental DNA would become in resolving property crime, which includes less serious offending such as general theft, burglary or vehicle crime (unlawful taking of and/or theft from vehicles).
- 3.10 The increasing reliance on DNA to resolve property crime is largely due to improvements in DNA technology. When the CIBS Act was first enacted in 1995, the only reliable sampling methods involved taking a blood sample, which was considered a grave intrusion on bodily integrity. Therefore, Police was only given powers to require a

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<sup>3</sup> The long title of the Criminal Investigations (Bodily Samples) Act 1995 simply explains the legal effect of the legislation, rather than identifying broader objectives that the Act will achieve.

<sup>4</sup> See Office of the Minister of Justice “Memorandum for Cabinet Social and Family Policy Committee: Enforcement, Prosecution and Sentencing – Part G Obtaining Blood Samples from Certain Convicted Offenders for the Purpose of a DNA Databank” (July 1994) at 2. See also (29 November 1994) 545 NZPD 5191; and (10 August 1995) 549 NZPD 8634. For further discussion of these objectives, see the Issues Paper at [2.20]–[2.31].

<sup>5</sup> Criminal Investigations (Bodily Samples) Act 1995, s 6(1).

<sup>6</sup> In Chapter 5, we discuss the role of the recently established Criminal Cases Review Commission in the oversight of the DNA regime. The primary function of the Commission is to “investigate and review convictions and sentences and decide whether to refer them to the appeal court”: Criminal Cases Review Commission Act 2019, s 11.

<sup>7</sup> High-profile examples include the 2002 conviction of Jules Mikus for the abduction, rape and murder of Teresa Cormack in 1987 and the conviction of Jarrod Mangels for the murder of Maureen McKinnel, 16 years after her death. See ESR *A Brief History of Forensic DNA 1990–2010: Marking 20 Years of DNA Analysis for the New Zealand Criminal Justice System* (February 2010).

suspect or offender to provide a sample in respect of serious offending.<sup>8</sup> The process of analysing DNA samples was also expensive, and a relatively large crime scene sample was needed in order to generate a DNA profile for comparison.<sup>9</sup> For these reasons, it was still relatively novel for Police to use DNA in criminal investigations.

- 3.11 Improvements in DNA technology resulted in amendments to the CIBS Act in 2003.<sup>10</sup> A new, less physically invasive form of sampling was introduced — buccal sampling — which involves rubbing a swab on the inside of a person’s mouth and can be self-administered by the person providing the DNA sample. At the same time, the scope of offences for which DNA samples could be required from suspects and offenders was broadened to include less serious offending. Further major amendments in 2009 lowered the offence threshold even further to enable police officers to require DNA samples in respect of any imprisonable offence.<sup>11</sup> Police officers were also given new powers to require a DNA sample from any person arrested or intended to be charged with a qualifying offence and to hold that person’s DNA profile on a temporary databank.<sup>12</sup> As sampling methods became less invasive, improvements in DNA technology also meant that scientists could generate a DNA profile from a crime scene sample as small as the traces of skin left in a fingerprint, making DNA an effective tool in identifying suspects in property offending.
- 3.12 These developments have broadened the operation of the DNA regime beyond the original policy intent of the CIBS Act. Around three-quarters of DNA profiles from crime scene samples uploaded to the Crime Sample Databank now relate to property crime.<sup>13</sup> While there is a public interest in resolving property crime, the weight assigned to that interest and how it is accommodated alongside other values and interests engaged by the collection and use of DNA may be different compared to the interest in resolving sexual and serious violent offending.<sup>14</sup>

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<sup>8</sup> As enacted, Part A of the Schedule to the Criminal Investigations (Blood Samples) Act 1995 listed 32 serious sexual or violent crimes for which DNA samples could be taken pursuant to a suspect compulsion order. A databank compulsion order could be obtained in relation to those offences and two further offences listed in Part B of the Schedule: burglary and entering with intent. These were considered precursors to the more serious offences listed in Part A. Police could, however, obtain samples by consent for less serious offending.

<sup>9</sup> For example, a blood stain at a crime scene would need to be about the size of an old 50 cent coin.

<sup>10</sup> Criminal Investigations (Bodily Samples) Amendment Act 2003.

<sup>11</sup> These amendments are reflected in ss 5(a) and 39 of the Criminal Investigations (Bodily Samples) Act 1995. These provisions authorise collection of a DNA sample in relation to any imprisonable offence or any offence listed in Part 3 of Schedule 1 of the Act. Part 3 of Schedule 1 was also introduced in 2009 and includes a range of minor offences. Notably, however, all but one of the offences listed in Part 3 are imprisonable. The single exception is the offence of peeping or peering into a dwellinghouse, which is an offence under s 30 of the Summary Offences Act 1981, punishable by a maximum fine of \$500.

<sup>12</sup> Police can require a sample on arrest or intention to charge from an adult in respect of any imprisonable offence, and from a young person in respect of a narrower range of “relevant offences”, the offences listed in Schedule 1, any offence punishable by a term of imprisonment of seven years or more and any attempts or conspiracies to commit such offences. See s 2 definition of “relevant offence” and ss 24J and 24K.

<sup>13</sup> This is referred to as “non-suspect volume crime”, which describes cases involving general theft, burglary or vehicle crime where no suspect sample is available for comparison.

<sup>14</sup> Public understandings and expectations regarding DNA in criminal investigations were explored in a New Zealand phone survey of 394 respondents. The survey asked respondents to indicate how important they thought DNA evidence would be, if they were a judge or juror, for four different types of crime. The more serious the crime, the more important the DNA evidence was seen to be. The results were as follows: 85.5 per cent said that DNA evidence would be vital or important in a sexual offence; 72.2 per cent in a major assault; 28 per cent in a major theft; and only 15.3 per cent in a minor theft: Cate Curtis “Public Understandings of the Forensic Use of DNA: Positivity, Misunderstandings, and Cultural Concerns” (2014) 34 *BSTS* 21 at 28.

### *Deterrence an unrealistic objective*

- 3.13 The objective of deterrence is not reflected in the CIBS Act and in our view is an unrealistic policy objective. Evidence on whether a DNA regime deters offending is inconclusive. Some studies suggest that, to the extent DNA databanks deter offending at all, the effect is minimal, while others claim a significant deterrent effect.<sup>15</sup> We have been unable to reconcile these studies given the different methodologies adopted and therefore do not draw any conclusions from them.<sup>16</sup>
- 3.14 In any event, deterrence depends on offenders undertaking a cost-benefit analysis before choosing to offend. This typically does not happen, especially in the context of spontaneous violent offending.<sup>17</sup> Even when this mental calculation does occur, offenders often do not appreciate that DNA evidence increases the risk of apprehension.<sup>18</sup> Alternatively, offenders may believe they can avoid forensic detection by employing countermeasures.<sup>19</sup> Some research even suggests that retaining DNA profiles creates barriers for the rehabilitation of offenders, which may increase the risk of recidivism for some individuals.<sup>20</sup> For these reasons and in the absence of clear and compelling evidence that supports a DNA regime in Aotearoa New Zealand having a deterrent effect on offending, we do not support this as a policy objective.

### *Cost-effectiveness of the DNA regime unclear*

- 3.15 We are not aware of any evidence to suggest that the collection and use of DNA in criminal investigations reduces policing costs. This is difficult to measure as very little information is routinely collected and analysed to show how efficient or effective the CIBS Act is in achieving the objectives of identifying and prosecuting offenders. For example, the number of matches between the Crime Sample Databank and the DNA Profile Databank and Temporary Databank are reported annually, but there is no data

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<sup>15</sup> Avinash Bhati and Caterina G Roman “Evaluating and Quantifying the Specific Deterrent Effects of DNA Databases” (2014) 38 Eval Rev 68 at 86–88. For a contrary view, see Jennifer L Doleac “The Effects of DNA Databases on Crime” (2017) 9 AEJ: Applied Economics 165 at 166–167; and Anne Sofie Tegner Anker, Jennifer L Doleac and Rasmus Landersø “The Effects of DNA Databases on the Deterrence and Detection of Offenders” (1 April 2020) Social Science Research Network <www.ssrn.com> at 24. These latter two studies found a high degree of deterrence.

<sup>16</sup> Dr Russil Durrant, a criminologist based at Te Herenga Waka | Victoria University of Wellington, reviewed the articles above n 15 for the Commission. He concluded that the literature, as it stands, does not allow any clear conclusions to be drawn about the potential deterrent effect of DNA databases, as each study has used different methodologies, each producing different results. He noted that the results are not too dissimilar to research that has examined the putative deterrent effects of policy changes such as the death penalty and three-strikes laws in the United States where there are also highly variable findings, which appear to be strongly influenced by the specific methodology employed.

<sup>17</sup> Nessa Lynch and Liz Campbell *The Collection and Retention of DNA from Suspects in New Zealand* (Victoria University Press, Wellington, 2015) at 59.

<sup>18</sup> Marie-Amélie George “Gendered Crime, Raced Justice: A Critical Race Feminist Approach to Forensic DNA Databank Expansion” (2005) 19 Nat’l Black LJ 78 at 87 found that databanks are not a deterrent as humans are cognitively biased “towards optimism and overconfidence” and “underestimate the likelihood of a future negative outcome”.

<sup>19</sup> See Carlos Jordi “Diminished Returns: The Exorbitance of Collecting DNA from all Arrestees” (2015) 26 St Thomas L Rev 346 at 367–368 where the author notes that offenders avoid detection in a number of ways such as intentionally contaminating DNA evidence so that it is unreadable by forensic scientists and avoiding leaving cigarette butts in the vicinity of their offending.

<sup>20</sup> Jason Tarricone ““An Ordinary Citizen Just Like Everyone Else’: The Indefinite Retention of Former Offenders’ DNA” (2005) 2 CRCL 209 at 243–254. See also Nessa Lynch and Liz Campbell *The Collection and Retention of DNA from Suspects in New Zealand* (Victoria University Press, Wellington, 2015) at 60.

on how often these matches assist in resolving the associated criminal investigations.<sup>21</sup> As we explore in Chapter 4, this problem is not unique to Aotearoa New Zealand. Difficulties assessing the effectiveness of DNA regimes is a significant problem worldwide.

### The CIBS Act does not recognise and provide for tikanga Māori and the Treaty

3.16 In Chapter 2, we explain that DNA holds special significance in te ao Māori and that its collection and use in criminal investigations engages rights and obligations under the Treaty, including the right to exercise tino rangatiratanga in accordance with tikanga. We identified applicable tikanga as including personal tapu and mana, whakapapa, whanaungatanga, manaakitanga and kaitiakitanga. As Māui Hudson observes:<sup>22</sup>

The interaction of [Māori] cultural values and forensic practice has some potential to create offense. These concerns can only be resolved by firstly, recognizing that the concerns exist, and secondly, including affected parties (i.e., Māori) in the development of the processes and procedures aimed at managing the issues arising from conflicting values.

3.17 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. In Chapter 2, we say that, 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 of the DNA regime. In our view, the CIBS Act's failure to do so is inconsistent with the Treaty guarantee of tino rangatiratanga and with the Treaty principles of partnership and active protection of Māori interests.

### Over-representation of Māori in the DNA regime

3.18 A further concern is that the CIBS Act fails to recognise the over-representation of Māori in the DNA regime. As we explore in Chapter 2, the Crown has an obligation under the Treaty to act fairly to reduce inequities between Māori and non-Māori. There are, however, no measures in the CIBS Act to support this obligation, such as reporting requirements or, as we discuss below, independent oversight of the DNA regime.

3.19 Māori are over-represented in the collection of DNA samples under the CIBS Act. While Māori comprise around 16.5 per cent of the general population,<sup>23</sup> since 2009, Māori have represented between 38 and 41 per cent of all DNA samples obtained from people on arrest or intention to charge.<sup>24</sup> Te Mana Raraunga | Māori Data Sovereignty Network

<sup>21</sup> Reporting requirements are discussed further in Chapter 5.

<sup>22</sup> Maui Hudson and others "The Impact of Māori Cultural Values on Forensic Science Practice in New Zealand" (2008) 53 JFS 380 at 382.

<sup>23</sup> As reported in the 2018 Census: Tatauranga Aotearoa | Stats NZ "New Zealand's population reflects growing diversity" (23 September 2019) <www.stats.govt.nz>.

<sup>24</sup> This is based on data Police has been required to report on since 2009, pursuant to s 76(2) of the Criminal Investigations (Bodily Samples) Act 1995. Our calculations are based on data reported in Ngā Pirihimana o Aotearoa | New Zealand Police *Annual Report 2010–2011* (October 2011) at 113; Ngā Pirihimana o Aotearoa | New Zealand Police *Annual Report 2011–2012* (October 2012) at 95; Ngā Pirihimana o Aotearoa | New Zealand Police *Annual Report 2012–2013* (October 2013) at 113; Ngā Pirihimana o Aotearoa | New Zealand Police *Annual Report 2013–2014* (October 2014) at 131; Ngā Pirihimana o Aotearoa | New Zealand Police *Annual Report 2014–2015* (October 2015) at 153; Ngā Pirihimana o Aotearoa | New Zealand Police *Annual Report 2015–2016* (October 2016) at 155; Ngā Pirihimana o Aotearoa | New Zealand Police *Annual Report 2016–2017* (November 2017) at 143; Ngā Pirihimana o Aotearoa | New

analysed these statistics and identified that Māori are around five times more likely to have a DNA sample taken on arrest or intention to charge than a person of European ethnicity.<sup>25</sup> While this data provides an incomplete picture,<sup>26</sup> it is reasonable to infer that similar levels of over-representation exist across the DNA regime.<sup>27</sup>

- 3.20 Māori over-representation in the DNA regime is part of a much broader problem of Māori over-representation in the criminal justice system, both as offenders and as victims. In 2019–2020, Māori represented 44.5 per cent of adults convicted of a criminal offence and 62.2 per cent of those sentenced to imprisonment.<sup>28</sup> The figures are even more alarming for Māori women, children and young people. Māori represent 51.4 per cent of adult women convicted of a criminal offence and 69.7 per cent of adult women sentenced to imprisonment.<sup>29</sup> In relation to children and young people, Māori also represent 61.9 per cent of those charged in court and 65.8 per cent of those given an order in court.<sup>30</sup>
- 3.21 Māori are also significantly more likely to be victims of crime than non-Māori. A 2018–2019 survey found that 38 per cent of Māori were victims of crime compared to the New Zealand average of 30 per cent.<sup>31</sup>
- 3.22 The causes of Māori over-representation in the criminal justice system are multiple and complex.<sup>32</sup> In its first report, *Te Uepū Hāpai i te Ora | Safe and Effective Justice Advisory Group* observed:<sup>33</sup>

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Zealand Police *Annual Report 2017–2018* (October 2018) at 148; and *Ngā Pirihimana o Aotearoa | New Zealand Police Annual Report 2018–2019* (November 2019) at 169.

<sup>25</sup> Te Mana Raraunga Submission to Law Commission at [10]. This is based on data from the 2017–2018 reporting year, which shows that 5,699 DNA samples were taken under Part 2B of the CIBS Act from Māori, compared to 5,766 samples taken from European people. Using that same methodology and updating the figures with more up-to-date information reveals an even higher disparity, with the number of samples taken from Māori representing around 0.6 per cent of the Māori population, while the number of DNA samples taken from people with European ethnicity representing just 0.1 per cent of the European population. This calculation is based on data reported in *Ngā Pirihimana o Aotearoa | New Zealand Police Annual Report 2018–2019* (November 2019) at 169 and uses 2018 Census results on population and ethnicity from *Tatauranga Aotearoa | Stats NZ “New Zealand’s population reflects growing diversity”* (23 September 2019) <[www.stats.govt.nz](http://www.stats.govt.nz)>.

<sup>26</sup> Police is not required to report on the ethnicity of people who provide suspect samples under Part 2 or databank samples under Part 3 of the CIBS Act and nor does Police report on the ethnic breakdown of all DNA profiles stored on the DNA Profile Databank.

<sup>27</sup> Our review in the Issues Paper at [11.72]–[11.73] of additional data provided by Police on the ethnicity of profiles added to the DNA Profile Databank between the 2012–2013 and 2017–2018 reporting years identified a very similar ethnic breakdown to that of DNA samples taken on arrest or intention to charge under Part 2B. We also noted that the ethnicity breakdown of DNA samples taken on arrest or intention to charge broadly equated to the ethnicity percentages recorded by *Tatauranga Aotearoa | Stats NZ* regarding apprehensions: at [11.70]–[11.71].

<sup>28</sup> *Tatauranga Aotearoa | Stats NZ “Adults Convicted in Court by Sentence Type – Most Serious Offence Fiscal Year”* (2019/20) <[nzdotstat.stats.govt.nz](http://nzdotstat.stats.govt.nz)>.

<sup>29</sup> *Tatauranga Aotearoa | Stats NZ “Adults Convicted in Court by Sentence Type – Most Serious Offence Fiscal Year”* (2019/20) <[nzdotstat.stats.govt.nz](http://nzdotstat.stats.govt.nz)>.

<sup>30</sup> *Tatauranga Aotearoa | Stats NZ “Children and Young People Given an Order in Court – Most Serious Offence Fiscal Year”* (2019/20) <[nzdotstat.stats.govt.nz](http://nzdotstat.stats.govt.nz)>. These are statistics for children and young people who are subject to an order under s 283 of the *Oranga Tamariki Act 1989* in the Youth Court or who are convicted and sentenced in the District Court or High Court. See Chapter 21 for further discussion.

<sup>31</sup> *Tāhū o te Ture | Ministry of Justice New Zealand Crime and Victims Survey Key Findings Cycle 2 (October 2018–September 2019) Descriptive statistics* (2020) at 3.

<sup>32</sup> See Peter Gluckman *It’s never too early, never too late: A discussion paper on preventing youth offending in New Zealand* (Office of the Prime Minister’s Chief Science Advisor, 12 June 2018) at 24–25; and Peter Gluckman *Using evidence to build a better justice system: The challenge of rising prison costs* (Office of the Prime Minister’s Chief

The data tells the story that, at every point in their lives, and over generations, Māori experience disadvantage that increases the risk they will come into contact with the criminal justice system. Poorer physical and mental health, education, housing and employment outcomes significantly reduce their ability to participate in and contribute meaningfully to their whānau, communities and wider society.

- 3.23 Several initiatives are underway to address the broader problem of Māori over-representation in the criminal justice system.<sup>34</sup> The DNA regime is a small but important aspect of the wider criminal justice system. As the Court of Appeal has observed, retaining a person’s DNA on a DNA databank “enables the state to conduct ongoing surveillance ... with molecular precision”.<sup>35</sup> We therefore consider that constitutionally sound DNA legislation should provide a framework for enabling the Crown to take reasonable steps to reduce inequities in the collection and use of DNA as part of these wider efforts.

### **Recognition and provision for tikanga and the Treaty in other statutes**

- 3.24 The CIBS Act’s failure to recognise tikanga Māori and the Treaty can be contrasted with statutes that regulate other areas where Māori have clear rights and interests. Traditionally, this has included statutes governing physical resources and the environment,<sup>36</sup> but more recently, Treaty obligations have been recognised in other areas such as health, education, housing and the wellbeing of children and young people.<sup>37</sup> Where legislation is recognised as engaging Māori rights and interests, it is common to require Māori participation in decision making or in an advisory capacity<sup>38</sup>

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Science Advisor, 29 March 2018) at 18. See generally Ara Poutama Aotearoa | Department of Corrections *Over-representation of Māori in the criminal justice system: An exploratory report* (September 2007).

<sup>33</sup> Te Uepū Hāpai i te Ora | Safe and Effective Justice Advisory Group *He Waka Roimata: Transforming Our Criminal Justice System* (9 June 2019) at 23.

<sup>34</sup> The Government announced a new direction for criminal justice reform in response to recommendations made in Te Uepū Hāpai i te Ora | Safe and Effective Justice Advisory Group *Turuki! Turuki! Move Together!* (December 2019). See Andrew Little “New direction for criminal justice reform” (12 December 2019) Beehive: The Official Website of the New Zealand Government <[www.beehive.govt.nz](http://www.beehive.govt.nz)>. In addition, in November 2019, Police launched its refreshed strategy to address Māori over-representation in the criminal justice system through a whānau ora approach to crime prevention: Ngā Pirihiimana o Aotearoa | New Zealand Police *Te Huringa o Te Tai: A Whānau Ora Crime and Crash Prevention Strategy* (November 2019). *Te Huringa o Te Tai* recognises the need to adopt a te ao Māori view, to focus on a whānau ora approach of co-design and to involve Māori at all levels of designing, planning and delivery: at 16–17.

<sup>35</sup> *R v Toki* [2017] NZCA 513, [2018] 2 NZLR 362 at [24].

<sup>36</sup> See, for example, the Environmental Protection Authority Act 2011, s 4; Climate Change Response Act 2002, s 3A; Crown Minerals Act 1991, s 4; Resource Management Act 1991, s 8; and State-Owned Enterprises Act 1986, s 9.

<sup>37</sup> See, for example, the New Zealand Public Health and Disability Act 2000, s 4; and Kāinga Ora – Homes and Communities Act 2019, s 4. The Education and Training Bill 2019 (193-2) received Royal Assent on 31 July 2020 and included amendments “aimed at giving better effect to” te Tiriti o Waitangi | the Treaty of Waitangi: Education and Training Bill 2019 (193-1) (explanatory note) at 6. The purpose of the Education and Training Act 2020 is to establish and regulate a system that, amongst other things, “honours Te Tiriti o Waitangi and supports Māori-Crown relationships”: s 4(d). See also the Mental Health and Wellbeing Commission Act 2020, s 3 (not yet in force); and s 7AA of the Oranga Tamariki Act 1989 (which came into force on 1 July 2019).

<sup>38</sup> For example, s 19 of the Environmental Protection Authority Act 2011 establishes a Māori Advisory Committee to provide advice and assistance from the Māori perspective to the Environmental Protection Authority (EPA) on various matters relating to the EPA’s role. Section 17 of Taumata Arowai – the Water Services Regulator Act 2020 similarly provides for the establishment of a Māori Advisory Group to advise the new water services regulator on Māori interests and knowledge. In the area of health, the Health (Cervical Screening (Kaitiaki)) Regulations 1995 establish the National Kaitiaki Group, responsible for considering and granting applications to disclose, use or publish information held on the National Cervical Screening Register that belong to Māori women. Section 116A of the Coroners Act 2006 also requires that the suicide and media expert panel, responsible for advising the chief coroner, includes at least one member with expertise in tikanga Māori and at least one member with expertise in Māori youth suicide.

and to ensure all decision makers have the capability and capacity to uphold the Treaty, to engage with Māori and to understand the perspectives of Māori.<sup>39</sup> In areas where Māori are experiencing inequitable outcomes, additional measures such as special reporting requirements and setting measurable outcomes might also be used.<sup>40</sup>

- 3.25 Other legislation that governs the use of human tissue, including the Human Tissue Act 2008 and the Coroners Act 2006, discussed at paragraph 3.36 below, recognises that the collection and examination of human tissue can have cultural and spiritual implications, including for Māori, and provide opportunities for tikanga-based practices where appropriate.<sup>41</sup>

### The CIBS Act does not accommodate human rights values

- 3.26 We consider that the CIBS Act fails to properly accommodate the human rights values engaged by the collection and use of DNA in criminal investigations highlighted in Chapter 2, including the rights to privacy, bodily integrity, freedom from discrimination and the rule of law. In doing so, the CIBS Act is out of step with other, more recent legislation in comparable areas.
- 3.27 The CIBS Act fails to address human rights values in three key respects.
- 3.28 First, there is no statutory recognition of the need to accommodate human rights values alongside law enforcement values. There is no purpose provision in the CIBS Act, as discussed above, and no statement of guiding principles. While the CIBS Act grants police officers broad powers to request and, in some situations, require a person to provide a DNA sample, there is no statutory guidance on how those powers should be exercised. Rather, these powers are exercised pursuant to internal Police policy, which is not easily accessible to others or subject to robust independent oversight. We also have concerns that current Police policy risks discriminating against suspects on grounds of ethnicity and age.<sup>42</sup> In addition, the CIBS Act fails to provide adequate guidance to the courts on the matters relevant to the exercise of judicial discretion, particularly in relation to granting suspect compulsion orders.<sup>43</sup>
- 3.29 Second, some of the broad powers granted to police officers under the CIBS Act to collect, use and retain DNA appear to be inconsistent with human rights values. As noted above, in 2009, amendments to the CIBS Act granted police officers the power

<sup>39</sup> See, for example, Kāinga Ora – Homes and Communities Act 2019, ss 4(a) and 11(1)(b); Criminal Cases Review Commission Act 2019, ss 9(2) and 15(3); Climate Change Response Act 2002, s 5H(1)(d); Mental Health and Wellbeing Commission Act 2020, ss 3 and 9(1); and Taumata Arowai – the Water Services Regulator Act 2020, ss 5 and 19.

<sup>40</sup> For example, in 2018, the Children’s Act 2014 was amended to require the Minister responsible for the Child and Youth Wellbeing Strategy to include special reporting requirements in relation to Māori children in its annual reports “in order to recognise and provide a practical commitment to the Treaty of Waitangi (te Tiriti o Waitangi)”: s 4A. See also s 7AA(2)(a) of the Oranga Tamariki Act 1989.

<sup>41</sup> For example, s 18 of the Human Tissue Act 2008 provides that a person collecting or using human tissue “must take into account ... the cultural and spiritual needs, values, and beliefs of the immediate family of the individual whose tissue is collected or used”. Section 26(2)(ea) of the Coroners Act 2006 requires a coroner to take into account customs or spiritual beliefs when considering whether to authorise a person to view, touch or remain with or near a body under s 25 of the Act. This includes consideration of “the customary requirement that immediate family members be able to view, touch, or remain with or near the body according to tikanga Māori”.

<sup>42</sup> Our concerns relating to internal Police guidance (set out in the *Police Manual*) and its potential to discriminate on the grounds of ethnicity and age are discussed in Chapters 18 and 21.

<sup>43</sup> Under ss 16 and 23 of the Act, a District Court or High Court Judge may make an order requiring a suspect to give a bodily sample if satisfied that, among other things, “it is reasonable to make the order”, but there is no express reference to the need to consider human rights values when undertaking this assessment.



to require a DNA sample from any person arrested or intended to be charged. In addition, the power to require a DNA sample from an offender and retain their DNA on a DNA profile databank indefinitely was broadened to include all offenders convicted of any imprisonable offence. At the time these amendments were introduced, the Attorney-General reported to Parliament that the amendments appeared to be inconsistent with the right to be secure against unreasonable search and seizure affirmed in section 21 of the New Zealand Bill of Rights Act 1990 (Bill of Rights Act).<sup>44</sup> The Attorney-General's view was that section 21 (alongside broader privacy rights and the rule of law) requires "a specific and sufficient basis" for taking a DNA sample and, absent emergency or other special circumstances, prior independent approval.<sup>45</sup> The Attorney-General affirmed this view in 2015 when the CIBS Act was extended to returning offenders.<sup>46</sup> We explore this issue in detail in Chapter 18.

- 3.30 Third, advances in DNA technology raise unique human rights concerns that the CIBS Act fails to address. In 1995, when the legislation was first introduced, there was a stronger emphasis on protecting intrusions on bodily integrity rather than on informational privacy.<sup>47</sup> There was little consideration of what DNA analysis involved.<sup>48</sup> Initially it was believed that DNA profiling targeted "junk" DNA that revealed no personal information beyond sex. However, scientists' understanding of DNA has grown exponentially in recent years. It is now understood that there is no such thing as "junk" DNA.<sup>49</sup> Further, as we explain in Chapter 6, vast amounts of information about a person can now be generated from a DNA sample as small as a few skin cells. The CIBS Act does not impose any limits on the amount of information that can be derived from a DNA sample or regulate how a DNA sample should be analysed.
- 3.31 New DNA analysis techniques and ways of using DNA profiles have also been developed and will continue to develop in future. This includes forensic DNA phenotyping (discussed in Chapter 14), which aims to predict a person's physical appearance, and familial searching (discussed in Chapter 23), which aims to identify suspects through their family members. As we discuss in Chapter 6, it is even possible that whole genome sequencing will become a routine part of the DNA analysis process.

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<sup>44</sup> Christopher Finlayson *Report of the Attorney-General under the New Zealand Bill of Rights Act 1990 on the Criminal Investigations (Bodily Samples) Amendment Bill* (10 February 2009).

<sup>45</sup> At [2.2] and [7]–[8].

<sup>46</sup> Christopher Finlayson *Report of the Attorney-General under the New Zealand Bill of Rights Act 1990 on the Returning Offenders (Management and Information) Bill* (18 December 2015) at [35]–[36].

<sup>47</sup> Under the Criminal Investigations (Blood Samples) Act 1995 as enacted, only blood samples could be taken, and these could only be taken by a medical practitioner or, with the agreement of the person providing the sample, a registered nurse: s 49. A person providing a blood sample was entitled to have a medical practitioner, a lawyer and one other person present with them when the sample was taken (s 50(1)(a)) and a blood sample had to be taken "in circumstances affording reasonable privacy" to the person providing the sample: s 53. While the duty to afford a person reasonable privacy remains, the introduction of buccal sampling, which can be self-administered under the supervision of a police officer, and Part 2B, which provides for DNA samples to be taken on arrest or intention to charge, have resulted in a softening of these procedural safeguards.

<sup>48</sup> During the extensive debates on the original Criminal Investigations (Blood Samples) Bill, only three Members of Parliament commented on the amount of personal information that DNA analysis could potentially reveal. Judith Tizard (25 July 1995) 549 NZPD 8079 and (10 August 1995) 549 NZPD 8630 expressed concerns about access to health information and information about genetic relationships; Tau Henare (10 August 1995) 549 NZPD 8636 highlighted that victims' DNA profiles could be used against them in later investigations and commented that the profiles could be used to define who is Māori; and Richard Northey (12 October 1995) 551 NZPD 9724 alluded to the possibility of familial searching.

<sup>49</sup> This is discussed in Chapter 6.

Whether these advances in technology should be utilised in the context of criminal investigations raises significant human rights issues that the CIBS Act fails to address.

### *Comparing CIBS Act to statutory regimes in comparable areas*

3.32 The inadequate focus on human rights values in the CIBS Act is out of step with more recent legislation in the wider law enforcement and security and intelligence contexts.

3.33 The Search and Surveillance Act 2012 was introduced in response to the Commission’s 2007 report on search and surveillance powers and was intended to “provide a coherent, consistent and certain approach in balancing the complementary values of law enforcement and human rights”.<sup>50</sup> The purpose of the Search and Surveillance Act is described in section 5:

The purpose of this Act is to facilitate the monitoring of compliance with the law and the investigation and prosecution of offences in a manner that is consistent with human rights values by—

- (a) modernising the law of search, seizure, and surveillance to take into account advances in technologies and to regulate the use of those technologies; and
- (b) providing rules that recognise the importance of the rights and entitlements affirmed in other enactments, including the New Zealand Bill of Rights Act 1990, the Privacy Act 1993, and the Evidence Act 2006; and
- (c) ensuring investigative tools are effective and adequate for law enforcement needs.

3.34 More recently, Parliament enacted the Intelligence and Security Act 2017 to reform the law applying to New Zealand’s intelligence and security agencies to reflect “New Zealand’s long-standing commitment to human rights, democracy, accountability and the rule of law”.<sup>51</sup> The purpose of the Intelligence and Security Act “is to protect New Zealand as a free, open, and democratic society”, including by:<sup>52</sup>

... ensuring that the functions of the intelligence and security agencies are performed—

- (i) in accordance with New Zealand law and all human rights obligations recognised by New Zealand law; and
- (ii) with integrity and professionalism; and
- (iii) in a manner that facilitates effective democratic oversight ...

3.35 The Intelligence and Security Act further recognises the importance of human rights values by elevating human rights considerations amongst new principles and decision-making criteria.<sup>53</sup> The role of the oversight body, the Inspector-General of Intelligence and Security, was also expanded to include conducting inquiries into any matter relating to compliance with human rights law.<sup>54</sup>

3.36 The CIBS Act can also be contrasted with other legislation that governs the collection and use of human tissue. The Human Tissue Act recognises that the collection of human tissue by the State engages human rights values of individual autonomy and dignity. It also recognises that the collection and use of human tissue will have cultural, ethical and

<sup>50</sup> Search and Surveillance Bill 2009 (45-1) (explanatory note) at 1.

<sup>51</sup> New Zealand Intelligence and Security Bill 2016 (158-1) (explanatory note) at 2.

<sup>52</sup> Intelligence and Security Act 2017, s 3(c).

<sup>53</sup> Sections 10(3), 12(7), 18(b) and 158(1)(a).

<sup>54</sup> Section 158(1)(a).

spiritual implications that should be recognised and respected.<sup>55</sup> Similarly, the Coroners Act recognises the cultural and spiritual needs of family and whānau in circumstances where a person has died, including considerations around retention of bodily samples.<sup>56</sup>

### The CIBS Act is not comprehensive

3.37 A further fundamental problem with the CIBS Act is that it does not comprehensively regulate all aspects of the DNA regime. Significant gaps include the following:

- (a) **DNA samples collected from crime scenes.** The CIBS Act does not regulate the collection and retention of DNA samples from crime scenes or the retention of crime scene profiles on a databank. Such a databank has existed since the CIBS Act was enacted and is an integral part of the DNA regime. These issues are discussed in Chapters 13, 16 and 17.
- (b) **DNA analysis techniques.** There are no limits on the nature or amount of information that can be included in a DNA profile nor how DNA samples and profiles can be analysed. This means important decisions about the use of new DNA analysis techniques such as forensic DNA phenotyping are made outside the CIBS Act, without parliamentary approval, and are typically motivated by law enforcement objectives. These issues are discussed in Chapter 6. Forensic DNA phenotyping is also discussed in Chapter 14.
- (c) **The role of the forensic services provider.** There is no regulation of the provision of forensic science services to Police including DNA analysis, conducting casework comparisons, administering the DNA databanks or undertaking databank searching, even though these services are central to the CIBS Act's operation. The role of the forensic services provider is discussed in Chapter 7.
- (d) **Elimination sampling.** The CIBS Act does not provide a regime for collecting DNA samples for elimination purposes (for example, to identify and isolate a victim's or third party's DNA from the suspected offender's DNA). As a result, Police has had to develop a voluntary elimination sampling regime outside the CIBS Act. This lacks transparency and legal certainty. It also fails to adequately safeguard a person who is not a suspect and is asked to provide an elimination sample to assist in the investigation. Elimination sampling is discussed in Chapter 9.
- (e) **Indirect sampling.** The CIBS Act only regulates the direct collection of DNA samples from suspects in criminal investigations. It does not regulate indirect sampling methods, such as obtaining a suspect's DNA sample from a discarded item like a coffee cup or using samples stored in other biobanks. Use of such indirect sampling methods raises significant privacy concerns and lacks legal certainty and transparency. We discuss indirect sampling in Chapter 12.
- (f) **Mass screening.** The regime in the CIBS Act for obtaining DNA samples from suspects is premised on there being individualised suspicion. It is not designed to be used in situations where Police wants to obtain samples from a class of people who share characteristics with the suspected offender in order to identify a suspect. Mass screening raises unique issues and should be subject to tailored regulation, as we discuss in Chapter 10.

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<sup>55</sup> Human Tissue Act 2008, s 3.

<sup>56</sup> Coroners Act 2006, s 3. See also s 50 of the Act, which requires a coroner to notify immediate family and whānau of retention and rights to request return of bodily samples.

- (g) **Permitted ways of using DNA profiles.** There are several gaps in the regulation of how DNA profiles can be used. For example, the CIBS Act does not regulate how DNA profiles on the DNA databanks can be compared to crime scene profiles. This has allowed the introduction of familial searching, discussed in Chapter 23, which aims to identify suspects through their family members by searching for a “near match” on the DNA databanks. There is also no regulation of the use of crime scene profiles, which is significant given the emerging technique of genetic genealogy searching discussed in Chapter 15. There is also a gap in the legislation that could permit the use of anonymised information on the DNA databanks to be disclosed to third parties for research purposes, as we discuss in Chapter 23.
- (h) **Missing and unidentified person investigations.** The CIBS Act only applies to criminal investigations. It does not address the use of DNA in missing and unidentified person investigations to identify an unidentified deceased person or human remains, or to identify a person who is unable to identify themselves due to incapacity. While the use of DNA in Police investigations other than criminal investigations is technically outside the scope of this review, we consider that the CIBS Act’s failure to regulate the collection and use of DNA in missing and unidentified person investigations creates legal uncertainty and results in a lack of transparency and accountability. It also restricts Police’s ability to utilise the DNA databanks in ways that might assist such investigations. We address these issues in Chapter 22.

3.38 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 is confusing and complex

3.39 The CIBS Act is confusing and complex. Successive amendments have increased the complexity and overlap of the CIBS Act and have resulted in considerable uncertainty. This makes the law difficult to navigate and apply. For example:

- (a) **The structure of the CIBS Act does not reflect Police practice.** It is not immediately obvious how Parts 2, 2B and 3 fit together. At first glance, the suspect sampling regime in Part 2 appears to be the focal point of the CIBS Act, as it provides for Police to obtain and analyse samples for casework and includes a range of safeguards for suspects. However, Police uses the CIBS Act differently. Since 2009, the vast majority of DNA samples are taken under Part 2B of the CIBS Act when a person is arrested or intended to be charged. Very few samples are obtained under Part 2.<sup>57</sup>
- (b) **The safeguards built into the CIBS Act are inconsistent and depend on whether a sample is collected under Part 2, 2B or 3.** For a sample to be compulsorily acquired under Part 2, a court must be satisfied that such an order is reasonable in all the circumstances. This safeguard does not apply to collection on arrest or intention to charge under Part 2B or following conviction under Part 3. The introduction of Part 2B effectively permits Police to circumvent the safeguards in Part 2 and obtain a sample for comparison with a crime scene profile on the Crime Sample Databank without proving to a court that collection is reasonable in the

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<sup>57</sup> See Table 2 in Appendix 3.

circumstances. Even if a suspect sample is subsequently required for evidential purposes, an application for a suspect compulsion order based on a databank link has now become “routine in nature”.<sup>58</sup>

- (c) **The periods for retaining DNA profiles on the DNA Profile Databank are complex and vary depending on how the sample was collected.** If a sample is obtained following conviction, it is retained indefinitely. In contrast, if a sample was originally obtained from a suspect or on arrest or intention to charge, the retention period may only be 10 years. In our view, these differences are unjustified. The differences are even more pronounced for young people, as detailed in Chapter 21.
- (d) **The procedural rules are overly complex.** The procedural rules a police officer must follow when obtaining a DNA sample vary depending on whether it is obtained under Part 2, 2A, 2B or 3 of the CIBS Act. In addition, each sampling method has different procedural rules, and these are difficult to navigate. Different rules also apply depending on whether the person providing a sample is a child, young person or adult and whether a sample is being provided by consent or compulsion. In total, 70 possible sampling notices exist, 36 for suspect sampling alone.<sup>59</sup> To manage this complexity, Police introduced its own computer system in 2010 (Biotrak) to automatically generate the correct DNA sampling notice.
- (e) **The offence thresholds are unnecessarily complex.** Successive amendments to the offence thresholds for obtaining DNA samples have resulted in unnecessary overlap and complexity. For example, suspect samples, samples taken from adults on arrest or intention to charge and samples from offenders may be obtained in relation to “any imprisonable offence or offence against any of the provisions listed in Part 3 of Schedule 1”.<sup>60</sup> There is, however, extensive overlap in the offence threshold because all but one of the 22 offences listed in Part 3 of Schedule 1 are imprisonable offences.<sup>61</sup> The long list of offences specified in Parts 1 and 2 of Schedule 1 are now only relevant where a DNA sample is taken from a young person on arrest or intention to charge. In that situation, a sample can only be taken in relation to a “relevant offence”, which is defined to include the offences listed in Parts 1, 2 and 3 of Schedule 1, any offence punishable by a term of imprisonment of seven years or more and any attempt or conspiracy to commit an otherwise qualifying relevant offence.<sup>62</sup> There is considerable overlap between the various limbs of the definition of relevant offence, as 58 of the 62 offences in Parts 1 and 2 of Schedule 1 are already punishable by seven years’ imprisonment or more.

### The CIBS Act lacks independent oversight

- 3.40 The final fundamental problem identified in this review is the lack of independent oversight of the DNA regime. As we explain in Chapter 5, independent oversight is fundamental to ensuring the integrity, transparency and public confidence in any regulatory regime. Unlike many comparable jurisdictions, there is no independent body

<sup>58</sup> *Fitzgerald v McClintock* HC Christchurch CRI-2008-409-95, 28 July 2008 at [6].

<sup>59</sup> This includes the forms pursuant to the regulations, affidavits and applications, procedural forms, forms for methods of sampling and general Police forms.

<sup>60</sup> Criminal Investigations (Bodily Samples) Act 1995, ss 5(a), 24J and 39.

<sup>61</sup> The exception is the offence of peeping or peering into a dwellinghouse, which is an offence under s 30 of the Summary Offences Act 1981 and is punishable by a maximum fine of \$500.

<sup>62</sup> Criminal Investigations (Bodily Samples) Act 1995, s 2 definition of “relevant offence” and s 24K.

with exclusive oversight of the DNA regime. Instead, oversight is fragmented across a range of existing bodies that lack the necessary functions, powers and expertise to ensure that the collection and use of DNA (including the use of new DNA technology) is lawful and appropriate. The lack of independent oversight also results in a lack of Māori participation in the oversight of the DNA regime. This is inconsistent with the Treaty guarantee of tino rangatiratanga, the principles of partnership, active protection and equity, and the responsibilities that arise from tikanga Māori applicable to the collection and use of DNA.

## RESULTS OF CONSULTATION

3.41 There was strong support among submitters for replacing the CIBS Act with new legislation to ensure the law governing the DNA regime meets our objectives of being fit for purpose, constitutionally sound and accessible. In fact, all 13 submissions that addressed the question of whether the CIBS Act should be repealed and replaced with a new Act answered in the affirmative. We summarise the key themes of these submissions below.

3.42 Several submitters considered the CIBS Act is no longer fit for purpose in light of successive legislative amendments and the improvements in DNA technology over the past 25 years. Te Hunga Rōia Māori o Aotearoa | The Māori Law Society submitted that this is illustrated by the following whakataukī:

Ka pū te ruha ka hao te rangatahi – As the old net withers, a new one is remade.

3.43 The New Zealand Law Society (NZLS) and the New Zealand Bar Association (supporting NZLS's submission in its entirety) submitted that the use of DNA in criminal investigations “has outstripped the statutory scheme”, with the result that the current system does not provide consistent or thorough safeguards. Rather, NZLS considered practices in this area “are driven by law enforcement objectives and opportunities rather than public, broadly informed and balanced debate”. In order for the law to be constitutionally sound, NZLS submitted that it is necessary to ensure that the costs and benefits of investigatory techniques are adequately considered in a publicly accountable way, as they apply to both individual and potentially competing public interests. This includes considering the effectiveness of investigatory techniques, the extent to which they intrude into individual privacy or impinge on tikanga Māori, whether techniques have any adverse side effects or consequences, such as distorting investigative procedures or giving rise to bias, and how individual investigations and new procedures or techniques are to be governed.

3.44 Similarly, Associate Professor Nessa Lynch noted that the CIBS Act “has been added to a number of times without a pause for reflection on the totality of the principles”. Nessa Lynch agreed that the current legislation is out of date and that it is time for a first principles review of how the public interest in effective and efficient investigation of crime is balanced with the individual rights of suspects and offenders.

3.45 Some submitters, including the Public Defence Service (PDS), the Auckland District Law Society Criminal Law Committee (ADLS) and Sue Petricevic, pointed to the gaps in the current regime identified at paragraph 3.37 above and emphasised the need for new legislation to comprehensively regulate the collection and use of DNA in criminal investigations. PDS expressed concern with the attempt to fill these gaps with Police and ESR policy, noting that this “is a dangerous precedent” and that it may not be

possible to challenge decisions or processes where they simply involve a failure to follow Police or ESR policy as opposed to the law. PDS submitted that the law should cover all aspects of DNA collection, retention and use, to ensure transparency and provide a means to challenge decisions or processes where necessary.

- 3.46 The Privacy Commissioner emphasised the important privacy considerations raised by the DNA regime and submitted that Aotearoa New Zealand needs a comprehensive framework with a clear purpose statement, effective governance and oversight and robust procedural checks and safeguards to ensure that the collection and use of DNA is necessary, justifiable, reasonable and proportionate. The Privacy Commissioner considered that a fundamental weakness of the CIBS Act is that its original purpose has been blurred and the policy rationale for the collection and retention of DNA is no longer clear. A clear purpose statement, the Privacy Commissioner submitted, is necessary to both provide a test for decision making and to inform the design of relevant safeguards. Furthermore, the Privacy Commissioner submitted that:

In my view, a legitimate reason needs to be articulated for the State to collect and retain the DNA profiles of some people and not others. The incremental changes to the CIBS Act implemented over time mean there is a risk ... that the scheme has become a de facto databank of those citizens who have come to the attention of the Police for a variety of reasons (where through being charged with an offence, being excluded as a suspect, being present in crime scene DNA analysis, or as a victim).

- 3.47 Without proper safeguards, there is a clear risk of gradual “function creep” if DNA gathered for one law enforcement purpose ends up being used for a broader range of purposes than originally articulated or intended. The Privacy Commissioner observed that this function creep can intensify privacy intrusions and erode trust and confidence.
- 3.48 The CIBS Act’s failure to recognise tikanga Māori and the Treaty was a key concern for some submitters. Te Hunga Rōia considered that the CIBS Act does not accord properly for the place of the Treaty or for Māori, which is especially important in the context of Māori over-representation in the criminal justice system. It submitted that, in order to be constitutionally sound, new legislation must give due consideration not only to the principles of the Treaty but also to the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). Te Hunga Rōia submitted that this requires providing Māori with a central role in the oversight of the DNA regime as well as considering the role of the Treaty in the rule of law in Aotearoa New Zealand.<sup>63</sup> It also supported recommendations to ensure Police is attuned to issues such as unconscious bias against Māori and consideration of tikanga Māori in the context of DNA collection, although it doubted the cultural competency of the police force as a whole to be able to follow tikanga Māori whenever DNA is obtained from a Māori suspect.
- 3.49 Te Mana Raraunga considered that any legislation that deals with Māori DNA and associated data must explicitly recognise Māori rights and interests, including individual and collective rights and governance rights. Te Mana Raraunga submitted that new legislation needs to strengthen Māori governance, align with Treaty obligations and relevant international conventions (including UNDRIP), provide for independent oversight and provide clarity and certainty around acceptable practice. It suggested that new legislation should include express reference to government obligations in relation to the Treaty. Te Mana Raraunga also emphasised the need for new legislation to be considered within the context of “documented institutional racism in the criminal

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<sup>63</sup> The rule of law is discussed in Chapter 2.

justice system that over-polices and over-incarcerates Māori”, otherwise it will likely reinforce existing bias in the system. Te Mana Raraunga supported requiring Police to report statistics for Māori on every indicator that is monitored in order to fully monitor impacts of the DNA regime on Māori.

3.50 Karaitiana Taiuru also submitted that the CIBS Act is not fit for purpose, reflective of the Treaty or open to a Māori world view. He supported replacing the CIBS Act with more comprehensive legislation that acknowledges that DNA is a taonga, recognises Māori customary rights to DNA and ensures DNA is obtained and stored in accordance with tikanga and customary rights. Karaitiana Taiuru also submitted that new DNA legislation should recognise Treaty rights and ensure adequate Māori representation in all decision making relating to DNA in criminal investigations.

3.51 The lack of clarity in the CIBS Act was also identified as a concern by several submitters. PDS submitted that the CIBS Act is “difficult to interpret for those who apply it daily”. Te Hunga Rōia also submitted that, from experience working within and around the criminal justice system, there is lack of clarity that creates confusion. For example, it is unclear if, how or when a DNA profile can be removed from the DNA Profile Databank. Te Hunga Rōia observed that this can be highly distressing for many Māori, as DNA samples represent their whakapapa, tūpuna and atua, all of which are taonga. DNA samples should be treated and disposed of with this in mind. Te Hunga Rōia further pointed to the confusion and complexity of the DNA collection process, observing that:

It is not uncommon for adults as well as young people to be confused by the language provided for in Police forms which explain DNA rights and Police obligations. It would seem that in this area, the temptation is to focus on the science, procedure, and process, however the law is not drafted in a way that considers who it is that is actually impacted by these laws, i.e who are the people that are subject to its Policing? It doesn't appear that consideration is given to their background, and how that may impact on their engagement in that process.

3.52 Police and ESR also submitted in favour of repealing the CIBS Act and replacing it with new legislation. ESR agreed that the science has advanced significantly since 1995, and Police pointed to the anomalies resulting from successive amendments identified at paragraphs 3.39(c) and 3.39(e) above and the lack of regulation of crime scene sampling, elimination sampling, familial searching, forensic DNA phenotyping and mass screening, also discussed above.

3.53 We also received comments from the Chief District Court Judge, Judge Jan-Marie Doogue, on behalf of the Judges of the District Court. They agreed that the CIBS Act is out of date, overly complex and badly structured and contains material gaps and omissions. The Judges observed that:

[The CIBS Act] is difficult to interpret and apply by many who are regularly called upon to do just that (including District Court Judges), and inaccessible to many in the wider New Zealand community who are directly or indirectly affected by decisions made pursuant to it.

3.54 The Judges of the District Court considered that the courts would be materially assisted if new legislation regulating the DNA regime:

- (a) expressly states the purposes of the legislation;
- (b) enumerates the criteria, both compulsory and permissive, for the discretionary decisions that the legislation empowers;



- (c) is comprehensive (addressing existing omissions such as the regulation of the Crime Sample Databank and elimination sampling) but also flexible and future-oriented;
  - (d) addresses issues arising from the intersection of the DNA regime with the Bill of Rights Act and the Search and Surveillance Act; and
  - (e) is appropriately and demonstrably cognisant of and consistent with the ongoing Treaty partnership and tikanga Māori.
- 3.55 The Judges commented that the District Court is acutely aware of the over-representation of Māori in the criminal justice system and that this ongoing imbalance, also reflected in the over-representation of Māori on the DNA databanks, requires addressing and reducing.

## RECOMMENDATIONS

### Enacting new legislation to regulate the DNA regime

#### RECOMMENDATION

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).

- 3.56 There is a clear public interest in enabling Police to use DNA in criminal investigations to confirm or exclude the involvement of known suspects and to identify new suspects in unsolved crimes. However, DNA contains a wealth of information about an individual and their family and whakapapa, and its use in criminal investigations engages a range of important constitutional values and principles arising from the Treaty, tikanga Māori and human rights. It is therefore important that the DNA regime is carefully regulated to ensure it is constitutionally sound.
- 3.57 We recommend the CIBS Act is repealed and replaced with a new Act. In our view, the fundamental problems identified above cannot be remedied by targeted amendments to the CIBS Act. DNA plays a vastly different role in criminal investigations than was anticipated in 1995 due to developments in DNA technology and successive amendments to the CIBS Act over the years. A new, comprehensive statute is required to promote consistency with the Treaty, to ensure proper recognition and provision for tikanga Māori, to properly address the significant human rights values engaged by the DNA regime and to provide a framework for responding to future developments in DNA technology.
- 3.58 We recommend that the new DNA legislation extend to investigations into missing and unidentified people. Currently, the CIBS Act only applies to criminal investigations. As explained at paragraph 3.37(g), there is no statutory regime that governs the collection and use of DNA in non-criminal investigations to identify an unidentified deceased person or human remains, or to identify a person who is unable to identify themselves due to incapacity. Extending new DNA legislation to missing and unidentified people investigations would ensure Police has clear and consistent powers and duties in relation to the collection and use of DNA and would promote transparency and

accountability. We discuss investigations into missing and unidentified people in detail in Chapter 22.

## Upholding the Treaty and providing for tikanga Māori

### RECOMMENDATION

#### 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).

3.59 We recommend that the new Act include specific measures to give practical effect to the Crown's obligations to Māori under the Treaty as they are relevant to the DNA regime. These measures, which would be reflected in the relevant operational provisions of the DNA legislation, should also be identified in a separate provision of the new Act.<sup>64</sup> This will provide certainty as to what is required in order to promote consistency with the Treaty and its principles and is consistent with guidance in the *Legislation Guidelines*.<sup>65</sup>

3.60 These measures are discussed elsewhere in this Report in detail. As an overarching point, the participation of Māori in the oversight of the DNA regime will be central to achieving constitutionally sound legislation. In Chapter 5, we recommend that the DNA Oversight Committee include Māori members who can operate as a Māori caucus and may have specific responsibilities, such as advising on Māori rights and interests and how tikanga may be provided for in regulations, practices, policies and procedures.

<sup>64</sup> For example, see Taumata Arowai – the Water Services Regulator Act 2020, s 5; Kāinga Ora – Homes and Communities Act 2019, s 4; and Oranga Tamariki Act 1989, s 7AA.

<sup>65</sup> The *Legislation Guidelines* explain that including specific measures in legislation that tie the Treaty and its principles to specific mechanisms has been the usual approach since 2000 and that this approach has:

... the advantage of demonstrating that the Government has actively worked through what is required in order to recognise and safeguard what the principles of the Treaty mean in a particular context.

See Legislation Design and Advisory Committee *Legislation Guidelines* (March 2018) at 30–31.

These recommendations provide for the exercise of tino rangatiratanga by Māori and enable Māori to articulate their rights and interests in the DNA regime.

- 3.61 In addition, the recommended Police reporting obligations and empowering the DNA Oversight Committee to monitor the impact of the operation of the DNA regime on Māori provide practical means for the Crown to meet its obligation to take active steps to reduce inequities and positively promote equity in the DNA regime.

### Stating a clear legislative purpose

#### RECOMMENDATION

#### 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.

- 3.62 The new Act should include a purpose statement that clearly identifies the policy objective of the legislation, which is to facilitate the collection and use of DNA in a manner that minimises interference with privacy and bodily integrity, ensures proper recognition and provision for tikanga Māori and is otherwise consistent with human rights values. This would:

- (a) signal a change in policy direction away from the (assumed) objectives of the CIBS Act identified at paragraph 3.7 above;
- (b) guide the establishment of a principled approach to the collection and use of DNA by Police, which we consider is the best way to achieve consistent protection of human rights values and tikanga Māori while at the same time promote effective law enforcement;<sup>66</sup>
- (c) provide the basis for guidance on the exercise of functions and powers under the new Act, including by police officers, the forensic services provider (discussed in Chapter 7), the courts and other bodies exercising oversight of the DNA regime and advising on the use of new DNA technology; and
- (d) broadly align with the Search and Surveillance Act and promote consistency with the Intelligence and Security Act (see paragraphs 3.33–3.35 above).

<sup>66</sup> Te Aka Matua o te Ture | Law Commission *Search and Surveillance Powers* (NZLC R97, 2007) at [2.8].

3.63 We recommend that the purpose statement expressly refers to privacy, bodily integrity and tikanga Māori. This will clearly highlight their centrality in the DNA regime. It signals the need to ensure that intrusions on privacy and bodily integrity are no more than is required to meet legitimate law enforcement objectives and that tikanga Māori is recognised and provided for in the collection and use of DNA.<sup>67</sup>

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<sup>67</sup> This is consistent with the focus on cultural, ethical and spiritual considerations in other legislation that regulates the collection and use of human tissue. The purpose of the Human Tissue Act 2008 includes helping to ensure that collection or use of human tissue occurs only with proper recognition of and respect for “the cultural and spiritual needs, values, and beliefs of the immediate family of that individual” and “the cultural, ethical, and spiritual implications of the collection or use of human tissue”: s 3(a)(ii)–(iii). Similarly, the Coroners Act 2006 recognises “the cultural and spiritual needs of family of, and of others who were in a close relationship to, a person who has died”: s 4(2)(b)(i). See also s 4 of the Human Assisted Reproductive Technology Act 2004.

## CHAPTER 4

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# A new DNA databank

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## INTRODUCTION

- 4.1 In this chapter, we describe how DNA is currently used in criminal investigations and explain the role of DNA databanks.
- 4.2 We then identify the broad issues with Aotearoa New Zealand's existing DNA databanks, explore DNA databanks in other countries and make recommendations for a single, comprehensive DNA databank.

## THE USE OF DNA IN CRIMINAL INVESTIGATIONS

- 4.3 Currently, the value of DNA as a law enforcement tool lies in the ability to generate a DNA profile from a sample of DNA found at a crime scene. This DNA profile can then be compared with other DNA profiles from known people, and forensic scientists can determine, with a high degree of accuracy, the likelihood that the DNA profiles come from the same person.
- 4.4 Two different processes are used to compare DNA profiles. These processes are described in detail in Chapter 17, but in summary they are:
- (a) **Casework comparison.** This process is used in criminal casework and is a one-to-one comparison that involves comparing DNA found at a crime scene against DNA from an individual believed to be involved in the offending. The objective of a casework comparison is to rule someone in or out of a criminal investigation. Often a casework comparison will involve comparing a crime scene profile with a suspect profile, but sometimes it will also be necessary to compare a crime scene profile with a profile from a victim or third party in order to eliminate them and isolate the likely offender's DNA. The results of casework comparison can be used as evidence in any subsequent proceedings.
  - (b) **Databank searching.** This process is used to identify potential suspects in unsolved crimes by comparing a crime scene profile against a DNA databank of profiles from known people. A match between a crime scene profile and a known person profile indicates that the profiles are likely to be from the same person. Police must then confirm the match by obtaining a suspect sample from the known person and conducting a casework comparison.<sup>1</sup> Databank searching can also be used to identify links between unsolved crimes, by comparing a crime scene profile to crime scene profiles from other unsolved crimes.

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<sup>1</sup> Databank matches themselves are not admissible as evidence in criminal proceedings: Criminal Investigations (Bodily Samples) Act 1995, s 71(1)–(2). A suspect sample under Part 2 of the CIBS Act is therefore required. The reasons for requiring a suspect sample are discussed in Chapter 8.

- 4.5 In future, DNA may also become a valuable source of information without the need for comparison (analysis in isolation) or if comparison does not yield any results. The most advanced techniques for analysis in isolation is known as forensic DNA phenotyping and involves analysing DNA to predict likely physical characteristics of the person who is the source of the DNA. We discuss forensic DNA phenotyping in Chapter 14.

### The DNA databanks

- 4.6 Currently, three DNA databanks are used for databank searching:
- (a) **The DNA Profile Databank (DPD)**. This contains DNA profiles from people who have been convicted of a qualifying offence (offenders) and adults who have agreed to have their profile stored on the DPD (volunteers). The DPD was established in 1996 under Part 3 of the CIBS Act.
  - (b) **The Temporary Databank**. This contains DNA profiles from young people<sup>2</sup> and adults who have had a DNA sample taken when arrested or intended to be charged with a qualifying offence. Profiles are stored on the Temporary Databank until the charge is resolved. If a person is convicted, their profile is transferred to the DPD. Otherwise, it is destroyed. The Temporary Databank was established in 2009 under Part 2B of the CIBS Act.
  - (c) **The Crime Sample Databank (CSD)**. This contains crime scene profiles. The CSD was established alongside the DPD to give effect to Part 3 of the CIBS Act but is not regulated by that Act.
- 4.7 The DNA databanks are not currently used for casework comparison. Instead, DNA profiles generated from samples obtained for casework comparison are kept on an electronic case file, and the casework comparison is conducted on that file rather than on the DNA databanks.
- 4.8 In addition to the DNA databanks described above, ESR also maintains two elimination DNA databanks. One contains profiles from ESR staff and people who have visited ESR's forensic laboratories. The second is the Police Criminal Investigators Elimination Database (CIED), which is established under Part 5 of the Policing Act 2008 and contains profiles from Police employees and forensic practitioners. We understand that few police officers have submitted profiles for retention on this database. It seems more common for police officers to submit a DNA sample for analysis on a case-by-case basis where necessary for a particular investigation. These databanks are used only in casework comparison to eliminate an investigator's DNA in the event of contamination and are not used for databank searching.

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<sup>2</sup> Of or over 14 years of age but under 18 years of age: Criminal Investigations (Bodily Samples) Act 1995, s 2 definition of "young person".

## Types of DNA samples collected in criminal investigations

4.9 In Table 1 below, we summarise the different types of DNA samples that are currently obtained for casework comparison and databank sampling and how they are regulated, stored and used.

TABLE 1: DNA SAMPLES USED IN CRIMINAL INVESTIGATIONS IN AOTEAROA NEW ZEALAND		
Type of DNA sample	Regulation	Location and use of DNA profile
DNA sample collected from crime scene (crime scene sample) Discussed in Chapter 13 of this Report	Not regulated by the CIBS Act	Stored on the electronic case file and used for casework comparison. May also be stored on the CSD and used for databank searching.
DNA sample collected from a suspect in an investigation (suspect sample) Discussed in Chapter 8 of this Report	Regulated under Part 2 of the CIBS Act	Stored on the electronic case file and used for casework comparison only. If the suspect is convicted of a qualifying offence, their DNA profile can be transferred to the DPD and used for databank searching.
DNA sample collected from a person who is not a suspect in an investigation for elimination purposes (elimination sample) Discussed in Chapter 9 of this Report	Not regulated by the CIBS Act	Stored on the electronic case file and used for casework comparison only.
DNA sample required from a person when arrested or intended to be charged Discussed in Chapter 18 of this Report	Regulated under Part 2B of the CIBS Act	Stored on the Temporary Databank and used for databank searching only.
DNA sample required from a person following a conviction for a qualifying offence Discussed in Chapter 18 of this Report	Regulated under Part 3 of the CIBS Act	Stored on the DPD and used for databank searching only.
DNA sample provided by a volunteer Discussed in Chapter 18 of this Report	Regulated under Part 3 of the CIBS Act	Stored on the DPD and used for databank searching only.

4.10 ESR is Police's sole provider of forensic services and is responsible for DNA analysis, conducting casework comparison and databank searching and maintaining the DNA databanks.<sup>3</sup>

<sup>3</sup> Under the *Forensic Science Services Agreement between the New Zealand Police and the Institute of Environmental Science and Research Limited 2018–2021* (2018). The Services Agreement is negotiated every three years.

## DNA DATABANKS IN COMPARABLE JURISDICTIONS

- 4.11 In 1995, Aotearoa New Zealand became the second jurisdiction in the world (after the United Kingdom) to establish a DNA databank for use in criminal investigations. All comparable jurisdictions reviewed in this Report have since followed suit.
- 4.12 Appendix 4 summarises the DNA databank regimes that operate in comparable jurisdictions. Our analysis identifies that Aotearoa New Zealand is falling behind jurisdictions with more recently established DNA databanks in several respects:
- (a) First, Aotearoa New Zealand is the only jurisdiction that maintains separate DNA databanks for DNA profiles collected in different ways. All other comparable jurisdictions maintain a single DNA databank for criminal investigations. The more recent DNA databanks in Australia, Canada and Ireland operate an index system, with different indices (or divisions) for different types of DNA profiles and with statutory rules as to the loading and matching of profiles that may occur within and across different indices.
  - (b) Second, the CIBS Act only regulates the known people databanks (the DPD and the Temporary Databank), not the CSD. This is similar to the approach adopted in the United Kingdom, where a DNA databank was also established in the mid-1990s. However, this is out of step with the more common approach in recent years, which has been for crime scene profiles to be regulated in the same way as profiles from known people through the creation of a single, indexed DNA databank.
  - (c) Third, the CIBS Act does not address the use of DNA for identification purposes in missing and unidentified person investigations. This is out of step with the recent DNA databanks in Australia, Canada and Ireland. In the United Kingdom, a separate databank of missing people has been established, and profiles on that databank are regularly compared to profiles on the databank established for criminal investigations. The use of DNA databanks when investigating missing and unidentified people is discussed in Chapter 22.
  - (d) Fourth, Aotearoa New Zealand, like Australia, has no independent body with direct responsibility for oversight of the DNA databanks. This contrasts with the designated oversight bodies established in England and Wales, Ireland, Scotland and Canada. Oversight is discussed in Chapter 5.
- 4.13 The number of profiles from known people on the New Zealand DNA databanks (DPD and Temporary Databank) as a proportion of the population falls within the range of known people on databanks in comparable jurisdictions. As of 30 June 2019, approximately 4.1 per cent of the New Zealand population had a profile on the DPD or Temporary Databank.<sup>4</sup> This is comparable to Australia, where the total number of profiles on the National Criminal Investigation DNA Database equates to 5.2 per cent of the population (although this includes crime scene profiles as well as known person profiles).<sup>5</sup> Fewer profiles are retained in Canada, where profiles from offenders retained

<sup>4</sup> Calculated using information reported in Ngā Pirihimana o Aotearoa | New Zealand Police *Annual Report 2018–2019* (November 2019) at 168 and Statistics New Zealand's population estimate of 4,911,600 for the second quarter of 2019: Tatauranga Aotearoa | Stats NZ "Estimated Resident Population (Mean Quarter Ended) by Sex (1991+) (Qrtly-Mar/Jun/Sep/Dec)" <archive.stats.govt.nz>.

<sup>5</sup> Based on 1,324,575 profiles (including from known people and crime scenes) on the National Criminal Investigation DNA Database as of 30 June 2019 and a population estimate of 25,464,116 as of 30 September 2019. See Australian Criminal Intelligence Commission *Annual Report 2018–2019* (October 2019) at 56; and Australian Bureau of Statistics "Australian Demographic Statistics" (September 2019) <www.abs.gov.au>.



on the DNA Index System equate to only 1.1 per cent of the population.<sup>6</sup> In contrast, in England and Wales, the number of profiles from individuals on the National DNA Database equates to 8.5 per cent of the population.<sup>7</sup> In Scotland, the number of profiles from individuals equates to 6.4 per cent of the population.<sup>8</sup>

## BROAD ISSUES WITH THE DNA DATABANKS IN AOTEAROA NEW ZEALAND

4.14 We have identified three broad issues with the DNA databanks in Aotearoa New Zealand:

- (a) Deficient regulation of the DNA databanks.
- (b) Problems with measuring the effectiveness of the DNA databanks.
- (c) Inadequate reporting requirements regarding the collection and retention of profiles for databank purposes.

4.15 We discuss these issues below.

### Deficient regulation

4.16 We consider that the regulation of the DNA databanks is deficient in several respects.

4.17 First, the DNA databanks are only partially regulated by the CIBS Act. Significant gaps include the lack of any regulation of the CSD or of how databank searching can be undertaken. This results in a lack of certainty, transparency and accountability. As we explore in the following chapters, some unregulated aspects of the DNA databanks have the potential to raise significant privacy issues and conflict with important aspects of tikanga Māori, including the criteria for uploading crime scene profiles to the CSD and retaining those profiles on the CSD (see Chapter 17) as well as familial searching (see Chapter 23).

4.18 Second, maintaining separate DNA databanks adds an unnecessary level of administrative complexity and makes it difficult to apply consistent reporting obligations and storage protocols to DNA profiles.

4.19 Third, the exclusion of profiles obtained for casework (profiles derived from suspect and elimination samples) from the DNA databanks also means that profiles are stored in different locations and on different systems depending on how the sample was obtained. In casework, comparison occurs outside the databanks. This undermines transparency of the regime and makes it difficult to monitor or audit the use of DNA profiles in casework.

4.20 Fourth, as we explore in Chapter 5, there is no independent oversight or auditing of the operation of the DNA databanks. This undermines transparency and accountability of

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<sup>6</sup> Based on 401,546 profiles on the convicted offender index of the Combined DNA Index System (CODIS) as of 31 March 2020 and a population estimate of 37,894,799 as at 31 March 2020. See Royal Canadian Mounted Police “Statistics for National DNA Data Bank” (March 2020) <[www.rcmp-grc.ca](http://www.rcmp-grc.ca)>; and Statistics Canada “Population Estimates, Quarterly” (June 2020) <[www150.statcan.gc.ca](http://www150.statcan.gc.ca)>.

<sup>7</sup> Based on 5,038,468 DNA profiles of individuals in England and Wales on the National DNA Database as of 30 June 2019 and a population estimate of 59,439,840 as of 30 June 2019. See Home Office “National DNA Database Statistics, As of 30th June 2019” (2019) <[www.gov.uk](http://www.gov.uk)>; and Office for National Statistics “Estimates of the Population for the UK, England and Wales, Scotland and Northern Island” (6 May 2020) <[www.ons.gov.uk](http://www.ons.gov.uk)>.

<sup>8</sup> Based on 350,318 known person profiles on the Scottish DNA Database in 2019 and a population estimate of 5,438,100 as at 25 April 2019. See Scottish Police Authority “Scottish DNA Database Statistics 2019/2020” (2020) <[www.spa.police.uk](http://www.spa.police.uk)>; and National Records of Scotland “Population of Scotland” (2019) <[www.nrscotland.gov.uk](http://www.nrscotland.gov.uk)>.

the DNA regime and is out of step with the approach taken in most comparable jurisdictions.

### Challenges measuring the effectiveness of the DNA databanks

- 4.21 Measuring the effectiveness of the DNA databanks is important, as the more useful they are in criminal investigations, the greater the justification for maintaining them despite the intrusions on human rights and tikanga Māori. However, measuring the effectiveness of DNA databanks is a challenging task.
- 4.22 The CIBS Act attempts to measure the effectiveness of the DNA databanks by requiring Police to report on the number of profile matches between the CSD and the DPD and Temporary Databank each year.<sup>9</sup> This information is set out in Table 5 of Appendix 3. This demonstrates that the number of databank matches vary year to year, dropping to 1,314 matches in 2011 and reaching a peak of 3,345 matches in 2017. In 2018 and 2019, the figures were 2,499 and 2,466 respectively.
- 4.23 ESR also monitors the ‘link rate’ as a measure of the effectiveness of the DNA databanks. The link rate is the percentage of profiles that have matched another profile on one of the databanks. ESR monitors and reports the link rates in its annual report. The most recent reported figures are a link rate of 30 per cent for crime scene profile to crime scene profile links (crime to crime links) and a link rate of 71 per cent for crime scene profile to known person links (crime to person links).<sup>10</sup> These figures (especially in relation to the crime to person link rate) can be used to support two propositions. First, Aotearoa New Zealand has the most effective DNA databank regime in the world.<sup>11</sup> Second, the ‘right people’ are on the DPD and the Temporary Databank.
- 4.24 Internationally, however, relying on the number or rate of databank matches to measure the effectiveness of DNA databanks is widely criticised because it focuses on activity on the DNA databanks rather than on case outcomes.<sup>12</sup> As noted by an Australian law reform commentator:<sup>13</sup>

<sup>9</sup> Criminal Investigations (Bodily Samples) Act 1995, s 76.

<sup>10</sup> For the most recently reported crime to crime link rate, see *ESR Annual Report 2018* (September 2018) at 62. For the most recently reported crime to person link rate, see *ESR Annual Report 2019* (October 2019) at 13. The match may occur when a crime scene profile is first uploaded to the Crime Sample Databank (CSD) or at a later date when new profiles are added to the CSD, the DNA Profile Databank or the Temporary Databank. The link rates are aggregates – they can increase or decrease over time. The best link rates in the last five years were 75 per cent for crime to person links and 31 per cent for crime to crime links as reported in ESR’s annual reports in both 2015–2016 and 2016–2017.

<sup>11</sup> In *ESR Annual Report 2018* (September 2018) at 62, ESR stated: “New Zealand leads the world in DNA matching with nearly 70% of all unsolved cases loaded to the crime sample databases successfully linked to individuals and 30% linked to another crime”. In *ESR Annual Report 2015* (September 2015) at 14 it said: “We now have an international reputation for DNA matching, with 71% of all crime samples successfully linked to individuals, and 29% of samples linked to other crimes”.

<sup>12</sup> See, for example, Standing Committee on Law and Justice *Review of the Crimes (Forensic Procedures) Act 2000* (New South Wales Legislative Council, Report 18, February 2002) at [3.135]:

The Committee has been unable to obtain satisfactory quantitative or qualitative data supporting claims about the effectiveness of DNA in solving crime, for New South Wales or for other jurisdictions. Overwhelmingly, available statistics relate to activity rather than outcomes. That is, figures are collated detailing numbers of profiles collected and analysed, incidences of database matches, and crimes involving DNA evidence. These statistics do not, however, identify the impact of DNA evidence in the solution and prosecution of crime.

See also Peter Ford and others *DNA Forensic Procedures: Further Independent Review of Part 1D of the Crimes Act 1914* (30 June 2010) at [4.1.4]; Standing Senate Committee on Legal and Constitutional Affairs *Public Protection, Privacy and the Search for Balance: A Statutory Review of the DNA Identification Act – Final Report* (Canadian Senate, June 2010) at 48–49; Jeremiah Goulka and others *Toward a Comparison of DNA Profiling and Databases in*

Statistics on the number of ‘matches’ between DNA profiles and crime scene stains are, however, misleading in some crucial respects. Firstly, ‘matches’ do not signify guilt, nor do they represent arrests made or convictions secured. A match simply denotes that a particular person may have been – but was not necessarily – present at a particular crime scene at some point in time.

- 4.25 In addition, neither the number of databank matches nor the link rate reveal the extent to which matches are followed up. It is unknown whether a match results in the identification of a new suspect, the filing of charges against a suspect or their conviction in related criminal proceedings. Some reported matches may have little evidential value. For example, a match may be to the victim or someone else who was present at the crime scene but who Police has ruled out as a suspect. Additionally, a databank match may confirm the involvement of a person who has already been identified as a suspect. In these situations, the suspect sampling regime could have been used with the same result. The lack of available information about what happens after a databank link report is received therefore makes it difficult to assess how effective the databanks are in providing intelligence that assists the resolution of criminal investigations.
- 4.26 Gaps in the reporting requirements in the CIBS Act further undermine efforts to measure the effectiveness of the DNA databanks. For example, there is no requirement to report on the number of direct matches within the CSD nor the number of familial searches undertaken.
- 4.27 The CIBS Act requires Police to report on the number of occasions on which a profile “obtained under a Part 3 procedure has been used in support of an application for a suspect compulsion order”.<sup>14</sup> This seeks to identify how often a databank match successfully identifies a suspect in an unsolved crime and is used to obtain a suspect sample that can be presented as evidence in court. However, the figures reported (32 in the year ended 30 June 2019) are likely to significantly underestimate the use of databank matches in criminal investigations. This is because this measure does not include:<sup>15</sup>
- (a) the number of occasions on which a profile obtained under a Part 2B procedure (that is, on arrest or intention to charge) has been used in support of an application for a suspect compulsion order;
  - (b) the number of occasions on which a suspect consent sample is obtained based on a databank match; or
  - (c) the number of occasions on which a defendant enters a guilty plea following a databank match, and so no suspect sample is required to present as evidence in court.

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*the United States and England* (Rand Corporation, 2010) at 20–22; Aaron Opoku Amankwaa and Carole McCartney “The effectiveness of the UK national DNA database” (2019) 1 FSI Synergy 45; and Roberta D Julian and others “What is the value of forensic science? An overview of the effectiveness of forensic science in the Australian criminal justice system project” (2011) 43 AJFS 217 at 220. Julian and others argue that the policing and forensic science community is “‘flying blind’ in terms of the true impact of its work” and that the continuing expansion of the databanks cannot be justified without more concrete evidence as to their utility: at 220.

<sup>13</sup> Ben Saul “Genetic Policing: Forensic DNA Testing in New South Wales” (2001) 13 CICJ 74 at 93.

<sup>14</sup> Criminal Investigations (Bodily Samples) Act 1995, s 76(1)(da).

<sup>15</sup> This may have been a helpful reporting measure when the CIBS Act was enacted, as profiles generated from samples obtained under Part 3 procedures (from volunteers and offenders) formed the majority of profiles on the DNA Profile Databank. However, significant changes in Police practice have occurred since the introduction of Part 2B in 2009. Now, most profiles added to the DNA Profile Databank are derived from DNA samples obtained under Part 2B procedures.

## Inadequate reporting requirements

- 4.28 While the CIBS Act includes a range of reporting measures that are designed to provide transparency as to the collection of DNA samples for databank purposes, there are several deficiencies in these measures. Specific gaps include:
- (a) The number of crime scene profiles uploaded to, stored on and removed from the CSD (and the reasons for removal).
  - (b) The number of profiles transferred to the DPD that were derived from suspect samples obtained under Part 2 or from samples required on arrest or intention to charge under Part 2B.
  - (c) The number of profiles removed from the Temporary Databank and the DPD and the reasons for removal.
  - (d) The age and ethnicity of people who provide samples and whose DNA profiles are retained on the Temporary Databank and the DPD.
  - (e) A breakdown of the profiles on the DPD that were obtained from a volunteer under Part 3 and from a suspect by consent under Part 2 (Police reports on the total number of profiles on the DPD that were obtained by consent, but this is not further broken down).
  - (f) The number of profiles on the DPD that were obtained from a volunteer under Part 3 that are retained indefinitely following a subsequent conviction for a qualifying offence.
- 4.29 The result of these gaps is that reporting on the collection and retention of samples and profiles for databank purposes is incomplete, undermining transparency and accountability.

## RECOMMENDATIONS

### Establishing a new and comprehensive DNA databank

#### RECOMMENDATIONS

- 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.

- 4.30 We recommend a new DNA databank with an index system, similar to the databanks operated in Australia, Canada and Ireland. The new DNA databank would replace the existing CSD, DPD and Temporary Databank. 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, including samples obtained in criminal casework and samples obtained for databank purposes. It should also include profiles generated from samples obtained in relation to any investigation of missing and unidentified people, as we explain in Chapter 22. No comparison between a crime scene profile and any other profile on the proposed DNA databank should be permitted outside the proposed DNA databank.
- 4.31 Such a model would meet our objectives of ensuring that the law governing the collection and use of DNA is fit for purpose, constitutionally sound and accessible. In particular, the proposed DNA databank would:
- (a) provide a secure storage system for all DNA profiles obtained in relation to criminal investigations and investigations of missing and unidentified people;
  - (b) minimise interference with privacy and tikanga Māori by providing a structural framework that limits searches against a person's profile to those reasonably necessary for effective law enforcement and imposes conditions on how profiles are stored and retained;
  - (c) simplify the regime, promote certainty and transparency and prevent misuses of DNA profiles by requiring all profiles to be stored in one place, setting clearly defined matching rules that regulate permissible searching between indices and requiring all comparisons to occur on the databank;
  - (d) enable easier reporting and improved oversight and auditing of the collection and use of DNA in criminal investigations;
  - (e) provide a structural framework for monitoring the impact of the DNA regime on Māori, consistent with the Crown's obligations under te Tiriti o Waitangi | the Treaty of Waitangi; and
  - (f) retain sufficient flexibility to respond to future changes in policy, for example, if the creation of a new index becomes necessary, such as an elimination index for the forensic services provider's employees or for police officers (discussed below).
- 4.32 We recommend that the proposed DNA databank include indices that distinguish the basis upon which a profile is being held. This will enable the setting of system-wide matching rules and conventions to prevent misuse of profiles. Other chapters address the indices that should make up the proposed DNA databank, the criteria for uploading profiles to an index, how profiles on the index can be used and how long profiles should be retained. The following indices are proposed for criminal investigations:
- (a) **Crime scene index:** to include profiles from crime scenes (discussed in Chapter 17).
  - (b) **Offenders index:** to include profiles from people convicted of qualifying offences (discussed in Chapters 18 and 21).
  - (c) **Pre-conviction index:** to include profiles from samples obtained on arrest or intention to charge (see Chapter 18) as well as profiles generated from samples obtained from suspects in the course of a criminal investigation (see Chapter 16).
  - (d) **Elimination index:** to include profiles derived from elimination samples and mass screen samples in the course of criminal casework (see Chapter 16).

- 4.33 The following indices are proposed for the purpose of assisting identification when investigating missing and unidentified people and are discussed in Chapter 22:
- (a) **Missing and unidentified index:** to include profiles of people who are missing and people who are unable to identify themselves due to incapacity.
  - (b) **Unidentified deceased index:** to include profiles of unidentified deceased people and human remains.
  - (c) **Relatives index:** to include profiles of relatives of missing people obtained for the purposes of assisting identification.
- 4.34 We have not recommended a separate elimination index for profiles obtained from forensic services provider employees, police officers and others involved in criminal investigations.<sup>16</sup> Currently, ESR maintains separate elimination databases, including the CIED (see paragraph 4.8 above). We are not aware of the current arrangements creating problems in practice. Consideration should be given, however, to whether provision should be made in new DNA legislation for a separate law enforcement elimination index to store any profiles obtained from law enforcement agencies for elimination purposes. This could replace the CIED established under the Policing Act 2008 and would be consistent with the approach taken in comparable jurisdictions. Benefits of such an index would be increased transparency and security. However, such a proposal would involve cost and should not be considered without proper consultation with members of the police and employees of ESR. We do not, therefore, reach a conclusive view on whether such an index should be established.
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<sup>16</sup> The role of the forensic services provider is discussed in Chapter 7.

## CHAPTER 5

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# Oversight of the DNA regime

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## INTRODUCTION

5.1 In Chapter 3, we identify the lack of independent oversight as a fundamental problem with the CIBS Act. We elaborate on this problem below, explore international best practice and make recommendations to improve oversight of the DNA regime.

## BACKGROUND

### The importance of oversight

5.2 Oversight is fundamental to the integrity and transparency of any regulatory regime. Effective accountability mechanisms perform several important functions. They:

- (a) ensure robust policies and systems are in place, minimising the risk of errors and injustices;
- (b) provide a framework for identifying and responding to isolated or systemic issues; and
- (c) promote and maintain public confidence in the regime.

5.3 In relation to DNA regimes, independent oversight is consistently recognised as important, if not essential, for effective regulation. As the Australian Law Reform Commission has observed:<sup>1</sup>

... the public interest in ensuring the operation of transparent and accountable DNA database systems requires that any oversight must be independent of the organisations operating or using them, and must be publicly accountable.

5.4 Guidance issued by the Forensic Genetics Policy Initiative similarly states:<sup>2</sup>

Best practice for DNA databases includes an independent and transparent system of governance, with regular information published (e.g. annual reports and minutes of oversight meetings). Multi-stakeholder governance is preferable, including civil society

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<sup>1</sup> Australian Law Reform Commission *Essentially Yours: The Protection of Human Genetic Information in Australia* (ALRC R96, 2003) at [43.72]. See also Tom Sherman and others *Report of the Independent Review of Part 1D of the Crimes Act 1914: Forensic Procedures* (Attorney-General's Department, March 2003) at ch 5.

<sup>2</sup> Forensic Genetics Policy Initiative *Establishing Best Practice for Forensic DNA Databases* (September 2017) at 25. The Forensic Genetics Policy Initiative is a collaboration of GeneWatch UK, Privacy International and the Council for Responsible Genetics. It undertook a seven-year project reviewing DNA profile databank legislation and media coverage from 132 countries and consulting widely, particularly with civil society groups.

and experts on genetic privacy. There must be adequate public and regulatory scrutiny to ensure the database is compliant with the law and to maintain public confidence.

- 5.5 The Nuffield Council in the United Kingdom also emphasises the need for independent oversight, observing that:<sup>3</sup>

The potential uses and abuses of forensic databases are considerable. Effective governance helps to ensure not only that their utility is maximised, but also that their potentially harmful effects – such as threatening privacy, undermining social cohesion and aggravating discriminatory practices – are minimised. Good governance can anticipate and respond to new challenges; it is not merely a means to impose sanctions once things go wrong. Moreover, open governance can address suspicion and promote support among the public for an enterprise which, after all, is essentially in the public interest.

### Existing oversight of the DNA regime in Aotearoa New Zealand

- 5.6 A model of “distributed oversight” of the DNA regime operates in Aotearoa New Zealand. This means that oversight is split across a range of internal and external accountability mechanisms. External accountability mechanisms include judicial oversight as well as oversight roles performed by independent statutory bodies. We discuss these different mechanisms below.

#### Internal accountability mechanisms

- 5.7 Several internal accountability mechanisms are in place, most of which are non-statutory:
- (a) **Arm’s-length arrangements for provision of forensic services.** ESR provides all forensic services, including DNA analysis and the maintenance of the DNA databanks, under the Forensic Science Services Agreement between Police and ESR (Services Agreement). It records the need for ESR scientists to remain impartial and objective in their forensic examinations and for Police to ensure the ESR scientists’ status as an independent expert is maintained. The DNA databanks themselves are stored on ESR systems rather than Police systems and are not accessible by Police employees.
  - (b) **ESR laboratory accreditation.** ESR’s biology laboratory is independently accredited by the internationally recognised accrediting body, ANAB,<sup>4</sup> to the international standard ISO/IEC 17025.
  - (c) **Internal policy.** Police and ESR have developed a range of policies designed to ensure compliance with the CIBS Act and human rights law. These policies are outlined in the *Police Manual*, in specific policy agreements between Police and ESR and in memoranda of understanding. ESR also maintains its own policies and standard operating procedures in relation to DNA analysis and the DNA databanks.

<sup>3</sup> Nuffield Council on Bioethics *The forensic use of bioinformation: ethical issues* (September 2007) at [7.1]. The Nuffield Council recommends a statutory framework of regulation, with a clear statement of purpose and specific powers of oversight delegated to an appropriate independent body or official: at [7.55].

<sup>4</sup> This organisation is now known as the ANSI National Accreditation Board. It was formerly known as “American National Standards Institute American Society for Quality National Accreditation Board” and is referred to by that name in the Agreement between Police and ESR. For simplicity we refer to it as ANAB in this Report.



- (d) **Internal audit arrangements.** Currently, Police and ESR rely on internal audits and management systems to ensure appropriate use, storage and destruction of DNA samples and profiles. The Services Agreement imposes formal reporting requirements on ESR and provides for Police to undertake an annual audit of the processes and procedures concerning the DNA databanks to ensure compliance with the requirements of the CIBS Act. Police may also ask to undertake an IT security audit of the DNA databanks and other audits related to casework from time to time.
- (e) **Public reporting requirements.** Police is required to report on some key indicators relating to the collection of DNA samples and the maintenance of the DNA databanks. These are set out in the CIBS Act, and reporting occurs in each Police annual report.<sup>5</sup>

### Judicial oversight

5.8 The judiciary performs a primary independent oversight role in the DNA regime. Judicial oversight can be exercised in several ways:

- (a) **Determining challenges to the admissibility of DNA evidence.** Evidence can be challenged on the basis that it was improperly obtained, including if it was obtained unfairly or in breach of any enactment including the CIBS Act and the New Zealand Bill of Rights Act 1990 (Bill of Rights Act).<sup>6</sup> This avenue is often used to challenge Police conduct or policy in the collection and use of DNA. However, it is only available where criminal charges have been filed, the defendant has not pleaded guilty and the prosecution seeks to rely on DNA evidence.
- (b) **Determining applications made under the CIBS Act to obtain a DNA sample.** If a suspect does not consent to provide Police with a DNA sample, a sample can only be obtained pursuant to a suspect compulsion order from a High Court or District Court Judge.<sup>7</sup> The Judge can only grant a suspect compulsion order if, among other things, they are satisfied that, in all the circumstances, it is reasonable to make the order.<sup>8</sup> This can act as an important check on the conduct of Police in the collection of DNA samples.<sup>9</sup> However, the introduction of Part 2B of the CIBS Act in

<sup>5</sup> Criminal Investigations (Bodily Samples) Act 1995, s 76.

<sup>6</sup> Evidence Act 2006, s 30. Evidence might be obtained in breach of s 21 of the New Zealand Bill of Rights Act 1990 if it was obtained in consequence of an unreasonable search or seizure.

<sup>7</sup> Criminal Investigations (Bodily Samples) Act 1995, ss 16 and 23. A more limited form of judicial oversight is exercised in relation to the collection of DNA samples from people who have already been convicted for the purpose of retaining their DNA profile on the DNA Profile Databank (DPD) for comparison against DNA profiles from unsolved crimes. If a police officer issues a databank compulsion notice to an offender under s 39, the recipient may request a databank compulsion notice hearing with a judge of the court before which that person was sentenced: s 41. However, the grounds for requesting a hearing (and for a judge to quash or vary a databank compulsion notice) are very narrow and are focused primarily on procedural irregularities: s 41(2). Very few databank compulsion hearings are requested. In 2018–2019, 599 samples were taken pursuant to a databank compulsion notice, but just four databank compulsion hearings were requested, and no orders were made that the databank compulsion notice was of no effect: Ngā Pirihimana o Aotearoa | New Zealand Police *Annual Report 2018–2019* (November 2019) at 167. We discuss the process of obtaining DNA samples from offenders for the DPD in Chapter 19.

<sup>8</sup> Criminal Investigations (Bodily Samples) Act 1995, ss 16(1)(e) and 23(1)(f).

<sup>9</sup> See, for example, *Police v SJ* [2017] NZDC 17314, [2018] DCR 587 at [38], where the Judge concluded it would not be reasonable to grant an application for a suspect compulsion order, as requiring SJ to provide a DNA sample would amount to an unreasonable search and seizure under s 21 of the New Zealand Bill of Rights Act 1990. This case is discussed in Chapter 17.

2009 significantly undermined the effectiveness of this accountability mechanism. Under Part 2B, a sample can be required from a person arrested or intended to be charged without any form of judicial oversight and using reasonable force if necessary.<sup>10</sup> In the 2018–2019 reporting year, only 62 applications for suspect compulsion orders were made, compared to the 13,056 DNA samples required under Part 2B of the CIBS Act.<sup>11</sup>

- (c) **Judicial review.** The exercise of discretionary powers under the CIBS Act is open to judicial review. If a police officer is found to have acted contrary to the CIBS Act, the collection or use of a DNA sample might be ruled unlawful and in breach of the right against unreasonable search and seizure affirmed in the Bill of Rights Act.<sup>12</sup> Such challenges are, however, rare. We are only aware of two judicial review applications. One successfully challenged the collection of a sample post-conviction on the basis that the conviction was not for a qualifying offence<sup>13</sup> and one unsuccessfully challenged a police officer’s exercise of discretion to collect a sample post-conviction which was not found to be unreasonable.<sup>14</sup>

### *Independent statutory bodies exercising oversight*

- 5.9 Several independent statutory bodies exercise some oversight of the DNA regime as part of their broader functions.<sup>15</sup> These bodies are described below. We note that this does not include the Ombudsman, who has no jurisdiction to investigate any decision, recommendation, act or omission of any police officer.<sup>16</sup>

#### *Independent Police Conduct Authority*

- 5.10 The Independent Police Conduct Authority (IPCA) is responsible for receiving and investigating complaints alleging misconduct or neglect of duty by any Police employee or concerning any Police practice, policy or procedure.<sup>17</sup> Following an investigation, IPCA forms an opinion as to whether the conduct, practice, policy or procedure was “contrary to law, unreasonable, unjustified, unfair, or undesirable”.<sup>18</sup> IPCA can then make recommendations to the Commissioner of Police and, if it is not satisfied with the Commissioner’s response, may refer to the matter to the Attorney-General and the Minister of Police, along with a report for tabling in Parliament.<sup>19</sup>

<sup>10</sup> Criminal Investigations (Bodily Samples) Act 1995, ss 24J–24K. This method of DNA sampling is discussed in Chapter 18.

<sup>11</sup> Ngā Pirihimana o Aotearoa | New Zealand Police *Annual Report 2018–2019* (November 2019) at 167–168. Of the 62 applications for a suspect compulsion order, 47 were granted, two were refused and the rest were either withdrawn, discontinued or outstanding at the time of reporting.

<sup>12</sup> *Tairi v New Zealand Police* HC Hamilton CIV-2006-419-1175, 21 December 2006 at [41] and [45]–[47].

<sup>13</sup> *Liston-Lloyd v Commissioner of Police* [2015] NZHC 2614 at [43] and [51].

<sup>14</sup> *Tairi v New Zealand Police* HC Hamilton CIV-2006-419-1175, 21 December 2006 at [41] and [45].

<sup>15</sup> These bodies are all designated as Independent Crown Entities under the Crown Entities Act 2004.

<sup>16</sup> Other than any matter relating to the terms and conditions of service of any constable: Ombudsmen Act 1975, s 13(7)(d).

<sup>17</sup> Independent Police Conduct Authority Act 1988, s 12(1)(a).

<sup>18</sup> Section 27(1).

<sup>19</sup> Sections 27(2) and 29(2)–(3).

- 5.11 As part of this broad investigatory function, IPCA can consider complaints relating to a police officer's decision to collect a DNA sample or any Police practice, policy or procedure regarding the collection and use of DNA in criminal investigations. It could then make recommendations regarding how practice, policy or procedure ought to change.<sup>20</sup> However, we understand that such complaints are rare. As IPCA has very narrow powers to initiate investigations of its own motion,<sup>21</sup> the scope of oversight of the DNA regime exercised by IPCA is very much dependent on the nature of complaints it receives.

### Privacy Commissioner

- 5.12 The Privacy Commissioner has a wide range of functions under the Privacy Act 1993 (and its successor, the Privacy Act 2020).<sup>22</sup> The Privacy Act prescribes rules (the information privacy principles) around how personal information should be collected, used, stored and disclosed.<sup>23</sup> The Privacy Commissioner's functions include promoting understanding and acceptance of the principles, conducting audits of personal information on behalf of agencies to assess compliance with the principles, receiving and inviting representations from members of the public on any matter affecting the privacy of individuals, inquiring into any matter if it appears that the privacy of individuals is being or may be infringed and providing advice on any matter relevant to the operation of the Act.<sup>24</sup>
- 5.13 The Privacy Act 2020 also gives the Privacy Commissioner new powers to issue compliance notices to agencies to require them to remedy a breach of the Act, including a breach of an information privacy principle, and to direct agencies to provide individuals with access to their personal information.<sup>25</sup>
- 5.14 Under these broad functions, the Privacy Commissioner can perform an oversight role in relation to privacy issues that arise in the DNA regime, both at a policy level and an operational level. Many aspects of the DNA regime raise potential privacy issues, such as the use of forensic DNA phenotyping, familial searching, mass screens, indirect sampling, sharing information with foreign law enforcement agencies and using the DNA databanks for research purposes. Privacy issues might also arise through the collection, use and storage of DNA samples and DNA profiles.
- 5.15 However, the Privacy Commissioner receives few complaints relating to the DNA regime.<sup>26</sup> While the Commissioner actively engages in policy development and draft

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<sup>20</sup> In the past, IPCA has drafted policy recommendations on issues such as Police pursuit practices, pre-charge warnings and the use of excessive force. See, for example, Mana Whanonga Pirihimana Motuhake | Independent Police Conduct Authority *Death of Calum Meyer following Police pursuit in Whanganui* (March 2016); Mana Whanonga Pirihimana Motuhake | Independent Police Conduct Authority *Review of pre-charge warnings* (September 2016); and Whanonga Pirihimana Motuhake | Independent Police Conduct Authority *Complaint of excessive force following arrest in Hokitika* (October 2016).

<sup>21</sup> The power to initiate own motion investigations is limited to incidents of death or serious bodily harm where they are caused or appear to be caused by a Police employee: Independent Police Conduct Authority Act 1988, ss 12 and 13.

<sup>22</sup> The Privacy Act 1993 will be replaced by the Privacy Act 2020 on 1 December 2020. In this Report, we refer to both statutes for completeness.

<sup>23</sup> Privacy Act 1993, s 6; and Privacy Act 2020, s 22.

<sup>24</sup> Privacy Act 1993, s 13; and Privacy Act 2020, s 17.

<sup>25</sup> Privacy Act 2020, ss 92 and 123.

<sup>26</sup> The Office of the Privacy Commissioner identified 12 complaints received relating to DNA databanks and/or the CIBS Act: Email from Vanessa Blackwood (Office of the Privacy Commissioner) to the Law Commission regarding follow-up on 21 May meeting (28 June 2019).

legislation related to the DNA regime,<sup>27</sup> the Privacy Commissioner's role is focused on providing specialist advice on privacy issues. As we explore below, there is also uncertainty as to whether DNA samples constitute "personal information" under the Privacy Act. If DNA samples are not personal information, the information privacy principles do not apply.

### The Human Rights Commission

- 5.16 The Human Rights Commission (HRC) is responsible for promoting and protecting human rights within Aotearoa New Zealand.<sup>28</sup> It has a wide range of functions including making public statements that promote understanding and compliance with New Zealand's human rights framework, promoting a better understanding of human rights dimensions of te Tiriti o Waitangi | the Treaty of Waitangi (the Treaty) through research, education and discussion, preparing and publishing guidelines and voluntary codes of practice, inquiring into any matter, enactment, law, practice or procedure that appears to infringe human rights and receiving complaints of unlawful discrimination and resolving those disputes.<sup>29</sup>
- 5.17 The DNA regime can engage significant human rights values. However, while the HRC has jurisdiction to receive and investigate human rights complaints relating to the DNA regime, we understand that such complaints are rare. Like the Privacy Commissioner, the HRC has a broad remit and is not designed to provide comprehensive or routine oversight of any one regulatory system.

### The Criminal Cases Review Commission

- 5.18 The role of the Criminal Cases Review Commission is to review potential miscarriages of justice.<sup>30</sup> It investigates and reviews convictions and sentences and decides whether it is in the interests of justice to refer them to an appeal court.<sup>31</sup> The Commission also has the power to initiate and conduct inquiries into general matters if, in the course of performing its functions and duties, it identifies a practice, policy, procedure or other matter that it considers may potentially relate to cases involving a miscarriage of justice.<sup>32</sup> In addition, the Commission has a duty to promote public awareness of its functions by carrying out the activities it considers necessary to make its functions known to and understood by the public.<sup>33</sup>

## ISSUES WITH THE EXISTING OVERSIGHT ARRANGEMENTS

- 5.19 Under the current arrangements, oversight of the DNA regime is fractured across a range of different bodies. There is no independent body with exclusive responsibility for

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<sup>27</sup> See, for example, submissions on the 2009 amendments to the CIBS Act as well as on our review.

<sup>28</sup> See Human Rights Act 1993, s 5.

<sup>29</sup> See pts 1A, 2 and 3 of the Human Rights Act 1993.

<sup>30</sup> Te Kāhui Tātari Ture | Criminal Cases Review Commission "About Us" (2019) <[www.ccrcc.nz](http://www.ccrcc.nz)>.

<sup>31</sup> Criminal Cases Review Commission Act 2019, ss 11 and 17.

<sup>32</sup> Section 12.

<sup>33</sup> Section 13.

oversight of the DNA regime. This falls short of international best practice and is out of step with the approach taken in most comparable jurisdictions, as we discuss below.<sup>34</sup>

- 5.20 We have several concerns regarding the current oversight arrangements:
- (a) Failure to provide a framework for Māori participation in oversight of the DNA regime.
  - (b) Lack of independent scrutiny of new DNA technologies and techniques.
  - (c) Lack of routine independent monitoring of the DNA regime.
  - (d) Lack of transparency in the existing oversight arrangements.
  - (e) Uncertainty as to whether the Privacy Act applies to DNA samples.
- 5.21 We discuss these issues below.

### Failure to provide for Māori participation

- 5.22 In Chapter 2, we explain that Māori rights and interests are central to this review. DNA holds special significance in te ao Māori, and its collection and use in criminal investigations engages rights and obligations under the Treaty, including the right to exercise tino rangatiratanga in accordance with tikanga Māori. In Chapter 2, we say that, at a minimum, ‘constitutionally sound’ DNA legislation requires providing for ongoing Māori participation in oversight of the DNA regime. However, the CIBS Act provides no role for Māori in the oversight of the DNA regime and no framework to enable Māori to articulate how their rights and interests are engaged by the DNA regime.
- 5.23 In addition, the CIBS Act makes inadequate provision for the Crown, working in partnership with Māori, to meet its Treaty obligations to take active steps to reduce Māori over-representation in the collection and use of DNA in criminal investigations. Police is required to report on the ethnicity of some key indicators,<sup>35</sup> but these reporting requirements are not subject to any routine independent scrutiny to monitor the impact of the DNA regime on Māori.

### Lack of independent scrutiny of new DNA analysis techniques

- 5.24 As we explain in Chapter 6, the CIBS Act does not regulate the use of new DNA analysis techniques. Currently, the decision as to whether to introduce a new form of DNA analysis into criminal casework is made by Police. It advises that any new technique would be discussed with Police’s National Forensic Services Centre which would consider the value of the new technique and undertake a cost-benefit analysis.<sup>36</sup> In

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<sup>34</sup> The Forensic Genetics Policy Initiative, a collaboration of GeneWatch UK, Privacy International and the Council for Responsible Genetics, has ranked New Zealand’s laws as contravening best practice on several fronts, including on matters of independent oversight, independence of forensic laboratories from Police, quality assurance procedures in relation to crime scenes and chain of custody, DNA profiling standards and provision for secure transfer of data: Forensic Genetics Policy Initiative *DNA databases in Australia and New Zealand* (May 2016) at 2–3 and 9–10.

<sup>35</sup> Criminal Investigations (Bodily Samples) Act 1995, s 76(2).

<sup>36</sup> In September 2020, Police published a new policy. See Ngā Pirihimana o Aotearoa | New Zealand Police *Proposals to test or trial use of emergent technologies* (18 September 2020). Under that policy, Police must consider “any relevant ethical and human rights considerations, including public expectations and legal obligations surrounding the right to privacy” and any test or trial must be approved by Police’s Security and Privacy Reference Group and endorsed by Police’s Organisational Capability Governance Group: at 5. Police has also signed up to Statistics New Zealand’s Algorithm Charter for Aotearoa New Zealand which outlines standards for the use of algorithms by public agencies and embeds a te ao Māori perspective. Police Commissioner Andrew Coster has said that, to support the new policy on the use of emergent technologies and Police’s commitments under the Algorithm Charter, Police intends to

practice, from a scientific perspective, Police relies on ESR's advice as to whether and when a new analysis technique has been sufficiently validated in the international community to be appropriate to be introduced into use in Aotearoa New Zealand. We discuss the validation process in Chapter 7.

- 5.25 There is, however, no independent oversight or statutory approval process that applies to the introduction of new DNA analysis techniques. Such techniques have the potential to raise significant privacy issues and impact on Māori rights and interests, including on tikanga associated with personal tapu, mana and whakapapa that pertains to DNA.<sup>37</sup> An example of a new DNA analysis technique is forensic DNA phenotyping, which is used to predict a person's appearance from their DNA. This technology has been used in 12 cases in Aotearoa New Zealand to infer a person's "biogeographical ancestry", which raises particular concerns in the context of the over-representation of Māori in the criminal justice system. Forensic DNA phenotyping is discussed in Chapter 14.
- 5.26 The use of new and more sensitive DNA analysis techniques might also raise the risk of wrongful conviction if the probative value of information generated from these techniques is overestimated or misunderstood.<sup>38</sup> For example, the use of "trace DNA" (generating a DNA profile from tiny traces of DNA found at a crime scene using sensitive analysis techniques) could wrongly implicate someone if the presence of their DNA at the crime scene was due to contamination or transfer. Currently, the task usually falls to the courts to determine whether evidence generated using a particular technique is sufficiently reliable to be admitted in any given case. However, many question whether the courts are adequately equipped to make such determinations. As the United States' National Research Council has observed:<sup>39</sup>

The adversarial process relating to the admission and exclusion of scientific evidence is not suited to the task of finding "scientific truth." The judicial system is encumbered by, among other things, judges and lawyers who generally lack the scientific expertise necessary to comprehend and evaluate forensic evidence in an informed manner, trial judges (sitting alone) who must decide evidentiary issues without the benefit of judicial colleagues and often with little time for extensive research and reflection ... Given these realities, there is a tremendous need for the forensic science community to improve. Judicial review, by itself, will not cure the infirmities of the forensic science community.

- 5.27 In Aotearoa New Zealand, the Court of Appeal has noted that considerable resources are needed to challenge the reliability of evidence and that this creates a tension with the right to a fair trial:<sup>40</sup>

The notion that the robustness of cutting edge scientific techniques can be established before juries creates a clear tension with the right to a fair trial in the many cases that

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"assemble a panel of experts who can externally peer review the use of emergent technologies, including algorithms that support decision-making by Police staff": Ngā Pirihimana o Aotearoa | New Zealand Police "Police strengthen commitments to use technology safely and responsibly" (30 September 2020) <[www.police.govt.nz/](http://www.police.govt.nz/)>.

<sup>37</sup> These tikanga Māori values are discussed in Chapter 2.

<sup>38</sup> See, for example, President's Council of Advisors on Science and Technology *Forensic Science in Criminal Courts: Ensuring Scientific Validity of Feature-Comparison Methods* (Executive Office of the President, September 2016) at 25.

<sup>39</sup> National Research Council *Strengthening Forensic Science in the United States: A Path Forward* (National Academies Press, August 2009) at 12 (citations omitted).

<sup>40</sup> *Lundy v R* [2018] NZCA 410 at [247].

might arise where the defence would simply be unable, through lack of resources, to mount soundly based challenges to the science relied on by the Crown.

- 5.28 Given these concerns, which are explored in greater detail in Chapter 6, we consider that the introduction of new DNA analysis techniques must be subject to independent scrutiny to ensure they are used only when appropriate.

### Lack of routine independent monitoring

- 5.29 There is no statutory provision for routine, independent monitoring of the DNA regime, either to keep the DNA regime under review generally or to identify systemic issues in internal policies or practices. While Police publicly report on some key measures regarding the collection, use and retention of DNA samples and profiles,<sup>41</sup> these reporting measures are incomplete (as we explain in Chapter 4) and are not subject to any routine independent scrutiny.

- 5.30 The judiciary performs an important independent monitoring role. However, there are problems with relying solely on this form of monitoring. As one report on the Australian DNA regime observed:<sup>42</sup>

It is not ordinarily the role of courts to examine the integrity of systems which underpin the evidence gathering process. They examine matters on a case by case basis and usually only examine the means of obtaining evidence when a specific challenge or criticism is made. This means that the great bulk of DNA testing and analysis is never scrutinised by the courts. Moreover, successful matching of DNA profiles will often result in a plea of guilty and the processes leading up to that plea will rarely be examined by the courts.

- 5.31 The effectiveness of judicial oversight in exercising a monitoring role can also be limited by the cost of access to justice, including the cost of engaging forensic scientists to challenge DNA evidence.<sup>43</sup> Further, it will not always be readily apparent that there has been an error in analysis or an improper use of powers to collect and use DNA samples that warrants legal challenge.<sup>44</sup> Some argue that:<sup>45</sup>

... it is not and cannot be the responsibility of the defendant and his or her lawyer to somehow identify errors, uncertainties and frailties retrospectively, possibly months or years after the original collection and analysis of materials. Those producing and relying on forensic science evidence are the only ones in a position to formally evaluate procedures and disclose limitations.

- 5.32 The lack of routine independent monitoring of the DNA regime is out of step with accountability arrangements in other jurisdictions, as we discuss below. It is also out of

<sup>41</sup> Criminal Investigations (Bodily Samples) Act 1995, s 76.

<sup>42</sup> Tom Sherman and others *Report of the Independent Review of Part 1D of the Crimes Act 1914: Forensic Procedures* (Attorney-General's Department, March 2003) at [5.9].

<sup>43</sup> At [5.10]. A recent parliamentary review in England and Wales identified that cuts to legal aid had affected the ability of defendants to access forensic expertise, hampering fair access to justice. See House of Lords Science and Technology Select Committee *Forensic science and the criminal justice system: a blueprint for change* (House of Lords, 3rd Report of Session 2017–2019, 1 May 2019) at 3 and [117]–[123]. Concerns regarding defence resourcing have also been noted in New Zealand. See, for example, Jack Drummond “Fifty years of forensic medicine in New Zealand” (2020) 936 *LawTalk* 72 at 73. However, as noted in Chapter 1 of this Report, the use of DNA evidence in court is not within the terms of reference of this review.

<sup>44</sup> Hannah Croucher “DNA ‘consent’ samples; overhauling the Criminal Investigations (Bodily Samples) Act 1995” [2019] NZLJ 279 at 280.

<sup>45</sup> Gary Edmond, Kristy Martire and Mehera San Roque “Expert Reports and the Forensic Sciences” (2017) 40 *UNSW Law Journal* Volume 590 at 624 (citations omitted).

step with other regimes in Aotearoa New Zealand that involve significant intrusions on privacy and other human rights values by the State.

- 5.33 For example, the Inspector-General of Intelligence and Security (IGIS) provides independent oversight of the New Zealand Security and Intelligence Service and the Government Communications Security Bureau. The IGIS has broad functions that include investigating complaints and receiving protected disclosures, conducting inquiries, reviewing all warrants and authorisations issued to the intelligence and security agencies and annual reviews of compliance procedures and systems, including through unscheduled audits.<sup>46</sup> The Government Inquiry into Operation Burnham has also recommended the establishment of a similar mechanism to provide independent oversight of the New Zealand Defence Force.<sup>47</sup> Another example is IPCA's special role in monitoring and reporting on places of Police detention under the Crimes of Torture Act 1989. This role includes regular examinations of the conditions of detention and the treatment of detainees, making recommendations for improving the conditions of detention and the treatment of detainees and reporting annually to Parliament and the relevant Minister on the exercise of these functions.<sup>48</sup>
- 5.34 In a slightly different context that nonetheless engages significant human rights issues, the Children's Commissioner exercises an oversight role in relation to Oranga Tamariki. This role includes investigating any decision or recommendation made in respect of any child or young person under the Oranga Tamariki Act 1989, monitoring and assessing Oranga Tamariki's policies and practices, encouraging the development of policies and services that are designed to promote the welfare of children and young people, advising the Minister on any matter relating to the administration of the Oranga Tamariki Act or regulations made under that Act and keeping under review and making recommendations on the working of that Act.<sup>49</sup>
- 5.35 In contrast, IPCA's oversight role in relation to the DNA regime is limited to investigating complaints regarding Police employee misconduct and Police practice, policy or procedure. It has no power to initiate audits or otherwise conduct investigations or make recommendations of its own motion.
- 5.36 While we do not have any particular concerns with the range of internal accountability mechanisms currently in place, it is important to recognise that, in any regulatory system, errors and (to a lesser extent) misuse can and will occur.<sup>50</sup> While the judiciary

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<sup>46</sup> Intelligence and Security Act 2017, s 158.

<sup>47</sup> Terence Arnold and Geoffrey Palmer *Report of the Government Inquiry into Operation Burnham and related matters* (July 2020) at ch 12.

<sup>48</sup> Crimes of Torture Act 1989, s 27.

<sup>49</sup> Children's Commissioner Act 2003, s 13.

<sup>50</sup> See, for example, *Wells v R* [2014] NZCA 479 at [5], where it was reported that Police asked ESR to destroy biological samples taken from a complainant after they withdrew their complaint, but the samples were not destroyed and were not handled in accordance with the normal ESR procedures. We were also made aware of one instance where a comparison between a suspect profile and a crime scene profile was carried out without consent, in contravention of the requirements of the CIBS Act. ESR, upon investigation of the incident, also identified a separate instance of a suspect profile being compared with a crime scene profile in error. As a result, ESR has implemented refresher training on the CIBS Act for all staff involved in casework involving DNA, and this will continue to be provided on an ongoing basis: Letter from Jill Vintiner (Institute of Environmental Science and Research) to Law Commission regarding matters raised by The Forensic Group (13 January 2020).



performs an important check on Police conduct and procedure when challenged in court, this does not supplant the need for active independent monitoring through regular reviews and audits of all aspects of the DNA regime. While Police does have the ability to audit some aspects of ESR's processes relating to forensic analysis and the DNA databanks, it is difficult for the agency involved in the day-to-day operation of the DNA regime to also be responsible for identifying and addressing systemic issues. Independent monitoring can be better placed to identify such issues, can assist in reducing error and misuse and, importantly, can promote public confidence in the regime.

### Lack of transparency

- 5.37 For the DNA regime to operate effectively, there must be public understanding, trust and confidence in the regime. However, there are serious deficiencies in the transparency of key elements. Police and ESR policies are not readily available. ESR's role as the forensic services provider is not provided for in legislation (see Chapter 7). No organisation has a clear role in promoting public awareness and understanding of the DNA regime. The current lack of transparency risks undermining public confidence in what is an important law enforcement tool.

### Uncertain application of the Privacy Act to DNA samples

- 5.38 As noted above, it is uncertain whether the information privacy principles in the Privacy Act apply to DNA samples. The principles apply to "personal information", which is defined as "information about an identifiable person".<sup>51</sup> It is not clear whether a DNA sample, which is a sample of a person's human tissue, would amount to "personal information". In 2012, the Office of the Privacy Commissioner considered this issue in respect of blood spot cards collected as part of the Ministry of Health's Newborn Metabolic Screening Programme. At that time, the Office observed that:<sup>52</sup>

The Privacy Act regulates information about identifiable individuals, rather than their bodily substances. The samples by themselves do not present any privacy risk ... However any use which might present privacy concerns would inevitably require the analysis of the samples, and the collection of information about them. This derived information will fall within the ambit of the Privacy Act ...

- 5.39 A similar view was expressed by the Australian Law Reform Commission, which considered this issue in the context of a comparable definition of personal information in the Australian Privacy Act.<sup>53</sup> The Commission concluded that "personal information" does not cover genetic samples, even when they are identifiable, because the samples themselves are not "information".<sup>54</sup>

<sup>51</sup> Privacy Act 1993, s 2 definition of "personal information"; and Privacy Act 2020, s 7 definition of "personal information".

<sup>52</sup> Te Mana Mātāpono Matatapu | Office of the Privacy Commissioner *Proposed Amendment No 7 to the Health Information Privacy Code 1994: Information Paper* (29 February 2012) at 5–6.

<sup>53</sup> See Privacy Act 1988 (Cth), s 6(1) definition of "personal information".

<sup>54</sup> Australian Law Reform Commission *Essentially Yours: The Protection of Human Genetic Information in Australia* (ALRC R96, 2003) at [8.7]–[8.26]. The Commission made a distinction between samples that are labelled with a person's name and other personal information, and samples that are not labelled. Samples that are labelled may constitute personal information but only by reason of the information on the label: at [8.20].

- 5.40 If DNA samples are not personal information, the information privacy principles would not apply to their collection, storage and destruction. This creates an arbitrary distinction between the samples themselves and the information generated from DNA samples, which *would* constitute personal information (including DNA profiles). When a DNA sample is from a known person, any DNA profile generated from that sample would be personal information as it is clearly information about an identifiable person. We also think that a DNA profile generated from an unknown DNA sample, such as a DNA sample collected from a crime scene, constitutes personal information because it is information that is generated for the sole purpose of identifying the source of the DNA sample and it can be used alongside other information to identify the person.<sup>55</sup> This interpretation was supported by the Privacy Commissioner in his submission on the Issues Paper. It may, however, be desirable to clarify this in legislation.
- 5.41 The uncertainty regarding DNA samples as personal information undermines the protections in place relating to DNA samples as well as the Privacy Commissioner's role in the oversight of the DNA regime.<sup>56</sup> The Privacy Commissioner could not, for example, audit DNA samples held by or on behalf of Police or issue a compliance notice to require the information privacy principles to be complied with in respect of DNA samples.<sup>57</sup>

## OPTIONS FOR REFORM

- 5.42 In the Issues Paper, we identified a range of oversight functions that could be performed in relation to the DNA regime, specifically:<sup>58</sup>
- (a) case-specific approvals for certain DNA collection methods, analysis techniques or uses of DNA information;<sup>59</sup>
  - (b) considering and determining complaints relating to the collection of suspect samples;
  - (c) reviewing convictions based solely on DNA evidence;
  - (d) reviewing cases where there is an unexpected match between an elimination sample and crime scene sample, resulting in that person becoming a suspect;

<sup>55</sup> In *Vidal-Hall v Google Inc (Information Commissioner intervening)* [2015] EWCA Civ 311, [2016] QB 1003, the Court of Appeal in England and Wales found that identifiability hinges on whether a person can be individually distinguished from a group. It does not matter that the person's name is not attached to the information, nor does it matter whether the person can recognise themselves in the information: at [115]. See the discussion of the case in Katrine Evans "Pressures on Personal Information: The Ever-Changing Field of Privacy" (paper presented to the New Zealand Law Society CPD Top-Up Day Conference, 20 March 2017) at 6–7. See also Paul Roth "What is 'Personal Information'?" (2002) 20 NZULR 40 at 41–42 and n 4.

<sup>56</sup> Similar concerns were identified regarding the gaps in privacy protection for DNA samples in Australian Law Reform Commission *Essentially Yours: The Protection of Human Genetic Information in Australia* (ALRC R96, 2003) at [8.30]–[8.54].

<sup>57</sup> These powers can only be exercised in respect of personal information: Privacy Act 1993, s 13(1)(b); and Privacy Act 2020, ss 17(1)(l) and 123(1)(b).

<sup>58</sup> Issues Paper at 324–327.

<sup>59</sup> Including approving the collection of DNA samples from a close genetic relative of a suspect, the use of forensic DNA phenotyping, mass screening or familial searching, the use of the CSD in a non-standard way, the use of any DNA profile databank for a secondary purpose and deciding any application by a defendant for analysis or reanalysis of DNA samples relating to their case.

- (e) consultation on or approval of Police and ESR policies;
  - (f) approval of the use of new technologies or techniques;
  - (g) auditing and monitoring compliance with statutory requirements and policies, including the storage, retention and destruction of DNA samples and profiles;
  - (h) reporting; and
  - (i) public education/engagement.
- 5.43 As to who should perform these oversight functions, we identified two broad options:<sup>60</sup>
- (a) dividing the oversight functions between the existing bodies discussed above; or
  - (b) establishing a new body or bodies, such as an independent oversight committee, an ethics committee, a standing or ad hoc group with a kaitiaki role in relation to Māori interests and data and/or a new commissioner or regulator.
- 5.44 Our preliminary view was that none of the existing bodies could provide the full range of oversight functions that may be necessary, even if their functions and powers were amended. That is primarily because their structures do not accommodate the necessary tikanga, scientific and ethical expertise that would be required nor the specific representation of Māori interests.<sup>61</sup>

## RESULTS OF CONSULTATION

- 5.45 We received 50 submissions that commented on oversight of the DNA regime from 13 organisations and 37 individuals. Of these, 43 submitters supported increased independent oversight, most favouring the establishment of a new independent oversight body.<sup>62</sup> The Judges of the District Court also provided comments in support of an independent oversight body.

### Support for increased oversight

- 5.46 Reasons given in support of increased oversight focused largely on the personal and sensitive nature of DNA information and the security, privacy and ethical issues that arise in relation to such information. The Privacy Commissioner considered that appropriate checks and safeguards are necessary to ensure that intrusions into the privacy of the individual are not unwarranted and to limit any unintentional adverse effects for individuals. HRC also noted that the DNA regime is inherently rights intrusive. The Innocence Project New Zealand and the Independent Forensic Practitioners Institute (IFPI) noted that forensic science is rapidly advancing, and independent oversight is needed to future-proof against errors resulting from the use of new techniques. The Public Defence Service (PDS) similarly submitted:

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<sup>60</sup> Issues Paper at [15.95]–[15.105].

<sup>61</sup> At [15.96].

<sup>62</sup> Organisations supporting increased oversight included the Human Rights Commission, the Privacy Commissioner, the Independent Police Conduct Authority, Te Mana Raraunga | Māori Data Sovereignty Network, the Innocence Project New Zealand, the New Zealand Law Society (NZLS), the New Zealand Bar Association (endorsing NZLS's submission in its entirety), Te Hunga Rōia Māori o Aotearoa | The Māori Law Society, the Auckland District Law Society Criminal Law Committee, the Public Defence Service and the Independent Forensic Practitioners Institute. Individuals supporting increased oversight included Associate Professor Nessa Lynch, Professor Dennis McNevin, Professor Carole McCartney, Dr Aaron Amankwaa, Sue Petricevic, Karaitiana Taiuru and 27 other individuals.

[I]ndependent oversight has the potential to decrease the risk of individual miscarriages of justice occurring and to ensure protection of privacy and appropriate limitations. The current situation where police, alongside ESR, self-regulate the use of DNA does not provide sufficient oversight, management, impartiality, scrutiny and safeguards.

- 5.47 Some submitters also pointed to inadequacies in the existing accountability mechanisms. The Innocence Project noted that errors can and do occur, reinforcing the need for independent oversight to ensure best-practice standards are being adhered to. The Innocence Project also pointed to the need for independent oversight to be prescribed in statute to counteract the competing incentives on ESR in developing commercial products. It submitted that:

There is always the possibility that the commercial interests are at odds with the public interests – or at least has the appearance of doing so – which independent oversight can mitigate against.

- 5.48 Five individuals did not support increased oversight of the DNA regime. Of these, two were concerned that it would result in over-administration, and one expressed concern that it removed control from individuals. That submitter did not think that DNA profiles should be kept at all.
- 5.49 Police did not comment on the need for oversight in its submission, although in subsequent engagement, Police expressed its desire to assist with improving oversight of the DNA regime on a more formalised basis, in particular where policing and crime prevention are concerned. It also expressed support for the inclusion of Māori at both governance and decision-making levels, in line with the Treaty. ESR submitted that, in principle, it is not averse to the introduction of an oversight body to independently oversee the use of DNA in criminal investigations.

### Oversight functions

- 5.50 Many submitters, including HRC, IPCA, PDS, the Innocence Project, IFPI, the Auckland District Law Society Criminal Law Committee (ADLS) and Sue Petricevic supported the oversight functions and powers suggested in the Issues Paper (outlined at paragraph 5.42 above). HRC also submitted that an oversight body should be empowered to provide a restitutionary remedy in the event that its inquiry into a complaint determines that an individual's rights have been breached or that due process requirements have not been followed. This, HRC submitted, should include orders that enable profiles to be removed from the databank and samples destroyed.
- 5.51 Several submitters commented specifically on the need for independent oversight of the operation and use of the proposed DNA databank, including the Privacy Commissioner, Associate Professor Nessa Lynch, Professor Carole McCartney and Dr Aaron Amankwaa. The Privacy Commissioner submitted that robust procedural checks and safeguards are required so that the databank is maintained in a manner that ensures the use of DNA in criminal proceedings is necessary, justifiable, reasonable and proportionate. Nessa Lynch considered that oversight functions should include auditing patterns of sample collection, such as ethnicity of people sampled and trends in the use of reasonable force to obtain samples, and the destruction of samples. Oversight should also include the use of samples and profiles in research and monitoring statistics on the efficacy of DNA evidence for securing convictions.
- 5.52 Carole McCartney and Aaron Amankwaa proposed that oversight functions should include the development of a code of practice on the retention, use and destruction of

DNA records, the development of governance rules for the database, regular review of the actual effectiveness and efficiency of the databank, making recommendations for improvement, ensuring compliance with the law and code of practice through regular audits and investigations, conducting regular ethical reviews and data protection impact assessments and producing annual reports for Parliament on the exercise of these functions.

- 5.53 The New Zealand Law Society (NZLS) considered that the two key functions of an oversight body should be standard setting, which must entail some mechanism for community-wide consultation, and auditing/monitoring/reporting. NZLS noted that retention of samples and profiles beyond their legislative “use-by” date can significantly increase the risk that samples are used for collateral and inappropriate purposes and that independent auditing is more likely to garner the necessary public confidence that processes are being correctly followed than a self-reporting regime. The provision of public information, NZLS considered, would also appropriately sit with an oversight body. NZLS further submitted:

Developments in DNA technology are likely to be contentious in their scope for application, and without monitoring, may inadvertently result in State or Police powers being significantly extended. As such, it is important for the purposes of State accountability, that the implementation of new DNA techniques in criminal investigations is subject to legislative amendment or subordinate legislation, with scrutiny provided by the Regulations Review Committee where appropriate. It would also be sensible for an oversight body to be involved where new techniques are adopted.

- 5.54 NZLS did not, however, support an oversight body being responsible for case-specific functions. It considered these are most appropriately dealt with by a judicial warrant system. Further, it considered complaints processes are already adequately provided by existing mechanisms, through the IPCA or the courts, and that complaints regarding criminal convictions will be addressed through the creation of the Criminal Cases Review Commission.
- 5.55 ESR submitted that the functions of any independent oversight body need to be clearly defined, with a focus on monitoring compliance with policy. The forensic services provider should be enabled to function on a business-as-usual basis, and the oversight body should accept the forensic services provider’s laboratory accreditation status as satisfying the general requirements for the laboratory to operate. ESR also made several comments on some of the suggested oversight functions. In terms of case-specific applications, ESR considered these would be better managed by policy, with compliance being demonstrated and audited by an oversight body. It noted that crime scene examinations, laboratory procedures and the reporting of quality concerns are already catered for under ESR’s accreditation process using an international third party. ESR also noted that some changes to DNA techniques, such as a change to or the introduction of a new DNA extraction method, would be part of the day-to-day running of the laboratory and should therefore be outside the scope of the oversight body.
- 5.56 Te Mana Raraunga | Māori Data Sovereignty Network and Te Hunga Rōia Māori o Aotearoa | The Māori Law Society supported specific reporting obligations on the use of Māori data. Te Mana Raraunga supported regular reporting back to Māori on how accountabilities to the communities, individuals and groups from whom Māori data derive are being met, including how Māori samples and data are collected, managed, analysed, reported, stored and disposed of. It also supported mechanisms for

monitoring and recording data harm, including mandatory reporting of data breaches. Te Hunga Rōia supported reporting obligations in respect of compliance with te Tiriti and monitoring the impact of DNA legislation on Māori, similar to section 7AA of the Oranga Tamariki Act 1989. It considered that such a provision would ensure the commitment to giving Māori a central role in oversight is transparent and enforceable.

- 5.57 A few submitters also commented on the wider context of biometric information. NZLS saw merit in establishing a new commissioner, like the recently established Biometrics Commissioner in Scotland (see paragraph 5.71 below), with jurisdiction to oversee the use of DNA and potentially other biometric information by Police and other state agencies. Te Hunga Rōia also noted the potential inconsistency in the regulation of biometric information if an enhanced regime is put in place for DNA but not for other biometrics such as fingerprints.

### The form of increased oversight

- 5.58 As noted above, many submitters favoured the establishment of a new independent oversight body. Various models were proposed. HRC suggested a model similar to IGIS (discussed at paragraph 5.33). NZLS and the Judges of the District Court supported a small, independent, multi-disciplinary panel led by a specialist commissioner. NZLS argued that the creation of such a panel was justified given the scale of data collection and access, the involvement of significant public interest issues and a small number of critical stakeholders, together with the highly technical nature of some of the suggested functions. PDS supported an oversight committee but noted that it may need to be full-time in the initial establishment stage.
- 5.59 Some submitters considered that some or all of the suggested oversight functions could be undertaken by existing accountability bodies. HRC considered that IPCA would be best placed among existing accountability bodies to perform the oversight functions. IPCA also submitted that there was a strong case for bringing the suggested oversight functions within the umbrella of the IPCA. Its reasons included that most of the suggested functions relate to Police decision making, which is the everyday function of IPCA, and that IPCA has detailed knowledge and understanding of the operational environment within which those decisions are taken. IPCA also noted that there is a high degree of symmetry and some indirect overlap between IPCA's existing functions and the suggested case-specific approval and review functions.
- 5.60 While IPCA recognised that some of the skills required for the suggested oversight functions would require IPCA to develop new expertise, particularly in forensic science, ethics, prosecution and defence, and tikanga Māori, this additional range of expertise would not only ensure the new oversight functions are undertaken robustly but would also enhance the quality and efficiency of the Authority's existing functions. IPCA submitted that:
- In short, by combining the two sets of overlapping functions within one operational body, there would be economies of scale that would enable the recruitment of the optimal range of high quality staff.
- 5.61 The Privacy Commissioner recognised the challenge in creating an effective and efficient oversight framework commensurate with New Zealand's needs, size and machinery of government. One important reform, in the Privacy Commissioner's view, is to affirm in legislation that DNA is "personal information" as defined in the Privacy Act.

The Commissioner observed that this is necessary to ensure that the privacy principles in the Privacy Act underpin the collection, analysis, use and disclosure of DNA samples as well as the DNA profiles derived from them. The Privacy Commissioner also suggested exploring options for strengthening internal governance arrangements to achieve some of the policy objectives, noting that external oversight will be more efficient and effective if the underlying governance arrangements are robust.

- 5.62 The Privacy Commissioner also questioned whether one oversight body should provide a “one-stop shop” or whether the oversight functions could be shared across different bodies. The Privacy Commissioner noted that a distributed model may be more efficient and may bring a broader set of oversight skills and experience. However, this would require effective coordination and “joined up” oversight between various entities so that issues do not fall between the cracks. The Privacy Commissioner noted that an oversight board could be considered, which could be made up of representatives of the existing accountability bodies and other relevant stakeholders.
- 5.63 Several other submitters supported a model of distributed oversight comprising a new independent body and strengthened oversight functions of existing accountability bodies. IFPI proposed that IPCA should continue to oversee Police and forensic science providers and that the Office of the Privacy Commissioner should have an increased oversight role, particularly in relation to the security, privacy and administration of the proposed DNA databank. Nessa Lynch suggested that the Privacy Commissioner could be given a statutory role in auditing information held by Police.
- 5.64 Other submitters, however, did not support a distributed oversight model. HRC did not think this would be as effective as a sole focal-point statutory office. It considered that the existing accountability bodies would struggle to meet the additional demands that such an approach would bear upon their existing baselines. HRC also argued that the complexity and narrower focus of the DNA regime warrants a specialist oversight approach. Similarly, ADLS and Sue Petricevic did not favour reliance on existing accountability mechanisms. They had concerns due to the very specific and complex technical considerations that arise in the DNA regime. These submitters considered that existing bodies such as the HRC, the Privacy Commissioner and the Criminal Cases Review Commission are important contributors with specialist knowledge in other areas.

### *A central role for Māori*

- 5.65 Many submitters, including Te Mana Raraunga, Te Hunga Rōia, HRC, NZLS, the Innocence Project, Karaitiana Taiuru and several other individuals, commented on the need for a central role for Māori in any oversight arrangements. Te Mana Raraunga submitted that strong Māori governance should be embedded in the independent oversight of the system to support collection and use of data in ways that uphold the dignity of Māori and minimise its use in ways that are stigmatising and harmful to Māori collectives and individuals. It supported Māori governance of Māori data, including stewardship arrangements for the collection, transfer and storage of data. Māori should have control over deciding the protocols and policies around Māori data, including control over deciding appropriate tikanga and kawa around bodily samples and derived data, consistent with the principles of kaitiakitanga and manaakitanga.
- 5.66 Karaitiana Taiuru made a similar submission, supporting the creation of a new specialist commissioner or a Māori advisory group and a tikanga expert to be appointed to manage all storage and requests for samples from the systems, allowing the customary

tikanga aspects and kaitiakitanga to be respected. HRC suggested an independent advisory panel or similar to advise on the impact of practices on tikanga and the rights of Māori over their DNA as guaranteed under the Treaty. The Innocence Project supported a kaitiaki role or something similar in order to take account of Māori interests.

### *The need for specialist expertise*

5.67 Many submitters commented on the need for any new oversight body to include a range of expertise, including in criminal investigations and court procedures, forensic science, tikanga, ethics and compliance monitoring. PDS also submitted that cultural specialists and community members should be represented. In addition, Nessa Lynch supported the body including representation from the Office of the Children’s Commissioner to represent children and young people. Alternatively, some submitters, including NZLS and the Judges of the District Court, noted that an oversight body could be supported by a separate ethics advisory group.

## OVERSIGHT IN COMPARABLE JURISDICTIONS

5.68 Most comparable jurisdictions have established one or more bodies with the express purpose of providing independent oversight of the DNA regime and specifically the operation of DNA databanks. Many comparable jurisdictions have also made statutory provision for one-off or regular reviews of the operation of the legislation after its commencement.<sup>63</sup> We summarise the approach taken to oversight in comparable jurisdictions below.<sup>64</sup>

### England and Wales

5.69 England and Wales operate a complex system of oversight that comprises:

(a) **The Forensic Information Database (FIND) Strategy Board** provides governance and oversight of the National DNA Database (NDNAD) and the National Fingerprint Database.<sup>65</sup> The FIND Strategy Board comprises a core voting membership of representatives of the Association of Chief Police Officers of England, Wales and Northern Ireland, the Home Secretary and the Association of Police and Crime Commissioners.<sup>66</sup> The Board also includes representatives from the Biometrics and Forensics Ethics Group, the Information Commissioner and the Forensic Science

<sup>63</sup> See Scottish Biometrics Commissioner Act 2020, s 6 (providing for an initial review after five years and the opportunity for subsequent five yearly reviews of the Commissioner’s functions); Criminal Justice (Forensic Evidence and DNA Database System) Act 2014 (Ireland), ss 11(6) and 95 (providing for an initial review after six years and subsequent reviews when the Minister considers appropriate); Crimes (Forensic Procedures) Act 2000 (NSW), s 122 (provides for a review after 18 months); DNA Identification Act SC 1998 c 37, s 13 (provides for annual reviews within three months after the end of each fiscal year); and Crimes Act 1914 (Cth), s 23YV (repealed).

<sup>64</sup> See also the Issues Paper at [15.19]–[15.59].

<sup>65</sup> The Forensic Information Database Strategy Board was recently renamed and is still referred to in legislation by its old name, the National DNA Database Strategy Board. See Police and Criminal Evidence Act 1984 (UK), s 63AB; and National DNA Database Strategy Board *Annual Report 2017–2018* (Home Office, February 2019) at 3. The objectives and specific responsibilities of the FIND Strategy Board are set out in its governance rules: Home Office *Governance Rules for the National DNA Database Strategy Board* (June 2014).

<sup>66</sup> Home Office *Governance Rules for the National DNA Database Strategy Board* (June 2014) at [5(a)].



Regulator. However, these members cannot cast votes, and the representative from the Information Commissioner attends in the capacity as observer only.<sup>67</sup> The FIND Strategy Board's responsibilities include issuing guidance on certain aspects of the DNA regime including on the destruction of DNA profiles, exercising oversight of the collection, use, retention and destruction of DNA samples and profiles and reporting annually to Parliament.<sup>68</sup>

- (b) **The Commissioner for the Retention and Use of Biometric Material** is an independent, statutory Commissioner responsible for keeping under review the retention and use of biological samples, DNA profiles and fingerprints.<sup>69</sup>
- (c) **The Forensic Science Regulator** is an independent, non-statutory appointee responsible for ensuring that the provision of forensic science services across the criminal justice system is subject to an appropriate regime of scientific quality standards.<sup>70</sup> The Regulator is advised by a number of expert subgroups, including the Forensic Science Advisory Council and the DNA Analysis Specialist Group.<sup>71</sup>
- (d) **The Biometrics and Forensics Ethics Group (BFEG)** is a non-statutory, independent advisory group appointed to advise on ethical aspects of the collection, retention and use of biological samples and biometric identifiers for purposes that fall within the purview of the Home Office.<sup>72</sup> BFEG members are appointed on the basis of their independent expertise, not as representatives of any particular organisation, employer, profession or interest group.<sup>73</sup>

5.70 In 2019, the House of Lords Science and Technology Committee published a report on forensic science, which criticised the “piecemeal nature of oversight of and responsibility for forensic science in England and Wales”.<sup>74</sup> The report made a number of recommendations on oversight, including recommending the creation of an independent Forensic Science Board to be responsible for the coordination, strategy and direction of forensic science and for creating and delivering a strategy that aims to promote proper understanding of forensic science in the criminal justice system.<sup>75</sup> The Committee also recommended giving the Forensic Science Regulator statutory powers to monitor and enforce compliance with forensic science standards.<sup>76</sup>

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<sup>67</sup> At [5(b)].

<sup>68</sup> Police and Criminal Evidence Act 1984 (UK), s 63AB(2), (4) and (7); and Home Office *Governance Rules for the National DNA Database Strategy Board* (June 2014) at 2.

<sup>69</sup> Protection of Freedoms Act 2012 (UK), s 20.

<sup>70</sup> Home Office “Forensic Science Regulator: About Us” <[www.gov.uk](http://www.gov.uk)>.

<sup>71</sup> Forensic Science Regulator *Terms of Reference: Forensic Science Advisory Council* (Home Office, FSR-T-C01 Issue 3, September 2020); and Forensic Science Regulator *Terms of Reference: DNA Analysis Specialist Group* (Home Office, FSR-T-C05 Version 4, September 2020).

<sup>72</sup> Biometrics and Forensics Ethics Group *Code of Practice including Terms of Reference and Working Protocol* (Home Office, November 2018) at [2.1.2].

<sup>73</sup> At [2.4.1].

<sup>74</sup> House of Lords Science and Technology Select Committee *Forensic science and the criminal justice system: a blueprint for change* (House of Lords, 3rd Report of Session 2017–2019, 1 May 2019) at [14]–[39].

<sup>75</sup> At [38]–[39].

<sup>76</sup> At [109].

## Scotland

- 5.71 In Scotland, legislation establishing a Scottish Biometrics Commissioner will come into effect on 1 December 2020.<sup>77</sup> The Commissioner's general statutory function is to support and promote the adoption of lawful, effective and ethical practices in relation to the acquisition, retention, use and destruction of biometric data for criminal justice and police purposes, including DNA samples and profiles.<sup>78</sup> In exercising this function, the Commissioner must have regard to the interests of children and young people as well as vulnerable people.<sup>79</sup>
- 5.72 The Commissioner's specific functions will include:
- (a) developing a code of practice on the acquisition, retention, use and destruction of biometric data for criminal justice and police purposes;<sup>80</sup>
  - (b) keeping under review the law, policy and practice relating to the acquisition, retention, use and destruction of biometric data by policing bodies;<sup>81</sup>
  - (c) promoting public awareness and understanding of the powers and duties those persons have in relation to the acquisition, retention, use and destruction of biometric data, how those powers and duties are exercised and how the exercise of those powers and duties can be monitored or challenged;<sup>82</sup> and
  - (d) promoting, and monitoring the impact of the code of practice, including receiving and determining complaints about a police officer or policing body's failure to comply with the code of practice.<sup>83</sup>

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<sup>77</sup> The Scottish Biometrics Commissioner Act 2020 (Commencement) Regulations 2020, reg 2. This legislation is based on recommendations made in *Independent Advisory Group on the Use of Biometric Data in Scotland* (Scottish Government, March 2018).

<sup>78</sup> Scottish Biometrics Commissioner Act 2020, s 2(1). Under s 2(2) of the Act, the Commissioner's general function does not extend to biometric data in which the Commissioner for the Retention and Use of Biometric Material has a function (discussed at [5.69(b)]). The Act defines "biometric data" in s 34(1) as:

... information about an individual's physical, biological, physiological or behavioural characteristics which is capable of being used, on its own or in combination with other information (whether or not biometric data), to establish the identity of an individual.

Section 34(2) expressly includes samples taken from any part of an individual's body from which information can be derived and information derived from such samples, as biometric data.

<sup>79</sup> Section 2(6). The term "vulnerable persons" means individuals who, by reason of their personal circumstances or characteristics, may have difficulty understanding matters relating to the acquisition, retention, use and destruction of their biometric data by or on behalf of policing bodies: s 2(8).

<sup>80</sup> Section 7. Under s 8 of the Act, when preparing a draft code of practice, the Commissioner must have regard to the importance of promoting and protecting human rights; promoting and protecting an individual's right to privacy; promoting and protecting public confidence in the acquisition, retention, use and destruction of biometric data for criminal justice and police purposes; and ensuring the safety of individuals and communities.

<sup>81</sup> Section 2(3)(a). In doing so, the Commissioner may prepare and publish a report about any matter relating to its functions and may make recommendations in relation to the technology used or capable of being used for the purposes of acquiring, retaining, using or destroying biometric data and about any other matter relating to the Commissioner's functions: s 20.

<sup>82</sup> Section 2(3)(b).

<sup>83</sup> Sections 2(3)(c) and 15. The Commissioner must prepare and publish a report about any failure to comply with the code, unless the Commissioner considers the failure is sufficiently minor not to merit it: s 20(1). Reports may include recommendations in relation to compliance: s 20(5)(a). In addition, the Commissioner can issue compliance notices requiring a person to take steps set out in the notice in order to address a failure to comply with the code: s 23.

- 5.73 The Commissioner must establish and maintain an advisory group to give advice and information to the Commissioner related to its functions.<sup>84</sup> It will have broad powers to carry out its functions, including information-gathering powers and powers to carry out or support any research it considers appropriate.<sup>85</sup>

### Ireland and Canada

- 5.74 Ireland and Canada both operate one independent statutory committee that has oversight of the operation of each jurisdiction's DNA databank.
- 5.75 In Ireland, the DNA Database System Oversight Committee oversees the management and operation of the DNA Database System for the purposes of "maintaining the integrity and security of the System".<sup>86</sup> For those purposes, the Committee must satisfy itself that statutory requirements are being complied with.<sup>87</sup> The Committee also has a range of statutory functions including overseeing arrangements, practices and procedures relating to receipt, handling, transmission and storage of samples, generation of DNA profiles, the security of the DNA Database System, the reporting of search results, destruction of samples, removal of profiles and international cooperation arrangements.<sup>88</sup> The Committee must be chaired by a serving or retired judge, and its members include the Director of Forensic Service Ireland (the forensic services provider responsible for administering the DNA database), a representative from the Data Protection Commission and three other members.<sup>89</sup>
- 5.76 In Canada, the DNA Data Bank Advisory Committee has a similar role. It has a broad function to provide advice, on its own motion or following a request from the Commissioner responsible for the National DNA Data Bank, on "any matter related to the establishment and operation of the National DNA data bank".<sup>90</sup> This enables the Committee to carry out a wide range of activities to assist the responsible Commissioner in ensuring the Data Bank operates in compliance with legislation and regulations.<sup>91</sup> The Committee also provides strategic guidance and direction concerning scientific advancements, matters of law, legislative changes, privacy issues and ethical practices.<sup>92</sup> In addition, it monitors the implementation of the spirit of DNA legislation to ensure that the privacy rights of Canadians are not being infringed upon and invites

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<sup>84</sup> Section 33.

<sup>85</sup> Sections 2(5), 4 and 16.

<sup>86</sup> Criminal Justice (Forensic Evidence and DNA Database System) Act 2014 (Ireland), s 72(1).

<sup>87</sup> Section 72(1).

<sup>88</sup> Section 72(2).

<sup>89</sup> Schedule 1, cl 1. The Data Protection Commission assumed any functions of the Data Protection Commissioner pursuant to s 14 of the Data Protection Act 2018 (Ireland).

<sup>90</sup> DNA Data Bank Advisory Committee Regulations SOR/2000-181, reg 5.

<sup>91</sup> National DNA Data Bank Advisory Committee *Annual Report 2014–2015* (October 2015) at Introduction. Some of its previous work-streams include training police and court personnel on proper procedures for collecting samples; adopting and implementing new processes and technologies such as robotic workstations, testing kits and DNA database software; carrying out assessments of the privacy implications of the NDDB in conjunction with the Privacy Commissioner; and approving recommendations regarding the use of new DNA analysis techniques. The Advisory Committee has also undertaken long-term projects such as promoting research into the probative value of forensic DNA and the role it plays in promoting public safety.

<sup>92</sup> National DNA Data Bank Advisory Committee *Annual Report 2014–2015* (October 2015) at Introduction.

complaints around privacy issues surrounding the National DNA Data Bank.<sup>93</sup> The Committee must include a representative of the Office of the Privacy Commissioner and up to six other members who may include representatives of the police, legal, scientific and academic communities.<sup>94</sup>

## Australia

5.77 Australia, like Aotearoa New Zealand, stands out among other comparable jurisdictions for the lack of any independent body with exclusive oversight of the DNA regime. Instead, Australia relies on a distributed oversight model that includes ombudsmen, police conduct authorities, privacy commissioners and the judiciary.<sup>95</sup> This model provides a degree of oversight in relation to police conduct by providing mechanisms for the independent investigation of complaints regarding the collection, use or retention of DNA samples and profiles. However, there is no broader statutory oversight regime. For example, there are no statutory arrangements for the independent oversight of new DNA analysis techniques or routine independent monitoring or auditing to identify systemic issues.

5.78 There have, however, been several calls for a more integrated system of complaint handling, monitoring and auditing to be carried out by existing independent bodies such as ombudsmen, privacy commissioners and police conduct authorities.<sup>96</sup> As one report concluded:<sup>97</sup>

Without a coordinated and integrated complaint handling, monitoring and audit framework supplemented with continuous improvement, the Review considers it likely that law enforcement agencies will miss opportunities to learn from particular incidents. Indeed, there is considerable risk that incidents will not be properly investigated.

5.79 That report also noted the need for independent scrutiny and community approval of new DNA technology or analysis techniques:<sup>98</sup>

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<sup>93</sup> Royal Canadian Mounted Police “The Privacy Implications of Forensic DNA Analysis” (24 November 2004) <[www.grc-rcmp.gc.ca](http://www.grc-rcmp.gc.ca)>.

<sup>94</sup> DNA Data Bank Advisory Committee Regulations SOR/2000-181, reg 2.

<sup>95</sup> For an overview, see discussion in Tom Sherman and others *Report of the Independent Review of Part 1D of the Crimes Act 1914: Forensic Procedures* (Attorney-General’s Department, March 2003) at 63–72.

<sup>96</sup> See Tom Sherman and others *Report of the Independent Review of Part 1D of the Crimes Act 1914: Forensic Procedures* (Attorney-General’s Department, March 2003) at 75–80; Peter Ford and others *DNA Forensic Procedures: Further Independent Review of Part 1D of the Crimes Act 1914* (30 June 2010) at Recommendation 25; Victorian Parliament Law Reform Committee *Forensic Sampling and DNA Databases in Criminal Investigations* (2004) at 462 and Recommendation 14.2; Mark Findlay *Independent Review of the Crimes (Forensic Procedures) Act 2000* (Attorney-General’s Department, 2003) at 1; and Australian Law Reform Commission *Essentially Yours: The Protection of Human Genetic Information in Australia* (ALRC R96, 2003) at 51.

<sup>97</sup> Tom Sherman and others *Report of the Independent Review of Part 1D of the Crimes Act 1914: Forensic Procedures* (Attorney-General’s Department, March 2003) at [5.103].

<sup>98</sup> At [7.24]. See also Australian Law Reform Commission *Essentially Yours: The Protection of Human Genetic Information in Australia* (ALRC R96, 2003) at [39.59]–[39.60]. Similarly, the NSW Ombudsman has called, on two separate occasions, for the NSW Parliament to consider what, if any, regulation is required of the way in which material obtained from forensic procedures may be analysed and compared: NSW Ombudsman *DNA sampling and other forensic procedures conducted on suspects and volunteers under the Crimes (Forensic Procedures) Act 2000* (October 2006) at 285 and Recommendation 104; and NSW Ombudsman *The Forensic DNA Sampling of Serious Indictable Offenders under Part 7 of the Crimes (Forensic Procedures) Act 2000* (August 2004) at 212 and Recommendation 48.

The whole issue of as yet undiscovered or undeveloped uses of DNA material is a sensitive one and care needs to be taken to ensure that the use of DNA material in law enforcement is carefully circumscribed. Any suggestion that DNA material is used for purposes such as genetic testing will quickly undermine public confidence in the system. This is not to say that at some time in the future parliament may not wish to legislate on the use of DNA for purposes other than identification. It is inevitable that this capability will develop and commercial services are already emerging. It is the opinion of this Review that as more becomes known about human DNA it will be essential to have an ongoing debate and consideration about how these new developments should be used by law enforcement. However, the use of these new developments should result from the deliberative action of parliament and not as a result of unaccountable function creep.

## RECOMMENDATIONS

### Establishing a new DNA Oversight Committee

#### RECOMMENDATION

**R8**

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

- 5.80 We recommend establishing a DNA Oversight Committee to be responsible for providing independent oversight of the DNA regime. The Committee should be established in new DNA legislation to ensure its permanence and to promote transparency and clarity around its functions.
- 5.81 In our view, there is a clear and compelling case for improving oversight of the DNA regime to identify the issues addressed above. While a wide range of different oversight frameworks could be adopted in this context, we favour a new independent body with a committee structure. We think this would best achieve our goal of constitutionally sound DNA legislation by providing a framework for Māori participation in the oversight of the DNA regime. Establishing a new independent DNA Oversight Committee would also:
- (a) ensure the body responsible for oversight of the DNA regime has the right mix of skills and expertise to perform the functions proposed below, which is not found in any existing body;
  - (b) promote best practice consistent with the approach taken in other regulatory regimes in Aotearoa New Zealand (discussed at paragraphs 5.32–5.34) and in DNA regimes in most comparable jurisdictions (discussed at paragraphs 5.69–5.76);
  - (c) ensure flexibility, with the Committee being able to meet as frequently as required and its membership able to change over time to ensure it retains the appropriate mix of expertise to address emerging issues;
  - (d) minimise establishment and operating costs to what is reasonable and proportionate, given the Committee’s specialist focus on the DNA regime; and

- (e) likely receive broad stakeholder support, given the strong support for increased oversight in our consultation (discussed above) and previous calls for the establishment of such a committee.<sup>99</sup>

### *Relationship between DNA Oversight Committee and other accountability mechanisms*

- 5.82 We recommend a new DNA Oversight Committee rather than allocating all the proposed oversight functions to an existing body such as IPCA. We recognise there is a degree of alignment between some of the oversight functions proposed below and IPCA's existing functions. However, some proposed functions, such as advising on the use of new DNA analysis techniques, would represent a fundamental shift in IPCA's role. This might undermine or obscure the proposed oversight functions or negatively impact on IPCA's existing functions.<sup>100</sup>
- 5.83 There are, however, practical advantages in aligning the roles of the DNA Oversight Committee and IPCA. We therefore recommend below that IPCA should be represented on the Committee, and that IPCA should have an additional auditing function related to the DNA regime to complement its existing complaints function. This would support the DNA Oversight Committee in performing its functions while maintaining a distinction between the Committee's strategic oversight role and IPCA's regulatory role.
- 5.84 In relation to other accountability mechanisms, below we recommend clarifying the application of the Privacy Act to DNA samples (and, by extension, the role of the Privacy Commissioner). The judiciary will also have a broader oversight role on a case-by-case basis under our recommendations in other parts of this Report, which will include approving mass screens, familial searching and the use of DNA for a different purpose than that for which it was collected.<sup>101</sup> Other existing accountability mechanisms including HRC and the Criminal Cases Review Commission will continue to play a role in oversight of the DNA regime pursuant to their broader functions.
- 5.85 We do not recommend establishing a separate statutory ethics committee. Ethics committees in comparable jurisdictions typically have a broader mandate to consider ethical issues arising from the use of biometrics more generally. We do not think it is necessary to establish a separate ethics committee solely to address ethical issues arising from the DNA regime. Rather, we consider that such issues should always be a core consideration of the DNA Oversight Committee itself.

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<sup>99</sup> In 2009, the Privacy Commissioner Marie Shroff called for improved oversight of the DNA regime and supported the establishment of an independent oversight committee: *Te Mana Matapono Matatapu | Privacy Commissioner "Submission to the Justice and Electoral Committee on the Criminal Investigations (Bodily Samples) Amendment Bill 2009"* (6 April 2009) at 5.

<sup>100</sup> Similar concerns were identified in Scotland when considering whether the Biometric Commissioner's functions should instead be conducted by one of the existing bodies responsible for the independent oversight of police. See Scottish Government *Scottish Biometrics Commissioner Bill: Policy Memorandum* (May 2019) at [39] (considering the existing regulatory bodies, Her Majesty's Inspectorate of Constabulary in Scotland and the Police Investigations and Review Commissioner).

<sup>101</sup> Mass screens are discussed in Chapter 10, and familial searching is discussed in Chapter 23. We also recommend requiring judicial approval to use an elimination sample against a person (if the results of analysis implicate the person who provided the sample as a suspect) (discussed in Chapter 9) and to use a sample required on arrest or intention to charge to conduct a databank search before that person is convicted (discussed in Chapter 18).

## Nature and composition of the DNA Oversight Committee

### RECOMMENDATIONS

- 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.

5.86 We recommend that new DNA legislation requires the Minister of Justice (as the Minister responsible for administering the new DNA legislation) to establish the DNA Oversight Committee.<sup>102</sup> We consider that a statutory committee is the most appropriate form for the new oversight body, given the proposed functions below are advisory in nature and have a specialist focus on the DNA regime and given the importance of the DNA Oversight Committee operating independently of Police and the forensic services provider, discussed in Chapter 7. The alternative would be to establish a new independent Crown entity. However, this would involve greater establishment costs.<sup>103</sup>

<sup>102</sup> Similar to the Advisory Committee on Assisted Reproductive Procedures and Human Reproductive Research, which must be established by the Minister pursuant to s 32 of the Human Assisted Reproductive Technology Act 2004.

<sup>103</sup> Establishing a new Crown entity requires the appointment of a board by the Governor-General and establishing an independent secretariat function to support the board, including the appointment of a chief executive. Crown entities are also subject to a range of governance, accountability and reporting provisions in the Crown Entities Act 2004. By

- 5.87 The size of comparable oversight committees varies,<sup>104</sup> but given the broad range of expertise the DNA Oversight Committee must hold and its proposed functions, we consider it is appropriate that membership sits between six and eight members.
- 5.88 We recommend that one member of the DNA Oversight Committee should be a member of IPCA. Members are appointed to IPCA by the Governor-General on the recommendation of the House of Representatives and must include a Judge or retired Judge who acts as chairperson.<sup>105</sup> We consider that providing for one member of IPCA (either the chairperson or another member) to also be a member of the DNA Oversight Committee will appropriately align the roles of the two bodies in the oversight of the DNA regime and promote a collaborative and coordinated approach. It also has the practical advantages of enabling the DNA Oversight Committee to draw on IPCA's specialist expertise in Police's operational environment and providing a clear communication line between IPCA's complaints and (proposed) audit functions (discussed below) and the DNA Oversight Committee.
- 5.89 Other members of the Committee should be appointed based on their relevant expertise. We suggest this should include those with experience in forensic science, ethics, criminal law and procedure, te ao Māori and tikanga Māori, privacy and human rights. We note that several comparable jurisdictions require a representative of the Privacy Commissioner (or equivalent office) to be appointed as a member of the Committee<sup>106</sup> and consider that such an approach may also be appropriate here to ensure the Board has the appropriate expertise in privacy issues. Representatives or nominees of the Human Rights Commission and the Office of the Children's Commission could also be considered.<sup>107</sup>

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way of example, the Criminal Cases Review Commission will be a Crown entity, and it is estimated to cost approximately \$2.3 million to establish and \$3.9 million per year in operating expenditure: Tāhū o te Ture | Ministry of Justice *Regulatory Impact Assessment: Criminal Cases Review Commission* (September 2018) at 3.

<sup>104</sup> In Ireland, the Committee shall be comprised of six members: Criminal Justice (Forensic Evidence and DNA Database System) Act 2014 (Ireland), sch 1, cl 1(1). In Canada, the DNA Databank Advisory Committee can be comprised of up to nine members: DNA Data Bank Advisory Committee Regulations SOR/2000-181, reg 2. In New Zealand, the size of advisory or oversight committees varies depending on the functions of the committee and their specialist expertise. For example, the proposed water services regulator, Taumata Arowai, shall be comprised of between five and seven board members: Taumata Arowai – the Water Services Regulator Act 2020, s 12. Similarly, the Criminal Cases Review Commission shall be comprised of between three and seven members: Criminal Cases Review Commission Act 2019, s 9. Finally, the Advisory Committee on Assisted Reproductive Procedures and Human Reproductive Research is comprised of between eight and twelve members: Human Assisted Reproductive Technology Act 2004, s 33.

<sup>105</sup> Independent Police Conduct Authority Act 1988, ss 5–5A.

<sup>106</sup> This is a requirement in Ireland and Canada. See DNA Data Bank Advisory Committee Regulations SOR/2000-181, reg 2; and Criminal Justice (Forensic Evidence and DNA Database System) Act 2014 (Ireland), sch 1, cl 1. In England and Wales, the FIND Strategy Board must also include a representative of the Information Commissioner in the capacity of an observer: Home Office *Governance Rules for the National DNA Database Strategy Board* (June 2014) at [5(b)(ii)].

<sup>107</sup> By way of example, the Human Assisted Reproductive Technology Act 2004 requires the Advisory Committee on Assisted Reproductive Procedures and Human Reproductive Research to include one or more members with the ability to articulate the interests of children (s 34(4)(g)), and any person appointed pursuant to that subsection must, at the time of his or her appointment, hold the office of Children's Commissioner or be a representative or employee of the person who holds that office (s 34(5)).



### *The Māori caucus*

- 5.90 We recommend that no less than three members of the DNA Oversight Committee must be Māori members. Māori members should only be appointed after appropriate consultation with Māori has been undertaken.
- 5.91 We considered the alternative option of establishing a separate Māori advisory committee to operate alongside the DNA Oversight Committee and advise on tikanga and Māori interests in the DNA regime. This could ensure a wide range of different Māori views are represented and would align with the approach taken in other areas where Māori have significant interests, such as in the regulation of natural resources.<sup>108</sup> However, further consideration and engagement revealed a range of concerns with a dual-committee approach, including the risk of overlapping functions, confusion of roles or gaps in oversight. This could result in tension emerging between the committees, especially if they become competing sources of advice. We are also concerned that a separate Māori committee that is simply advisory in nature would lack the mana to truly give effect to the Treaty guarantee of tino rangatiratanga and the Treaty principle of partnership.<sup>109</sup>
- 5.92 We have therefore recommended a single DNA Oversight Committee with a strong Māori membership (the Māori caucus) which will support a partnership approach to oversight and avoid issues inherent in a dual-committee structure. This is consistent with the broader recommendation of a mana ōrite (equal power) governance model for criminal justice sector decision making made by Te Uepū Hāpai i te Ora | Safe and Effective Justice Advisory Group.<sup>110</sup> Below we explain that the Committee should have the power to regulate its own procedures, including on matters such as whether the Māori caucus should have specific responsibilities on behalf of the Committee, such as advising on Māori interests or tikanga or exercising a form of kaitiakitanga over Māori DNA and data as part of the Committee's broad functions. We also note below that we

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<sup>108</sup> Sections 18 and 19 of the Environmental Protection Authority Act 2011 establish a Māori Advisory Committee (Ngā Kaihautū Tikanga Taiao) to provide advice and assistance from the Māori perspective to the Environmental Protection Authority (EPA) on various matters relating to the EPA's role. Sections 14 and 17 of Taumata Arowai – the Water Services Regulator Act 2020 similarly provide for the establishment of a Māori Advisory Group, which will advise the new water services regulator, Taumata Arowai, on Māori interests and knowledge as they relate to the objectives, functions and operating principles of Taumata Arowai and the duties of the board.

<sup>109</sup> Similar concerns were identified in submissions on Taumata Arowai – the Water Services Regulator Bill 2019, which proposed to establish a Māori Advisory Group to advise the board of Taumata Arowai and require the board to have regard to that advice. See Te Tari Taiwhenua | Department of Internal Affairs *Taumata Arowai – the Water Services Regulator Bill: Departmental Report* (April 2020) at [215]–[227]. The Select Committee reported that some submitters “expressed concern that these provisions were not strong enough” and were concerned “that the advice might not be followed and that there would be no way to see how the board had followed the advice”: *Taumata Arowai – the Water Services Regulator Bill 2019 (202-2) (select committee report)* at 4. The Select Committee agreed that there should be more accountability and transparency as to how the board considers the group's advice and recommended amendments to the Bill accordingly. Section 17(3)(b) of the Taumata Arowai – the Water Services Regulator Act 2020 requires the board to demonstrate how it has had regard to the group's advice in its annual report and report on situations in which it did not act on the group's advice, the reasons for that and alternative actions taken if any. The board must also provide the group with the opportunity to include commentary in the annual report on its role and the advice it has provided the board over the period of the annual report: s 17(3)(c). The Select Committee also made amendments to enable dual membership of both the Māori Advisory Group and the board in order to facilitate more effective collaboration and information sharing and enhance the relationship between the board and the group: *Taumata Arowai – the Water Services Regulator Bill (202-2) (select committee report)* at 4.

<sup>110</sup> Te Uepū Hāpai i te Ora | Safe and Effective Justice Advisory Group *Turuki! Turuki! Move Together!* (December 2019) at Recommendation 2.

expect the Māori caucus would be able to meet separately and consult with Māori to enable it to fulfil any specific responsibilities it has.

### *Role of Police and the forensic services provider*

5.93 We recommend that a representative of Police and the forensic services provider should be able to attend meetings of the DNA Oversight Committee and engage in Committee discussions, where appropriate, but that they should be excluded from the Committee's deliberations and decision making.<sup>111</sup> This will enable Police and the forensic adviser to provide information and advice to the Committee and enable the Committee to ask questions and seek clarification on operational matters to ensure it is able to make informed decisions. We do not consider it would be appropriate for the Committee's membership to include representatives from the forensic services provider or Police, as this would undermine the Committee's independent status.

## Functions of the DNA Oversight Committee

### RECOMMENDATIONS

**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.

<sup>111</sup> Similar to the model adopted under s 33(2) of the Human Assisted Reproductive Technology Act 2004 whereby each meeting of the Advisory Committee on Assisted Reproductive Procedures and Human Reproductive Research may be attended by a member of the ethics committee (which considers and determines applications relating to assisted reproductive procedures or the conduct of human reproductive research).

**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.

- 5.94 We recommend that new DNA legislation should prescribe a clear set of functions for the DNA Oversight Committee to promote transparency and certainty. The primary function of the 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 that is, to support and promote the collection and use of DNA in a manner that minimises interferences with privacy and bodily integrity, recognises and provides for tikanga Māori and is otherwise consistent with human rights values.
- 5.95 The Committee will achieve this primary function through six specific functions. We discuss these functions below.

#### *Evaluating and advising on new DNA analysis techniques*

- 5.96 The DNA Oversight Committee should be responsible for evaluating any proposed regulations to introduce new DNA analysis techniques or to remove a DNA analysis technique from existing regulations and advising the Minister accordingly. In Chapter 6, we explain this function in detail and recommend that regulations should only be made on the recommendation of the Minister after the Minister has received and considered advice from the DNA Oversight Committee.<sup>112</sup> This would address the current lack of independent scrutiny of new DNA analysis techniques identified at paragraph 5.24 above. The Committee should also have a role in advising on any other regulations made under new DNA legislation, including any regulations to introduce a new sampling procedure, discussed in Chapter 11.
- 5.97 We consider that an advisory role rather than an approval function is an appropriate degree of oversight for the DNA Oversight Committee to exercise in relation to this function. Approval would require a more formal process including rights of appeal, and we are not satisfied that the problems identified with the current lack of oversight warrant such a heavy-handed approach.

#### *Advising on practice, policy and procedure relating to the DNA regime*

- 5.98 The DNA Oversight Committee should have a role in advising on practice, policy and procedure developed by Police and the forensic services provider as it relates to the operation of the DNA regime to support and promote the purpose of new DNA legislation.
- 5.99 As we note in Chapter 3, this will enable the DNA Oversight Committee (or the Māori caucus on behalf of the Committee, as noted below) to advise Police and the forensic services provider on the collection and use of DNA in a manner that recognises and

<sup>112</sup> Similar to the statutory requirement on the responsible Minister to consult with and receive advice from the Advisory Committee on Assisted Reproductive Procedures and Human Reproductive Research before making regulations relating to assisted reproductive procedures: Human Assisted Reproductive Technology Act 2004, s 76(2).

provides for tikanga Māori. It also provides an opportunity for the DNA Oversight Committee to advise generally on the impacts of the DNA regime on privacy, bodily integrity and other human rights values.

5.100 Throughout this Report, we identify the need for the DNA Oversight Committee to be consulted in relation to the development of:

- (a) policy by the forensic services provider in relation to obtaining and storing anonymised population data (Chapter 7);
- (b) procedures and practices for explaining information to suspects who are asked to consent to provide a suspect sample (Chapter 8) and to people asked to consent to the collection of an elimination sample (Chapter 9);
- (c) practice guidelines for police officers on applying for mass screen orders (Chapter 10);
- (d) policy on sampling procedures (Chapter 11);
- (e) practice guidelines for police on collecting crime scene samples from a person (Chapter 13);
- (f) procedures to govern the storage and destruction of DNA samples and related information (Chapter 16);
- (g) policy, practice and procedure relating to the crime scene index (the Crime Scene Index Protocol) of the proposed DNA databank (Chapter 17);
- (h) policy on databank sampling (Chapter 18); and
- (i) practice guidelines setting out procedural and technical requirements applying to the conduct of familial searches (Chapter 23).

5.101 Consideration should also be given to whether this function should extend to laboratory operating procedures of the forensic services provider. As noted above, ESR's biology laboratory is independently accredited to the international standard ISO/IEC 17025. However, as we explain in Chapter 7, this standard is not specific to forensic science or to DNA analysis in particular and it does not confer accreditation on individuals working within an accredited organisation (although individuals must participate in proficiency testing). This means that, while accreditation with international standards goes some way to ensuring consistency with analytical processes, this "cannot ensure the accuracy of every result of any given examination of forensic materials".<sup>113</sup> We note that, in Ireland, the oversight committee must oversee the procedures relating to the generation of DNA profiles and "the quality control and quality assurance of those procedures" to ensure that they comply with international best practice.<sup>114</sup> While we have not identified any systemic concerns relating to ESR's practices and procedures in its work as Police's forensic services provider, it may be appropriate for the DNA Oversight Committee to perform a similar function in relation to the forensic services provider and Police.

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<sup>113</sup> House of Lords Science and Technology Select Committee *Forensic science and the criminal justice system: a blueprint for change* (House of Lords, 3rd Report of Session 2017–2019, 1 May 2019) at [79]–[80].

<sup>114</sup> Criminal Justice (Forensic Evidence and DNA Database System) Act 2014 (Ireland), s 72(2)(b).

- 5.102 We note that, in some comparable jurisdictions, the oversight body has a more active role in this area. For example, the Scottish Biometrics Commissioner must develop and publish a code of practice that police officers and policing bodies must comply with.<sup>115</sup> The FIND Strategy Board in England and Wales must also issue guidance on aspects of retention and destruction of DNA profiles.<sup>116</sup> Also in England and Wales, the Forensic Science Regulator has developed codes of practice that forensic service providers must comply with in addition to ISO/IEC 17025, including a code of practice in relation to DNA analysis.<sup>117</sup> However, in our view, Police and the forensic services provider are best placed and resourced to develop such policies and procedures themselves. The DNA Oversight Committee, rather than developing a code or guidance itself, should have the role of providing independent, specialist advice on such policies and procedures.
- 5.103 We recommend that Police and the forensic services provider should be required to have regard to any advice of the DNA Oversight Committee, to notify the Committee of any action taken to give effect to its advice and to give reasons for any decision not to act on that advice.<sup>118</sup> The DNA Oversight Committee would then be able to publicly report on the advice it provides and the outcome of that advice in its annual report (discussed below). We consider that this would provide an appropriate degree of oversight without requiring the DNA Oversight Committee to formally approve what will invariably be operational policy, practice and procedures.

### *Monitoring the operation of the DNA regime on an ongoing basis*

- 5.104 Another function of the DNA Oversight Committee should be to monitor the operation of the DNA regime by Police and the forensic services provider through its consideration of:
- (a) reports from IPCA on the exercise of its broadened functions in relation to the DNA regime (discussed below);
  - (b) information reported by Police pursuant to its reporting obligations (discussed below);
  - (c) any issues identified by the DNA Oversight Committee in the performance of its functions; and
  - (d) any other matter raised with the DNA Oversight Committee by any other person.
- 5.105 This function, like all of the DNA Oversight Committee's functions, has the objective of supporting and promoting the operation of the DNA regime in a manner consistent with the purpose of the new DNA legislation. However, in light of the disproportionate impact of the DNA regime on Māori, the Treaty guarantee of tino rangatiratanga and the Treaty principles of partnership, active protection and equity, we consider it is appropriate to highlight a specific role for the DNA Oversight Committee in relation to

<sup>115</sup> Scottish Biometrics Commissioner Act 2020, s 7.

<sup>116</sup> Police and Criminal Evidence Act 1984 (UK), s 63AB.

<sup>117</sup> Forensic Science Regulator *Codes of Practice and Conduct: DNA Analysis* (Home Office, FSR-C-108 Issue 2, 2020).

<sup>118</sup> Similar to the powers of the Independent Police Conduct Authority (IPCA) to make "recommendations" to Police following an investigation and the duty on Police to notify IPCA of the action (if any) proposed to be taken to give effect to the recommendation and give reasons for any proposal to depart from or not to implement any such recommendation: Independent Police Conduct Authority Act 1988, s 29(1). See also s 17(3) of the Taumata Arowai – the Water Regulator Act 2020, under which the Board must "have regard to" the advice of the Māori Advisory Group and demonstrate how it has had regard to that advice in its annual report, including information on situations in which it did not act on the advice and reasons for that and the alternative actions taken, if any.

monitoring the impact of the DNA regime on Māori. This would promote accountability and transparency and would provide an information basis for Police to address disparities.<sup>119</sup>

- 5.106 If an issue came to the attention of the DNA Oversight Committee through its monitoring function, it would be able to provide advice to Police and the forensic services provider in the first instance on any aspect of practice, policy and procedure to resolve that issue. If the issue is one that requires a legislative solution, the Committee should advise the Minister on the need for reform pursuant to its proposed function discussed below.

### *Approving applications to use the proposed DNA databank for research*

- 5.107 In Chapter 23, we recommend that the DNA Oversight Committee approves any internal use of the proposed DNA databank for research purposes (by Police and/or the forensic services provider on behalf of Police). Research must relate to the purpose of the new DNA legislation, and external use of the proposed DNA databank for research purposes should be prohibited.

### *Promoting understanding and awareness of the DNA regime*

- 5.108 The DNA Oversight Committee should also have a role in promoting awareness and understanding of the DNA regime. There is some evidence that the public in Aotearoa New Zealand does not have enough information to understand and evaluate Police's use of DNA.<sup>120</sup> We consider it is important that people are able to access clear and accurate information, to promote public trust and confidence in the DNA regime and to minimise the risk of reliance on misinformation. This function should include promoting awareness and understanding of the powers and duties Police has in relation to the collection and use of DNA, how those powers and duties are exercised and how the exercise of those powers and duties can be monitored or challenged.<sup>121</sup>

### *Advising the Minister on the operation of new DNA legislation*

- 5.109 Finally, we recommend that the DNA Oversight Committee has a role in advising the Minister of Justice on the operation of new DNA legislation and the need for any amendments to the legislation or regulations, as its monitoring function will put it in a good position to identify any issues that require a legislative solution.

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<sup>119</sup> See, for example, the obligations on the Chief Executive of Oranga Tamariki under s 7AA of the Oranga Tamariki Act 1989, including the obligation to ensure that policies and practices of the department "have the objective of reducing disparities" by setting measurable outcomes for Māori children. These policies and practices are subject to independent oversight by the Children's Commissioner, pursuant to s 13 of the Children's Commissioner Act 2003.

<sup>120</sup> In a public survey of 394 respondents on public understanding of the use of DNA in criminal investigations, the most common source of information was television fiction or drama (30.2 per cent) or television news or documentaries (29.4 per cent): Cate Curtis "Public Understandings of the Forensic Use of DNA: Positivity, Misunderstandings, and Cultural Concerns" (2014) 34 BSTS 21 at 28–29.

<sup>121</sup> Similar to the function of the Scottish Biometrics Commissioner under s 2(3)(b) of the Scottish Biometrics Commissioner Act 2020.

## Powers and duties of the DNA Oversight Committee

### RECOMMENDATIONS

**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.

- 5.110 We do not make detailed recommendations on how the Committee should perform its functions on a day-to-day basis. Rather, the Committee itself should have the power to regulate its own procedures, including on matters such as voting, the appointment of the chair and whether the Māori caucus should have particular responsibilities. The Māori caucus could, for example, have responsibility for advising on Māori interests and how to recognise and provide for tikanga in the DNA regime (as part of the Committee's advisory function) or to exercise a form of kaitiakitanga over Māori DNA and associated data (as part of the Committee's broad monitoring function). The Māori caucus could then meet separately and consult with Māori and others to support its performance of such responsibilities.
- 5.111 The DNA Oversight Committee should have all the powers necessary to perform its functions. This should include the power to require relevant information from Police and the forensic services provider<sup>122</sup> and to establish subcommittees or advisory panels to support its performance of its functions, either on a standing basis or as required. For example, if the Committee is asked to consider an application to approve a new DNA analysis technique, it may wish to establish an advisory panel of independent experts.
- 5.112 In the performance of its functions, the DNA Oversight Committee should also have the power to consult broadly where appropriate, including with Māori, the general public when appropriate and key stakeholders such as IPCA, the Office of the Privacy Commissioner, HRC and the Office of the Children's Commissioner.
- 5.113 The DNA Oversight Committee should be responsible for reporting annually on its activities. Annual reports should be published and tabled in the House of Representatives.<sup>123</sup> The DNA Oversight Committee should also have the power to

<sup>122</sup> Similar to the obligation on the Commissioner of Police to provide the Independent Police Conduct Authority relevant information under s 21 of the Independent Police Conduct Authority Act 1988. See also Criminal Justice (Forensic Evidence and DNA Database System) Act 2014 (Ireland), s 73.

<sup>123</sup> As required in relation to the Advisory Committee on Assisted Reproductive Technology: Human Assisted Reproductive Technology Act 2004, s 42(4).

publish periodic reports on the results of any work undertaken pursuant to its functions.<sup>124</sup>

## Independent Police Conduct Authority to exercise broader functions

### RECOMMENDATIONS

**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.

5.114 We recommend broadening the role of IPCA to include audits of the collection, use, storage and retention of DNA samples and profiles.<sup>125</sup> We agree with the observation at paragraph 5.78 made in an Australian review that, without a coordinated and integrated complaint handling, monitoring and audit framework, it is likely that opportunities to learn from incidents will be missed and that such investigations may not be properly investigated.<sup>126</sup> We therefore propose that IPCA should have the additional responsibility of conducting audits of the DNA regime alongside its existing complaints function.

<sup>124</sup> Similar to the requirements on the DNA Database System Oversight Committee in Ireland: Criminal Justice (Forensic Evidence and DNA Database System) Act 2014 (Ireland), s 74.

<sup>125</sup> As we noted above, the Independent Police Conduct Authority already performs a monitoring role in relation to places of Police detention under the Crimes of Torture Act 1989.

<sup>126</sup> Tom Sherman and others *Report of the Independent Review of Part 1D of the Crimes Act 1914: Forensic Procedures* (Attorney-General's Department, March 2003) at [5.103].



- 5.115 IPCA should convey the results of any audits to Police and the forensic services provider, along with any recommendations it considers appropriate to facilitate compliance with new DNA legislation and any relevant policy, practice or procedure.<sup>127</sup>
- 5.116 IPCA should also regularly consult with the DNA Oversight Committee on the performance of its audit function, for example, by preparing briefings for the Committee on a periodic basis. This should include consulting the Committee on IPCA's proposed audit programme so that the Committee can provide feedback, if any, on areas of the DNA regime that it considers might require particular focus. IPCA should also regularly brief the Committee on the findings and outcomes of its audits, including any action taken by Police and the forensic services provider in response to audit findings. This will support the Committee's performance of its strategic oversight role in the DNA regime.
- 5.117 This function will require IPCA to acquire appropriate expertise in forensic science. Such expertise will put IPCA in a better position to identify general or systemic issues in the DNA regime through both its complaint-handling and auditing roles.
- 5.118 We also recommend requiring IPCA to regularly brief the DNA Oversight Committee on any complaints received in relation to the DNA regime and the outcome of such complaints to support the Committee's strategic oversight role.

### Clarifying the application of the Privacy Act

#### RECOMMENDATION

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.

- 5.119 We recommend clarifying the application of the Privacy Act and its information privacy principles relating to the collection, use, storage and disclosure of personal information. We consider that it is appropriate that the same safeguards that apply to personal information derived from DNA samples also apply to the samples themselves.<sup>128</sup> As the Australian Law Reform Commission noted, when recommending a similar clarification be made to Australian legislation:<sup>129</sup>

Bodily samples constitute such an immediate source of personal information (a 'virtual medical record') that they demand similar comprehensive privacy protection.

- 5.120 The Privacy Commissioner supported clarifying that DNA samples constitute personal information under the Privacy Act (see paragraph 5.61 above).

<sup>127</sup> Like its existing powers to make recommendations following the outcome of a complaint (Independent Police Conduct Authority Act 1988, s 27(2)) and following audits of places of Police detention (Crimes of Torture Act 1989, s 27(b)).

<sup>128</sup> This is consistent with the recommendations made by the Australian Law Reform Commission, although the Commission recommended amending privacy legislation to clarify that *all* bodily samples be treated as personal information. Given the confined scope of our review, we prefer a deeming provision in new DNA legislation to clarify the situation with respect to DNA samples collected in the investigation and prosecution of offences and the investigation of missing and unidentified people only. The recommendations made by the Australian Law Reform Commission have not, to date, been adopted. See Australian Law Reform Commission *Essentially Yours: The Protection of Human Genetic Information in Australia* (ALRC R96, 2003) at 55–56 and Recommendation 8-2.

<sup>129</sup> At [8.100].

## Improving reporting requirements

### RECOMMENDATION

**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.

5.121 We recommend that new DNA legislation include comprehensive reporting requirements that require Police to publicly report annually on all aspects of the DNA regime. This should include ethnic breakdowns and breakdowns based on whether a person is a child, young person or an adult who lacks the ability to consent. This will ensure the DNA Oversight Committee can exercise its strategic monitoring role discussed above, particularly its monitoring of the impact of the DNA regime on Māori.

## Oversight of other biometrics and forensic science techniques

### RECOMMENDATION

**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.

5.122 While our review is limited to the use of DNA in criminal investigations, we note the rapid pace at which technology is developing in relation to other biometric information, such as facial recognition software, remote iris recognition and behavioural biometrics such as voice pattern analysis. Such techniques are finding favour not only with Police but also with other state agencies such as the Department of Internal Affairs, the New Zealand Customs Service and Immigration New Zealand. We are also aware of concerns in relation to existing and emerging forensic science techniques other than DNA analysis,<sup>130</sup> many of which are largely unregulated in Aotearoa New Zealand.<sup>131</sup>

5.123 In light of the rapid pace of technological development and concerns noted in other jurisdictions,<sup>132</sup> the Government should consider the adequacy of existing oversight arrangements in the fields of biometrics and forensic science.

<sup>130</sup> See, for example, concerns raised in a United States report: President's Council of Advisors on Science and Technology *Forensic Science in Criminal Courts: Ensuring Scientific Validity of Feature-Comparison Methods* (Executive Office of the President, September 2016).

<sup>131</sup> See, for example, discussion of forensic brainwave analysis and the need for independent verification of its validity in: Robin Palmer "Time to take brain-fingerprinting seriously?" [2017] 316-365 *Te Wharenga* | NZ Crim L Rev 330.

<sup>132</sup> See House of Lords Science and Technology Select Committee *Forensic science and the criminal justice system: a blueprint for change* (House of Lords, 3rd Report of Session 2017–2019, 1 May 2019).

## CHAPTER 6

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# Regulating DNA analysis

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## INTRODUCTION

- 6.1 In Chapter 3, we say that a fundamental problem with the CIBS Act is that it does not comprehensively regulate all aspects of the DNA regime. One important aspect that lacks adequate regulation is the use of DNA analysis techniques.
- 6.2 In this chapter, we explain the main methods of DNA analysis currently used, how future advances in DNA technology are anticipated to change DNA analysis and why the lack of adequate regulation is a problem. We then expand on our recommendation in Chapter 5 that the new DNA Oversight Committee should evaluate proposals to make or amend regulations under new DNA legislation approving new DNA analysis techniques.

## CURRENT LAW AND PRACTICE

### The CIBS Act

- 6.3 There is little regulation of DNA analysis in the CIBS Act. Part 2 of the CIBS Act governs the collection of DNA samples from suspects (suspect samples) for casework comparison and is based on the premise that “the analysis of the sample will tend to confirm or disprove the suspect’s involvement in the commission of the offence”.<sup>1</sup> However, there is no definition of what constitutes “analysis” of a suspect sample and no reference to the DNA analysis techniques that may be used.
- 6.4 It can be inferred from the CIBS Act that analysis of a suspect sample involves generating a DNA profile.<sup>2</sup> The CIBS Act defines DNA profile as follows:<sup>3</sup>

**DNA profile** in relation to any person, means information derived from an analysis of a sample of genetic material obtained from that person, being information—

- (a) that is clearly identifiable as relating to that person; and
- (b) that is able to be compared with information obtained from an analysis (using the same technique) of another sample of genetic material for the purpose of determining, with reasonable certainty, whether or not the other sample is from that person

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<sup>1</sup> Criminal Investigations (Bodily Samples) Act 1995, s 6(1).

<sup>2</sup> See, for example, s 76(1)(d) and (g), which impose reporting requirements on Police in relation to DNA profiles “obtained under a Part 2 procedure”. See also ss 16(3)–(4) and 23(3)–(4), which, among other things, require the Judge considering an application for a suspect compulsion order to have regard to whether or not the respondent has offered or been given an opportunity to provide a DNA sample other than by one of the prescribed sampling procedures “from which a DNA profile may be obtained”.

<sup>3</sup> Section 2 definition of “DNA profile”.

- 6.5 Because the CIBS Act does not regulate the collection and use of DNA samples from crime scenes, it is arguable whether this definition was intended to apply to crime scene profiles.
- 6.6 The CIBS Act is clearer in terms of the use of DNA samples obtained for databank searching under Parts 2B and 3 of the CIBS Act. These samples are used to generate a DNA profile that is then stored on a DNA databank.<sup>4</sup> Part 3 of the CIBS Act establishes the DNA Profile Databank (DPD), which can be used “for the purpose of forensic comparison in the course of a criminal investigation by the Police”,<sup>5</sup> while the Temporary Databank established by Part 2B is used:<sup>6</sup>
- ... to compare with unidentified DNA information obtained from the scenes of offences under investigation or otherwise in respect of which a conviction or further conviction is yet to be obtained, for the purpose of a criminal investigation by the Police into the triggering offence or any other offence ...
- 6.7 Although the CIBS Act provides for regulations to prescribe procedures for the analysis of DNA samples, no such regulations have been made.<sup>7</sup> There are, therefore, no restrictions on the type of DNA analysis that can be used to generate a DNA profile for casework comparison or databank searching.
- 6.8 There are also no parameters in the CIBS Act on how much DNA needs to be present within a sample before analysis is permitted and what information resulting from analysis may be recorded in a DNA profile.

### Other legal limitations on DNA analysis

- 6.9 While there is minimal regulation of DNA analysis under the CIBS Act, the New Zealand Bill of Rights Act 1990 (Bill of Rights Act) may be relevant. Section 21 of the Bill of Rights Act protects against unreasonable search and seizure by the State. As we explain in Chapter 2, section 21 applies whenever there is an intrusion upon a “reasonable expectation of privacy”,<sup>8</sup> and the Court of Appeal has held that, because DNA contains a “wealth of genetic information”, section 21 applies when obtaining a DNA sample directly from a known person.<sup>9</sup> We also think that a person could have a reasonable expectation of privacy in relation to the analysis or “search” of their DNA even if it is obtained in other ways, such as DNA collected from a crime scene. The question then is whether the search or seizure is reasonable.<sup>10</sup> In our view, to avoid inconsistency with section 21, any DNA analysis techniques used must be reasonable and proportionate to

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<sup>4</sup> Sections 24O and 26.

<sup>5</sup> Section 27(1)(a). The term “forensic comparison” is defined in s 2 to mean:

... the comparison of a DNA profile stored in a DNA profile databank with another DNA profile, where that comparison is undertaken for the purpose of confirming or disproving the involvement of any person in the commission of an offence

<sup>6</sup> Section 24R(1)(a).

<sup>7</sup> Sections 58 and 80(a).

<sup>8</sup> *R v Alsford* [2017] NZSC 42, [2017] 1 NZLR 710 at [63]–[64]; and *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305 at [160] and [163].

<sup>9</sup> *R v Toki* [2017] NZCA 513, [2018] 2 NZLR 362 at [15]. The Court of Appeal in *R v Toki* also cited the following two judgments: *R v T* [1999] 2 NZLR 602 (CA) at 613; and *R v Shaheed* [2002] 2 NZLR 377 (CA) at [166].

<sup>10</sup> *R v Alsford* [2017] NZSC 42, [2017] 1 NZLR 710 at [17] and [64].

the law enforcement value and public interest in the investigation and prosecution of criminal offending.<sup>11</sup>

- 6.10 The Privacy Act 1993 (and its successor, the Privacy Act 2020) might also have implications for DNA analysis. The Privacy Act prescribes rules (the information privacy principles) about how personal information should be collected, stored and disclosed.<sup>12</sup> As we explain in Chapter 5, these information privacy principles should apply to all DNA samples obtained in the investigation and prosecution of offences and the investigation of missing and unidentified people, and any information generated from the analysis of these samples, including DNA profiles. One of these principles is that an agency that holds personal information must take steps to ensure personal information it uses or discloses is accurate, up to date, complete, relevant, and not misleading.<sup>13</sup>

### Methods of DNA profiling for casework comparisons and databank searching

- 6.11 We discuss below the different DNA analysis techniques currently used for casework comparisons and databank searching in Aotearoa New Zealand. These methods all focus analysis on areas of the human genome (that is, the complete set of genetic information contained in DNA) that are known to vary among humans, rather than sequencing a person's entire genome. However, it is now possible to do exactly that. Whole genome sequencing and its implications for DNA analysis in criminal investigations are discussed below in the section on future analysis techniques.
- 6.12 ESR is responsible for conducting DNA analysis, casework comparisons and databank searching although its role is not provided for in the CIBS Act. We explore these roles in Chapter 7. In any given case, ESR and the police officer in charge of the investigation will consider together which DNA analysis technique to use. Ultimately, however, it is ESR's responsibility to decide on the method used, and it is not required to inform Police of its decision on the method used unless specifically requested.<sup>14</sup> As we discuss in Chapter 5, ESR also has a role in recommending to Police what new analysis techniques should be introduced and when a new DNA analysis kit is available for use in casework comparisons and databank searching.

### STR profiling

- 6.13 The main method of analysis in criminal investigations, both in New Zealand and elsewhere, is short tandem repeat (STR) profiling. This is used to generate DNA profiles both for casework comparisons and for databank searching.<sup>15</sup>

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<sup>11</sup> See discussion of these concepts in Chapter 2.

<sup>12</sup> Privacy Act 1993, s 6; and Privacy Act 2020, s 22.

<sup>13</sup> Privacy Act 2020, s 22 (information privacy principle 8). This reflects the language of information privacy principle 8 as expressed in the Privacy Act 2020, which differs slightly from the Privacy Act 1993 in that it includes "or disclose" after the words "use".

<sup>14</sup> Pursuant to the *Forensic Science Services Agreement between the New Zealand Police and the Institute of Environmental Science and Research Limited 2018–2021* (2018). As we discuss in Chapter 7, ESR holds accreditation as a forensic services provider. It is an accreditation requirement that the scientist discusses with the client what methods will be used. ESR advises that, as this is not practicable, an exemption from this requirement is in place that allows the scientist to proceed. However, this does not preclude discussions with police officers involved in a case as to what the scientific approach may involve.

<sup>15</sup> The analysis process involves a number of steps that lead up to a profile being generated. First, a sample may be screened for bodily fluids. A forensic scientist then extracts any DNA found, separating it from other cellular material. This may involve using "laser microdissection" to separate out cells. The next step is quantification, where the

- 6.14 STR profiling targets a number of locations (or “loci”) on the autosomal chromosomes (the 22 non-sex-marking chromosomes) where STRs are known to occur and measures how many times the STRs repeat at those loci.<sup>16</sup> There are two STRs at each locus (one inherited from each parent) known as “alleles”. A DNA profile then records the number of times the STRs repeat at each allele of the loci analysed. The current STR analysis kit used by ESR for analysing samples from known people targets 21 loci (42 alleles), and the kit used for crime scene samples targets 15 loci (30 alleles).<sup>17</sup> Both kits also analyse sex.
- 6.15 Until recently, the regions on the genome targeted by STR profiling were thought to be “non-coding” or to contain only “junk” DNA. It was therefore assumed that analysis would not reveal specific genetic information about a person, such as information about a person’s health or physical characteristics.<sup>18</sup> It is now acknowledged that personal genetic information could be derived from particular STRs (including, for instance, information that a person may have Down syndrome).<sup>19</sup> However, it is still “not possible to make useful inferences regarding a person’s externally visible traits or disease risk based on an STR profile”.<sup>20</sup>

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forensic scientist ensures the sample contains an appropriate quantity of DNA for analysis. From this point, the analysis process is automated. The DNA is amplified using the chosen DNA analysis kit, which involves the DNA being cut into tiny fragments, each portion being tagged fluorescently and then replicated millions or even billions of times. This “genetic photocopying technique” is known as polymerase chain reaction (PCR) and works by alternating cycles of heating and cooling (typically 28 to 32 cycles). The next step is to measure the size of the DNA fragments through capillary electrophoresis. This process separates clusters of like material and measures the fragments. The results appear as data on an electropherogram. The forensic scientist then interprets the electropherogram results and records the profile. The results of extraction, quantification and amplification are stored on the electronic case file by ESR.

<sup>16</sup> Short tandem repeats (STRs) are repetitive chains of the four chemical bases that make up DNA. See The Forensics Library “DNA Analysis” (22 August 2017) About Forensics UK <[www.aboutforensics.co.uk](http://www.aboutforensics.co.uk)>; and John M Butler and Dennis J Reeder “Short Tandem Repeat DNA Internet DataBase” (2 October 2020) STRBase – National Institute of Standards and Technology <<https://strbase.nist.gov>>.

<sup>17</sup> The loci are determined by the scientific community and incorporated by the DNA kit manufacturers into analysis kits. Currently, ESR uses a kit called GlobalFiler for analysing profiles from known people and a kit called Identifier for analysing profiles from crime scenes.

<sup>18</sup> See Kat Arney *Herding Hemingway’s Cats: Understanding How Our Genes Work* (Bloomsbury Publishing, London, 2016) at 23–24.

<sup>19</sup> In May 2009, Dr Martin Somerville, President of the Canadian College of Medical Geneticists, testified before the Canadian Senate stating:

The information that is obtained from the analysis of the 13 DNA markers used for identification purposes can have direct medical relevance. There are numerous claims that these regions are anonymous and, other than gender, do not provide specific medical or physical information about the donor, but the use of these markers can, in fact, detect the presence of changes in the copy number of very large segments of DNA. In other words, it is not designed to do this, but it can do it by circumstance. It is not a very sensitive way of getting medical information, but it can. The list of conditions that this type of profiling can detect includes, but is not limited to, any difference in the number of sex chromosomes as well as Down syndrome or what is commonly known as trisomy 21. DNA profiling will very effectively detect that. No DNA information is truly anonymous, since any portion of the DNA has potential to reveal personal details about an individual. It is only since the completion of the human genome project in 2003 that the complexity and relevance of what was previously labelled as junk DNA has been realized. In essence, that term has fallen out of favour.

See Standing Senate Committee on Legal and Constitutional Affairs *Public Protection, Privacy and the Search for Balance: A Statutory Review of the DNA Identification Act – Final Report* (Canadian Senate, June 2010) at 52 (citations omitted). See also Manfred Kayser “Forensic DNA Phenotyping: Predicting human appearance from crime scene material for investigative purposes” (2015) 18 FSI Genetics 33 at 46.

<sup>20</sup> National DNA Database Ethics Group (United Kingdom) *Ethical Dimensions of the Application of Next Generation Sequencing Technologies to Criminal Investigations* (March 2017) at 12; and The Royal Society and The Royal Society of Edinburgh *Forensic DNA analysis: A primer for courts* (November 2017) at 29.

### Risk of adventitious matches

6.16 Because STR profiling only targets certain loci for analysis, there is a risk that a DNA profile generated through STR analysis may match a DNA profile from another person. Some of these matches may be what are known as “adventitious matches” or “false positives” and can occur within a sizeable databank.<sup>21</sup> In 1995 when the CIBS Act was enacted, STR analysis only targeted six loci (12 alleles) for analysis, for both samples from known people and from crime scenes. The risk of an adventitious match has decreased as the number of loci targeted in STR profiling has increased.<sup>22</sup>

### Partial profiles

- 6.17 Unlike DNA samples obtained from known people, which will usually contain biological material rich in DNA,<sup>23</sup> DNA samples collected from a crime scene are often of poor quality. They may:
- (a) be degraded by environmental factors (such as moisture or heat), meaning the sample has been broken down into small pieces so only parts of the DNA may be available to analyse;<sup>24</sup>
  - (b) contain only a small amount of DNA such as only a few skin cells (small amounts of DNA are known as “trace DNA”); or
  - (c) contain a mixture of DNA from different people (mixed crime scene samples).
- 6.18 In these cases, it may not be possible to generate a complete DNA profile using STR profiling. It may only be possible to generate a partial DNA profile (if one can be generated at all). A partial profile could range from having results at nearly all the loci to having results at only one allele at one locus.
- 6.19 When a partial crime scene profile is compared to another profile, a match at only a few loci may prove to be significant. However, there is also an increased risk of an adventitious match.<sup>25</sup> The more partial the profile, the greater the risk. Below is a simplified image of what a match between a partial and complete profile could look like as compared to a match between two complete profiles.

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<sup>21</sup> Forensic Genetics Policy Initiative *Establishing Best Practice for Forensic DNA Databases* (September 2017) at 22:

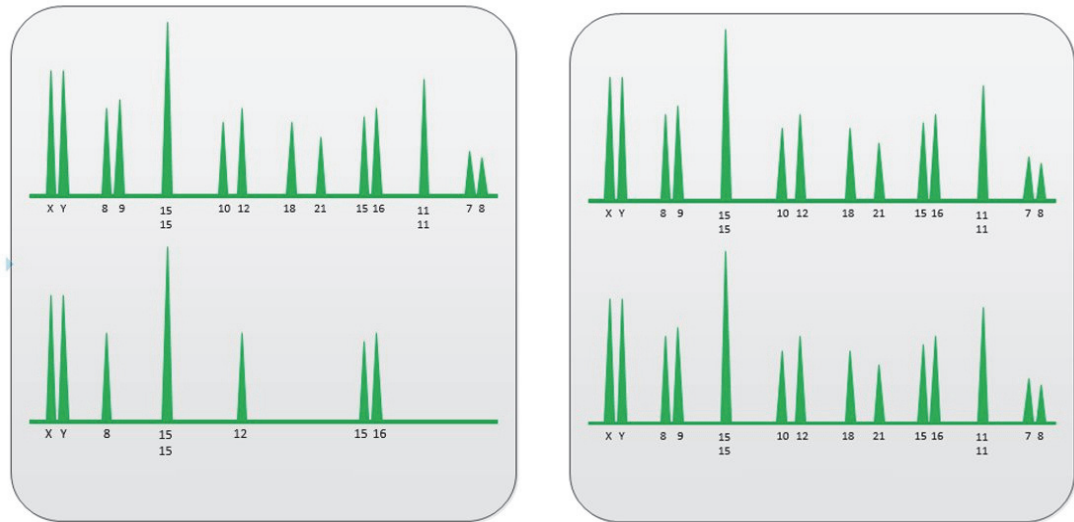
The likelihood of errors increases the larger the database is, because more samples are being analysed and more computer searches are being conducted. The expected number of false matches that will occur by chance (“adventitious matches”), assuming there are no errors or mix-ups at the crime scene or the lab, is given by the probability of a false match (i.e. a match with a DNA profile from the wrong person) times the total number of comparisons made between DNA profiles.

<sup>22</sup> In 1999, when samples were analysed at six loci, an adventitious match led to the arrest of Raymond Easton in the United Kingdom, a 49-year-old man living with advanced Parkinson’s disease. Easton was arrested and charged for a burglary approximately 175 miles away from his home. The charges were based on his DNA profile (held in the UK National DNA Database) matching a DNA sample from the crime scene, despite the fact he was unable to walk more than 10 metres without help. His DNA profile had been loaded onto the database four years earlier following a domestic dispute. The crime scene sample matched Mr Easton’s DNA profile “at six loci, which was considered enough to secure an identification at that time. The chances of a match was reported as 37-million-to-one.” Mr Easton spent several months in custody before further DNA tests eliminated him as a suspect: Sense About Science and EUROFORGEN *Making Sense of Forensic Genetics: What can DNA tell you about a crime?* (2017) at 25.

<sup>23</sup> The sampling procedures for obtaining DNA samples from known people are discussed in Chapter 11 (for casework comparison) and in Chapter 19 (for databank searching).

<sup>24</sup> Sense About Science and EUROFORGEN *Making Sense of Forensic Genetics: What can DNA tell you about a crime?* (2017) at 15.

<sup>25</sup> Human Genetics Commission *Nothing to hide, nothing to fear? Balancing individual rights and the public interest in the governance and use of the National DNA Database* (November 2009) at [3.19]–[3.22]; and Peter Gill *Misleading DNA Evidence: Reasons for Miscarriages of Justice* (Academic Press, London, 2014) at 125–128.



*A match between a partial profile and complete profile is shown in the left hand diagram. A match between two complete profiles is shown in the right hand diagram.*

#### A full casework comparison: determining the likelihood ratio

- 6.20 To counter the risk that a match may be adventitious, a full casework comparison between the profiles can be conducted by a forensic scientist to statistically determine the strength of a match. The forensic scientist calculates the likelihood of achieving certain results when a number of propositions (commonly two) are compared, for instance:
- the likelihood of obtaining the DNA profiling results if the crime scene sample came from the person in question (usually the suspect/defendant);
- as compared to:
- the likelihood of obtaining the DNA profiling results if the crime scene sample came from someone in the general population of Aotearoa New Zealand.
- 6.21 In making the overall likelihood ratio assessment,<sup>26</sup> the forensic scientist uses anonymised population frequency datasets to assess how common a particular allele is within the population and makes a statistical calculation of the likelihood of a match at that allele.<sup>27</sup> This ensures that DNA evidence is not overstated or understated by including allowances for the different population substructures within New Zealand. This assessment is made for each locus, and then all the ratios are multiplied together to obtain an overall likelihood ratio.
- 6.22 The likelihood ratio is then explained using an equivalent verbal scale<sup>28</sup> — for example, the likelihood of obtaining these DNA profiling results is at least 1 million times greater if

<sup>26</sup> Ngā Pirihimana o Aotearoa | New Zealand Police “DNA evidence at crime scenes” in *Police Manual* at 17 defines “likelihood ratio” as:

A statistical term that measures the value of a piece of evidence. Equal to the probability of seeing a piece of evidence given the prosecutor’s hypothesis, divided by probability of seeing a piece of evidence given the defence hypothesis.

<sup>27</sup> The anonymised frequency sets are discussed in Chapter 7.

<sup>28</sup> This is based on the “verbal equivalent scale” for expressing likelihood ratios that is used in Aotearoa New Zealand, which is as follows (this differs to the scale used in some other jurisdictions):



the DNA in this sample originated from Person X rather than from someone selected at random from the general population of Aotearoa New Zealand. On the verbal equivalent scale, this would provide extremely strong support for the proposition that the DNA evidence came from the person of interest. In a population of 5 million people, a likelihood ratio of 1: 1,000,000 means that there would be approximately five people with the same DNA profile. However, this does not take into account the gender of those people or their opportunity to commit the crime.<sup>29</sup>

- 6.23 When providing findings of a full casework comparison (of a suspect profile to a crime scene profile) to be used in a court setting, ESR sets out the likelihood ratio assessment in a “likelihood ratio statement”, which can be relied on as evidence in court proceedings.

### Y-STR profiling

- 6.24 The other method of analysis used to generate DNA profiles is Y-STR profiling, a type of STR profiling. Rather than analysing the autosomal (non-sex-marking) chromosomes, the Y chromosome (the male sex chromosome) is analysed at different points. Y-STR profiling can be useful in investigations into male sexual offending against a female when the crime scene sample is a mixture of male and female DNA and there is insufficient male DNA to conduct standard STR profiling. It might also be used if the crime scene sample is degraded and only the Y chromosome can be analysed.<sup>30</sup> Y-STR analysis can be used to generate profiles from both the crime scene sample and a sample from a known person and the profiles then compared. The results of comparison may rule the known person in or out of the investigation.
- 6.25 Like standard STR profiling, a full Y-STR casework comparison involves making a statistical calculation to obtain an overall likelihood ratio. In order to do this, scientists refer to anonymised Y-STR population datasets. The forensic scientist making the assessment can then identify how many times the exact same Y-STR profile as that obtained from the crime scene sample appears within each population databank.
- 6.26 ESR has routinely used Y-STR profiling for casework comparisons since 2006. In late 2018, Police gave ESR permission to begin loading crime scene profiles analysed using

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1 is neutral.

1–10 provides slight support.

10–100 provides moderate support.

100–1,000 provides strong support.

1,000–1,000,000 provides very strong support.

Over 1,000,000 provides extremely strong support.

<sup>29</sup> Even if the suspect’s DNA was found at the crime scene, the presence of DNA by itself, however, does not indicate guilt but rather that someone *may* have been present at a crime scene. In addition, as we discuss below, it has now been found that DNA can be transferred from one surface to another or stay on a surface for some time. Therefore, without other evidence, the presence of DNA at a crime scene may not even indicate someone had been present there.

<sup>30</sup> Y-STR profiling was used in *Wallace v R* [2010] NZCA 46. Mr Wallace was found guilty at trial of murder. DNA taken from the victim’s boots was linked to the appellant using Y-STR analysis (yielding a partial profile of five alleles with a likelihood ratio of 13 times more likely to have originated from the appellant’s family). See also *Carseldine v R* [2016] NZCA 573. Mr Carseldine was convicted at trial of sexual violation by unlawful sexual connection. DNA found on the complainant’s labia was 70 times more likely to have come from Mr Carseldine or a paternal relative than from any other male selected at random from the New Zealand population. For another example, see *R v Kerr* [2016] NZHC 416. Mr Kerr was found guilty at trial of blackmail. DNA was found on an envelope and letter that retracted statements made in an earlier blackmail letter. The DNA was 260 times more likely to have come from Kerr (or one of his brothers or sons) than any other males sourced from the New Zealand population.

Y-STR profiling to the Crime Sample Databank (CSD) for each new crime scene sample, alongside the usual STR profile (if one could be generated).<sup>31</sup> The aim of loading Y-STR profiles to the CSD is to find linked offending. However, Y-STR profiling is not as useful in distinguishing between individuals as standard STR profiling. This is because the Y chromosome passes down the male line largely unchanged. Therefore, male members of a family or whānau can have very similar Y-STR profiles.<sup>32</sup> A Y-STR likelihood ratio statement therefore contains a caution that it “should be noted that paternal male relatives of Mr X may not be excluded by this Y-STR DNA evidence alone”.<sup>33</sup>

### Supplementary DNA analysis techniques for crime scene samples

6.27 Scientists have developed additional DNA analysis techniques to supplement standard STR profiling in relation to degraded DNA, trace DNA and mixed crime scene samples. We describe below the main supplementary techniques in use in Aotearoa New Zealand.

#### MiniSTR analysis

6.28 Using a special analysis kit (MiniFiler), additional genetic information known as miniSTR information, can be generated at each STR. Analysing miniSTRs is useful when a crime scene sample is degraded and a complete crime scene profile cannot be generated from analysis of the STRs. MiniFiler targets eight of the same loci as with the standard STR profiling analysis kit, but as it is a more sensitive analysis technique, it is able to provide the miniSTR information. The results of analysis can be used in conjunction with results from standard STR profiling to make a “composite” crime scene profile that can be used in casework or loaded to the CSD, provided it meets ESR’s guideline criteria.<sup>34</sup>

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<sup>31</sup> ESR advises that a profile generated using early analysis kits would have only narrowed someone down to approximately a third of the Polynesian male populations of Aotearoa New Zealand. However, the Y-STR analysis kit now used (Yfiler Plus) targets parts of the Y chromosome that are rapidly mutating. ESR’s view, based on its research, is that the profiles generated from Yfiler Plus provide sufficient basis to distinguish between profiles, particularly those with similar ancestry. Due to this added discrimination ESR advises that it was deemed suitable to begin adding Y-STR profiles to the CSD. However, ESR accepts there is still a risk that the profiles of family members may not be able to be distinguished from each other and it continues to provide a caution to this effect as part of its likelihood ratio statement (see [6.26]).

<sup>32</sup> National DNA Database Ethics Group (United Kingdom) *Ethical Dimensions of the Application of Next Generation Sequencing Technologies to Criminal Investigations* (March 2017) at 18.

<sup>33</sup> An example provided by ESR is as follows:

Either a) the male DNA determined from this sample originated from Mr X; or (b) this DNA has originated from a male paternally unrelated to Mr X, selected at random from the New Zealand population and the match has occurred by chance. When considered in this way, the Y-STR profiling evidence is at least one million million ( $1 \times 10^{12}$ ) times more likely if the male DNA determined from the sample originated from Mr X, rather than from another male paternally unrelated to him and selected randomly from the New Zealand population. This finding provides scientific support for the proposition that the male DNA determined from the sample originated from Mr X. It should be noted that paternal male relatives of Mr X may not be excluded by this Y-STR DNA evidence alone.

ESR has advised that, to date, the highest possible likelihood ratio for a matching Y-STR profile in New Zealand is approximately 1:430. This is significantly lower than the likelihood ratios in the millions that are common in relation to standard STR profiling.

<sup>34</sup> According to ESR’s guidelines, composite profiles can be used for casework only if there is zero (or close to zero) “allelic drop-in” – that is, there are no random alleles in the results that may be due to contamination or effects of the testing. Each profile that makes up the composite profile has to have some of the same alleles as are in the other profiles. See Chapter 17 for discussion on the quality threshold for loading profiles to the Crime Sample Databank.

### Mitochondrial analysis

6.29 Mitochondrial (MtDNA) analysis can also be undertaken on degraded crime scene samples and on cells that have no nucleus (such as cells in a hair that has no root attached).<sup>35</sup> Mitochondria (also found in cells) have their own DNA, different from nuclear DNA which is used in STR profiling. It is inherited maternally so is the same for a mother and all her biological children. Therefore, similar issues arise as with Y-STR profiling in that it may be difficult to distinguish between profiles of family members. At present MtDNA analysis this is not conducted in Aotearoa New Zealand. Instead, ESR sends any samples overseas to be analysed. The *Police Manual* specifies that MtDNA is only to be used if “conventional DNA analysis is not possible”, for serious offences and in consultation with ESR. It also notes that it could be used for “body identification if reference samples from maternal relatives are available”.<sup>36</sup>

### Analysis of trace or low template DNA

6.30 In 2006, ESR introduced low copy number (LCN) analysis to analyse trace DNA (sometimes known as “low level” or “low template” DNA). This is a sensitive DNA analysis technique that enables a full or partial DNA profile to be generated from trace DNA such as the skin cells left behind in fingerprints. The *Police Manual* states that LCN analysis may be useful for analysing clothing that has been grabbed at by an offender or where someone has smudged a window.<sup>37</sup>

6.31 LCN analysis uses the same analysis process as with STR profiling using polymerase chain reaction to rapidly replicate a piece of DNA, generating thousands to millions of copies. With LCN analysis, cells are copied extra times. The results of LCN analysis can be used in combination with STR profiling to produce a composite profile, either for casework comparison<sup>38</sup> or databank searching.<sup>39</sup> We understand that it is more often used in casework comparisons, but only around 50 times per year.

6.32 There are several risks with the use of LCN analysis:<sup>40</sup>

- (a) First, there is a risk of contamination, either by the investigator collecting the sample or the forensic scientist conducting the analysis.<sup>41</sup> To address contamination

<sup>35</sup> See, for example, *Mikus v R* [2011] NZCA 298. Mikus was found guilty at trial of the murder of Teresa Cormack. Fourteen years after the investigation began, scientists found a potential match between the DNA in a small amount of semen found on the victim and the DNA of Mikus. To confirm the match, scientists analysed the mitochondrial DNA in three hairs that had been found on the victim’s body. These also matched Mikus.

<sup>36</sup> Ngā Pirihimana o Aotearoa | New Zealand Police “DNA evidence at crime scenes” in *Police Manual* at 5.

<sup>37</sup> At 4–5 and 15.

<sup>38</sup> In *Manoharan v R* [2015] NZCA 237 at [35]–[39] (an aggravated burglary case), the crime scene sample was of such poor quality that it was only possible to obtain a partial DNA profile containing STR results at three alleles. To obtain this result, ESR had to use LCN analysis as well as standard STR profiling. The partial profile that resulted was compared to Manoharan’s full profile (results at 15 loci or 30 alleles). The three alleles in the crime scene profile and Manoharan’s profile had the same number of STRs. Manoharan was found guilty. He unsuccessfully appealed the conviction based in part on a challenge to LCN analysis.

<sup>39</sup> However, as we discuss in Chapter 17, ESR has a quality threshold for loading profiles to the Crime Sample Databank, including composite profiles using LCN. Due to their nature, LCN crime scene profiles are less likely to reach the quality threshold. However, a one-off speculative search might be conducted.

<sup>40</sup> Other issues relevant to sensitive DNA analysis techniques generally are discussed below.

<sup>41</sup> Contamination or effects of the testing process may result in allelic drop-in: John M Butler and Carolyn R Hill “Scientific Issues with Analysis of Low Amounts of DNA” (2010) Promega Corporation <[www.promega.com.au](http://www.promega.com.au)>.

risks, ESR advises that it has an entirely separate facility for LCN analysis. Police also issues guidance to investigators swabbing for trace DNA.<sup>42</sup>

- (b) Second, due to the sensitivity of the analysis technique most samples are a mixture of DNA, and therefore some DNA revealed through analysis may be unrelated to the offence. It may be “background” DNA already present at the scene or it could have been transferred there by some other means.
  - (c) Third, random alleles can appear or disappear due to the additional copying process.<sup>43</sup> The analysis can be rerun (sometimes a number of times) to check whether the alleles appear in repeated tests. If a result is repeated, that may then be recorded in what is known as a consensus profile.
- 6.33 Due to these risks, a likelihood ratio statement for a LCN casework comparison will contain a caveat that the scientist cannot say when and how the DNA came to be at the scene and that the results may be unconnected with the offence.<sup>44</sup>
- 6.34 The *Police Manual* recommends that LCN should only be used in serious cases where other analysis techniques have failed to produce results and after consultation with an ESR scientist. It states that discussions need to be held “between the investigator and ESR scientist to understand the evaluation and evidential relevance of the findings”.<sup>45</sup>

### **Mixed crime scene samples**

- 6.35 Approximately half of all crime scene samples analysed by ESR contain DNA from more than one contributor. For example, a sample might contain DNA from a victim, the victim’s partner and the likely offender. Laser microdissection is a physical technique that can be used to separate mixed samples. It involves using a microscope with a laser to cut a particular cell type from a mixture of cells on a microscope slide.<sup>46</sup> The cells are then analysed using STR, Y-STR, miniSTR or LCN analysis.
- 6.36 Another option is to use algorithmic software to calculate which are the most likely profiles present in the DNA mixture. ESR uses a software programme called STRmix that it co-developed. Using statistical methods, STRmix builds “millions of conceptual DNA profiles” and finds the combinations “that best explain the profile”.<sup>47</sup> Specially trained forensic scientists then look at the results and determine from the information which are the most likely profiles. Those profiles can then be used in casework comparison or loaded to the CSD for databank searching as individual profiles.

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<sup>42</sup> Ngā Pirihimana o Aotearoa | New Zealand Police “DNA evidence at crime scenes” in *Police Manual* at 11.

<sup>43</sup> This is known as “stochastic effect” or “allelic drop-out”: John M Butler and Carolyn R Hill “Scientific Issues with Analysis of Low Amounts of DNA” (2010) Promega Corporation <[www.promega.com.au](http://www.promega.com.au)>.

<sup>44</sup> ESR in its submission gave two examples of such caveats: “Where DNA profiling results have been obtained, it is not possible to identify the type of cells from which the DNA has originated, neither is it possible to state when or how the cells were deposited on the item” and “[t]he relevance of these results requires careful consideration in the context of this case given the sensitivity of the techniques employed and the possibility that the DNA tested is unconnected with the offender under investigation”.

<sup>45</sup> Ngā Pirihimana o Aotearoa | New Zealand Police “DNA evidence at crime scenes” in *Police Manual* at 5.

<sup>46</sup> At 6.

<sup>47</sup> ESR “STRmix: Resolve More DNA Mixtures” (September 2020) at 2.

- 6.37 ESR's policy is that mixtures that contain DNA from up to five contributors can be "resolved" using STRmix (that is, separated into individual profiles).<sup>48</sup> Some mixtures, however, cannot be fully resolved using STRmix, and ESR may therefore load a mixed crime scene profile to the CSD if it otherwise meets the quality threshold. The use of mixed profiles in casework comparison and databank searching is discussed in Chapter 17.

## FUTURE ANALYSIS TECHNIQUES

- 6.38 Forensic scientists, academics and commentators acknowledge we are at a significant juncture in the evolution of forensic science.<sup>49</sup> Ethical decisions will need to be made regarding certain techniques now on the horizon. As we are reliant on the commercial manufacturers of DNA analysis kits, worldwide trends will impact DNA analysis in Aotearoa New Zealand.

### Massively parallel sequencing and whole genome sequencing

- 6.39 One of the most significant approaching challenges relates to the use of massively parallel sequencing (MPS), also known as next generation sequencing. This technology allows large sections of the human genome to be rapidly sequenced. It targets for analysis the single nucleotide polymorphisms (SNPs) in the genome. SNPs occur at the level of the nucleotides (the four chemical bases that make up DNA) and are the simplest and most common form of genetic variation, accounting for about 90 per cent of variations in humans. Analysing one SNP on its own would not be particularly helpful in identifying a particular person but analysing large numbers of "SNP panels" or "SNP arrays" can provide useful distinguishing information.<sup>50</sup> MPS technology is able to sequence multiple SNPs at the same time, very quickly and to a high degree of sensitivity.<sup>51</sup> This means MPS technology can provide significantly more information than standard STR profiling.
- 6.40 It is expected that MPS technology will enable whole genome sequencing to become cheaper and therefore more readily available in future. Whole genome sequencing involves identifying and recording the order of all 3 billion base pairs that make up the human genome. A profile generated using whole genome sequencing would reveal an individual's entire genetic blueprint. This technology was not available when the CIBS Act was first enacted, as the human genome was not fully mapped until 2003. It is not a preferred analysis technique currently because it is expensive and time-consuming and the resulting profile requires considerable storage space. However, with the

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<sup>48</sup> The FBI has published a study validating the use of STRmix with up to five contributors: Tamyra R Moretti and others "Internal validation of STRmix for the interpretation of single source and mixed DNA profiles" (2017) 29 FSI Genetics 126. ESR has informed us that, as of November 2019, it has validated resolution of five-person mixtures when the initial analysis kit used with the crime scene sample was Identifiler Plus.

<sup>49</sup> National DNA Database Ethics Group (United Kingdom) *Ethical Dimensions of the Application of Next Generation Sequencing Technologies to Criminal Investigations* (March 2017) at 1–3 and 11–12; and Victor Toom and others "Approaching ethical, legal and social issues of emerging forensic DNA phenotyping (FDP) technologies comprehensively: Reply to 'Forensic DNA phenotyping: Predicting human appearance from crime scene material for investigative purposes' by Manfred Kayser" (2016) 22 FSI Genetics e1 at e3.

<sup>50</sup> See The Forensics Library "DNA Analysis" (22 August 2017) About Forensics UK <[www.aboutforensics.co.uk](http://www.aboutforensics.co.uk)>.

<sup>51</sup> See generally Tracy Tucker, Marco Marra and Jan M Friedman "Massively Parallel Sequencing: The Next Big Thing in Genetic Medicine" (2009) 85 AJHG 142.

introduction of MPS technology, whole genome sequencing could become the preferred DNA analysis method internationally.<sup>52</sup> Whole genome sequencing analysis could be a first step in casework, with scientists then destroying information unnecessary for the purpose of the criminal investigation.<sup>53</sup>

- 6.41 DNA analysis kits that use MPS technology are already commercially available. These kits target the same STRs as those used in standard STR profiling so the analysis will produce profiles that can be compared to existing profiles on DNA databanks. These kits also provide additional genetic information by targeting SNPs. This could be useful in enhancing STR profiling by “enabl[ing] STR-based identification of known offenders with increased predictive value”.<sup>54</sup> It will also provide more information to assist in analysing degraded DNA samples and trace DNA and enable mixed crime scene samples to be separated into individual profiles.<sup>55</sup>
- 6.42 ESR is currently conducting validation of a DNA analysis kit that uses MPS technology.<sup>56</sup> Alongside the STR information, this kit would also target the genetic markers that determine hair colour, eye colour and ancestry. Targeting such personal genetic information is known as forensic DNA phenotyping, and this has significant implications which we discuss in Chapter 14.
- 6.43 Once validated, the new MPS analysis kit could be in use within one or two years. ESR advises that, initially at least, this kit would not replace all STR profiling kits due to cost and the time MPS analysis takes.<sup>57</sup> Instead, it would likely be used for analysing profiles for casework comparisons rather than for use in databank searching. However, this may change if it were to become more efficient to use MPS analysis kits for all profiling purposes.

### Other possible uses of MPS technology

- 6.44 In addition to whole genome sequencing, within the next 10 years, it is anticipated that MPS technology could be used for the following forms of analysis, some of which have already been conducted but will be more readily accessible with MPS technology:

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<sup>52</sup> In England and Wales, the National DNA Database Ethics Group (now the Biometric Forensics Ethics Group) wrote in 2017 that “[i]t is likely that whole genome sequencing of individuals will be cost effective for forensic application within a few years”: National DNA Database Ethics Group (United Kingdom) *Ethical Dimensions of the Application of Next Generation Sequencing Technologies to Criminal Investigations* (March 2017) at 14.

<sup>53</sup> At 19.

<sup>54</sup> At 15.

<sup>55</sup> At 4 and 13–14.

<sup>56</sup> Validation is of the MiSeq kit developed by the company Illumina. Validation involves conducting testing to ensure that the results claimed by the manufacturers can be reproduced in the New Zealand environment using samples from different population groups. This testing takes several years. See ESR *Forensic: Crime Science and Intelligence 2016–2017* (2017) at 7.

<sup>57</sup> ESR advises that it may take half a day to conduct STR analysis of a sample, whereas massively parallel sequencing analysis currently takes two to three days.

- (a) Conducting whole exome sequencing: sequencing of the protein coding genes in the genome.<sup>58</sup>
  - (b) Mitochondrial sequencing: sequencing of the mitochondria, which is maternally inherited.<sup>59</sup>
  - (c) Epigenetics: a form of analysis that looks at the chemical modification of the DNA sequence, affecting how DNA is expressed. This analysis is useful, for instance, in determining someone’s age or distinguishing between identical twins.<sup>60</sup>
  - (d) Metagenomics, including the analysis of the human microbiome: the collection of microorganisms that inhabit the human body including the genes and genomes of the microbiota as well as the products of the microbiota and environment.<sup>61</sup>
  - (e) Ribonucleic acid (RNA) analysis: RNA is present in all living cells and is essential to the coding, decoding, regulation and expression of genes. RNA analysis enables different human tissue types to be distinguished from each other (for instance, menstrual blood versus arterial blood).<sup>62</sup>
- 6.45 ESR is currently exploring the use of MPS technology to conduct whole genome sequencing, epigenetics and mitochondrial sequencing.<sup>63</sup>

### Portable rapid DNA analysis

- 6.46 Another likely change in the next few years relates to the anticipated introduction of rapid DNA devices.<sup>64</sup> These are portable machines that can conduct standard STR profiling within hours, either from DNA samples from known people or collected at crime scenes. This could enable DNA profiling at crime scenes or in police stations. ESR advises that there are no plans yet to introduce this technology, as it is currently more cost-effective to analyse samples from known people at laboratories and the machines are not yet sufficiently reliable to analyse and produce profiles from a range of crime scene samples.

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<sup>58</sup> Whole exome sequencing looks at the protein-coding part of DNA, which contains around 85 per cent of known disease-causing variants: National DNA Database Ethics Group (United Kingdom) *Ethical Dimensions of the Application of Next Generation Sequencing Technologies to Criminal Investigations* (March 2017) at 14.

<sup>59</sup> See the discussion at [6.29] above. The massively parallel sequencing kit being validated by ESR enables mitochondrial sequencing.

<sup>60</sup> National DNA Database Ethics Group (United Kingdom) *Ethical Dimensions of the Application of Next Generation Sequencing Technologies to Criminal Investigations* (March 2017) at 9 and 15–16. See generally Peter Gunn, Simon Walsh and Claude Roux “The nucleic acid revolution continues – will forensic biology become forensic molecular biology?” (2014) 5(44) *Frontiers in Genetics* 1.

<sup>61</sup> National DNA Database Ethics Group (United Kingdom) *Ethical Dimensions of the Application of Next Generation Sequencing Technologies to Criminal Investigations* (March 2017) at 9 and 16.

<sup>62</sup> At 4. ESR noted in its 2019 Statement of Corporate Intent that its planned initiatives include identifying human tissue sources of biological fluids and cells with sensitive new technologies such as RNA analysis: ESR *Statement of Corporate Intent 2019–2024* (2019) at 17. Since 2001, ESR has been using an analysis kit that it developed – Celltyper 2 – to analyse messenger RNA (mRNA), a subtype of RNA, to identify body fluids such as blood, menstrual blood, vaginal fluid, saliva or semen. Celltyper 2 uses polymerase chain reaction (the same analysis technique as used with STR profiling and other techniques): ESR *Annual Report 2018* (2018) at 33; and ESR “DNA profiling for forensics” <[www.esr.cri.nz](http://www.esr.cri.nz)>.

<sup>63</sup> ESR *Annual Report 2018* (2018) at 34.

<sup>64</sup> Nathan Scudder and others “Massively parallel sequencing and the emergence of forensic genomics: Defining the policy and legal issues for law enforcement” (2018) 58 *Science & Justice* 153 at 154.

## ISSUES

- 6.47 There is a clear public interest in enabling Police to utilise new DNA technology in criminal investigations where that technology can provide meaningful assistance in the investigation and prosecution of offending. The ability to detect smaller and smaller amounts of DNA through sensitive analysis techniques such as LCN analysis has been beneficial in “enabling difficult cases to be resolved, and the perpetrators brought to justice”.<sup>65</sup>
- 6.48 However, the minimal statutory regulation of DNA analysis and the rapidly evolving scientific advances over the past 25 years since the CIBS Act’s enactment raise concerns about the CIBS Act’s ability to ensure that the use of DNA in criminal investigations:
- (a) minimises intrusions on privacy and applicable tikanga Māori; and
  - (b) adequately protects against the risk of overestimating the probative value of DNA evidence, which could, in a worst-case scenario, contribute to wrongful conviction.
- 6.49 We discuss these concerns below. In addition, the lack of independent oversight of the introduction of DNA new analysis techniques and their use raises general issues about the lack of transparency and accountability in the DNA regime. These issues are explored in Chapter 5, where we discuss the need for Māori oversight to give effect to te Tiriti o Waitangi | the Treaty of Waitangi (the Treaty) and enable the recognition of and provision for applicable tikanga.

### Privacy and tikanga Māori

- 6.50 The purpose of DNA analysis in criminal investigations is to reveal information about the person who is the source of the DNA sample and is, therefore, inherently intrusive of an individual’s privacy. It might also intrude on collective privacy because DNA is hereditary material. In te ao Māori, DNA has been described as taonga, and the information generated from DNA about a person’s whakapapa is considered a taonga that is tapu. The use of DNA and the whakapapa information it contains may therefore impact on Māori rights and interests, including in terms of tikanga associated with personal tapu, mana, and whakapapa. These concepts are described in Chapter 2.
- 6.51 However, different DNA analysis techniques generate different amounts and types of information in different ways. Each technique’s impact on privacy and tikanga must therefore be considered separately. Below, we consider some of the potential privacy and tikanga implications of current and future DNA analysis techniques.

### STR profiling, LCN and miniSTR analysis

- 6.52 STR profiling was the only available method of analysis when the CIBS Act was enacted. As noted at paragraph 6.15, at that time, STR profiling was thought to target areas of the genome that do not reveal information about an individual’s genetic characteristics. Indeed, it is the fact these markers were said to provide limited personal information

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<sup>65</sup> Sense About Science and EUROFORGEN *Making Sense of Forensic Genetics: What can DNA tell you about a crime?* (2017) at 16.



that provided the underlying justification for the State obtaining and analysing an individual's DNA:<sup>66</sup>

... compulsory DNA collection programs [rest] heavily on the distinction between the use of DNA to discern “meaningless” identifier traits versus those associated with some personal characteristic.

- 6.53 While it is now acknowledged that some personal information could be derived from particular STRs, commentators accept that standard STR profiling has delivered a “robust, generally privacy-compliant system for more than twenty years”.<sup>67</sup> We agree that STR profiling continues to present a justified privacy intrusion in the context of investigating criminal offending.
- 6.54 LCN analysis and the analysis of miniSTRs enhance the information on the same STRs as those targeted by STR profiling. As with standard STR profiling, we consider that, in the context of criminal investigations, this is a justified intrusion. However, as we discuss below, the use of LCN analysis raises other concerns.

### *Y-STR profiling and MtDNA analysis*

- 6.55 Y-STR profiling is more invasive than standard STR profiling. It can reveal sensitive personal information such as information about infertility.<sup>68</sup> It also risks revealing previously unknown or concealed familial relationships because, as noted at paragraph 6.26, male members of a family, whānau or even ancestry grouping can have very similar Y-STR profiles.
- 6.56 Despite these concerns, we consider the use of Y-STR analysis in casework comparisons in sexual offending cases is reasonable, given the seriousness of the offending and the utility of the technique in assisting to isolate the male offender's DNA that may otherwise be difficult to profile.
- 6.57 However, we have concerns about using Y-STR profiles in databank searching. Because Y-STR profiles are very similar, databank searching is less effective as an intelligence tool than standard STR profiling. It also operates in effect as a form of “familial searching”, providing a means to police families, whānau or ancestry groupings rather than individuals. For Māori, this involves the use of whakapapa information, which, as noted above, is considered a taonga and gives rise to certain rights and responsibilities in accordance with tikanga, such as to exercise kaitiakitanga with respect to whakapapa. The potential for its use to have a disproportionate impact on Māori also risks inconsistency with the Treaty and its principles. We discuss these issues in Chapter 2 and, in the context of familial searching, in Chapter 23.
- 6.58 There is also a concern that Y-STR linking or research on Y-STR profiles could lead to suggestions of a “criminal gene” running through certain family or ancestry groups.<sup>69</sup>

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<sup>66</sup> Victor Toom and others “Approaching ethical, legal and social issues of emerging forensic DNA phenotyping (FDP) technologies comprehensively: Reply to ‘Forensic DNA phenotyping: Predicting human appearance from crime scene material for investigative purposes’ by Manfred Kayser” (2016) 22 FSI Genetics e1 at e3.

<sup>67</sup> Nathan Scudder and others “Forensic DNA phenotyping: Developing a model privacy impact assessment” (2018) 34 FSI Genetics 222 at 223.

<sup>68</sup> National DNA Database Ethics Group (United Kingdom) *Ethical Dimensions of the Application of Next Generation Sequencing Technologies to Criminal Investigations* (March 2017) at 6.

<sup>69</sup> In England and Wales, the National DNA Database Ethics Group (now the Biometric Forensics Ethics Group) identified that this may be a risk with MPS technologies, which “will allow the possibility of going further without a separate workflow to reveal relationships that most people would be unaware of and could result in suggestions of a ‘criminal

While the ethnicity of crime scene profiles on the CSD is unknown, Māori over-representation in the criminal justice system (discussed in Chapter 3) suggests that Māori may be similarly over-represented on the CSD and could therefore be disproportionately affected.

- 6.59 Similar concerns have been identified in England and Wales where, in 2014, the National DNA Database Ethics Group advised that Y-STR information should only be used on a case-by-case basis for serious crimes and only after approval from the National DNA Database Strategy Board.<sup>70</sup> It cautioned against “opening the door to routine/speculative searches of genealogical links between males”.<sup>71</sup> Updating its advice in 2017, the Ethics Group noted that, if newer technologies, such as MPS technology, are to provide Y-STR information by default, then “its governance must be considered”.<sup>72</sup>
- 6.60 Like Y-STR analysis, MtDNA analysis, which targets maternally inherited mitochondria, is a technique we consider proportionate for casework comparisons in certain situations, for example, if a profile cannot otherwise be generated from degraded DNA. However, it would be unduly intrusive if it was used for databank searching, as it has the potential to reveal predictive health information.<sup>73</sup> Additionally, maternal family members have similar MtDNA profiles, and therefore, if used with databank searching, this would raise similar issues as those identified with Y-STR profiling.<sup>74</sup>

### **MPS technology and whole genome sequencing**

- 6.61 As explained at paragraph 6.40 above, MPS technology has the potential to make whole genome sequencing a viable analysis technique in future. Such analysis would result in a DNA profile containing significant and sensitive information about an individual, including information about disease and health and relatedness. It would also provide information about an individual’s relatives and whakapapa, past, present and future. In other words, whole genome sequencing would produce much more information than is reasonably required to identify the person who is the source of the DNA source using DNA profiling and would therefore constitute a significant intrusion on privacy and applicable tikanga Māori, particularly tikanga associated with whakapapa.
- 6.62 In the more immediate future, MPS technology could be used to analyse genetic markers for physical appearance and ancestry. We have concerns about this type of analysis, which we explore in detail in Chapter 14.

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gene””: National DNA Database Ethics Group (United Kingdom) *Ethical Dimensions of the Application of Next Generation Sequencing Technologies to Criminal Investigations* (March 2017) at 19.

<sup>70</sup> At 18, n 6.

<sup>71</sup> At 18.

<sup>72</sup> At 18.

<sup>73</sup> At 6.

<sup>74</sup> Nathan Scudder and others “Massively parallel sequencing and the emergence of forensic genomics: Defining the policy and legal issues for law enforcement” (2018) 58 *Science & Justice* 153 at 154; and National DNA Database Ethics Group (United Kingdom) *Ethical Dimensions of the Application of Next Generation Sequencing Technologies to Criminal Investigations* (March 2017) at 9. Massively parallel sequencing technology will allow mitochondrial analysis to be conducted within New Zealand by ESR, whereas it is currently conducted overseas.

- 6.63 Other possible future uses of MPS technology, such as epigenetics, whole exome sequencing and microbiome analysis, also have far-reaching privacy implications including, for example, the potential to reveal health and disease information.<sup>75</sup>
- 6.64 Some commentators suggest that portable rapid devices may in time use MPS technology that routinely targets phenotypic information and therefore provide investigators with “near-immediate information about the likely appearance of a suspect, even without establishing identity using databases”.<sup>76</sup> Concerns about forensic DNA phenotyping also go hand in hand with disquiet about the reliability of such devices.

### Overestimating the probative value of DNA evidence

- 6.65 The use of new DNA analysis techniques that can produce more information from degraded DNA, trace DNA and mixed DNA samples may help to reduce the risk of an adventitious match that could, in a worst-case scenario, contribute to a person being wrongly accused or convicted. However, regardless of the analysis technique or kit used, the increased sensitivity of analysis techniques comes with risks. As the Government Chief Scientific Adviser in England and Wales noted in 2015:<sup>77</sup>

... new capabilities create other challenges for our existing systems; in particular, our ability to analyse may outstrip our ability to interpret. Because we can identify very small traces of a substance, we need greater certainty in understanding their significance and better ways to communicate different levels of confidence.

- 6.66 We discuss some of these risks below.

### Reliability of sensitive DNA analysis techniques and results

- 6.67 Some risks come from the techniques used. For example, there has been international debate amongst forensic scientists regarding the reliability of LCN analysis due to the presence of random alleles in results, discussed at paragraph 6.32(c) above. Some scientists consider LCN should not be used as it leaves too much interpretation to the discretion of forensic scientists. Others, however, consider that repeat testing to construct a “consensus” profile is a robust approach.<sup>78</sup> We discuss the validation of new techniques further in Chapter 7.
- 6.68 Whatever technique is used for analysis, the reliability of results will always depend on the quality and amount of DNA in a crime scene sample itself and the quality standards

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<sup>75</sup> See discussion in National DNA Database Ethics Group (United Kingdom) *Ethical Dimensions of the Application of Next Generation Sequencing Technologies to Criminal Investigations* (March 2017) at 7–8.

<sup>76</sup> Nathan Scudder and others “Massively parallel sequencing and the emergence of forensic genomics: Defining the policy and legal issues for law enforcement” (2018) 58 *Science & Justice* 153 at 154.

<sup>77</sup> Government Office for Science *Forensic Science and Beyond: Authenticity, Provenance and Assurance – Annual Report of the Government Chief Scientific Adviser 2015* (2015) at 6 as cited in House of Lords Science and Technology Select Committee *Forensic science and the criminal justice system: a blueprint for change* (House of Lords, 3rd Report of Session 2017–2019, 1 May 2019) at [156].

<sup>78</sup> Erin E Murphy *Inside the Cell: The Dark Side of Forensic DNA* (Nation Books, New York, 2015) at 331–334. We understand there is still division amongst forensic scientists about its use. ESR takes the consensus approach to low copy number analysis.

of the laboratory undertaking the work. The Royal Society and the Royal Society of Edinburgh note, in their primer for the courts on forensic DNA analysis, that:<sup>79</sup>

There will always come a point below which no software or method of interpretation can deal effectively with the level of variability in extremely low-level DNA profiles and such profiles should not be interpreted. There is no simple way of defining the lowest-level profile that should be interpreted. A scientist should always stay within the validated range for his or her interpretation methods using the relevant laboratory equipment and tests and should not attempt to interpret profiles that fall outside this range.

- 6.69 Therefore, the sensitivity of the techniques requires forensic scientists to take considerable care, both when conducting analysis and interpreting the results.<sup>80</sup> When degraded DNA, trace DNA or mixed samples are being analysed, it is highly likely that only a partial profile will be generated. As noted at paragraph 6.19 above, partial profiles increase the risk of an adventitious match.

### *Risk of contamination*

- 6.70 As the sensitivity of DNA analysis increases, the required size of the DNA sample reduces, yet this greatly increases the risk of contamination. This is because:<sup>81</sup>

... the impact of DNA contamination can be greater when the amount of DNA in the evidence sample is very small – if there is very little DNA to begin with, then even a minute amount of contaminating DNA could ‘take over’, with the result that only the contaminant DNA and not the source DNA is seen.

- 6.71 Consequently, there is a risk of the results being “more prejudicial than probative”.<sup>82</sup> As we noted in the Issues Paper, there have been cases in other jurisdictions where sample contamination has resulted in wrongful convictions.<sup>83</sup> That risk may increase if cold cases are re-examined using more sensitive DNA analysis techniques, as the necessary precautions against contamination that will be required may not have been taken when the samples were collected.<sup>84</sup>

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<sup>79</sup> The Royal Society and The Royal Society of Edinburgh *Forensic DNA analysis: A primer for courts* (November 2017) at 39.

<sup>80</sup> Leading forensic scientist Peter Gill has highlighted the considerable risks with forensic scientists interpreting DNA evidence generated using sensitive techniques. These risks include the risk of confirmation bias, that partial profiles will lead to adventitious matches, the effect of contamination and that DNA is easily shed but can remain on surfaces for months and be transferred from one person and object to another. For a comprehensive discussion, see Peter Gill *Misleading DNA Evidence: Reasons for Miscarriages of Justice* (Academic Press, London, 2014). Some of these risks are considered below.

<sup>81</sup> The Royal Society and The Royal Society of Edinburgh *Forensic DNA analysis: A primer for courts* (November 2017) at 37.

<sup>82</sup> Anna Sandiford has noted that: “If the risk of accidental contamination cannot be mitigated, any low template DNA results may not be reliable and are potentially more prejudicial than probative”: Anna Sandiford *Forensic Science and the Law: A Guide for Lawyers, Police and Expert Witnesses* (2nd ed, Thomson Reuters, Wellington, 2019) at 347.

<sup>83</sup> Issues Paper at [7.76]–[7.79]. In 1999, there was also a similar contamination case in New Zealand, although this was before sensitive forms of DNA analysis were adopted. The case led to an external inquiry and to substantial improvements to ESR’s premises and anti-contamination policies and procedures. See Thomas Eichelbaum and John Scott *Report on DNA Anomalies for the Minister of Justice* (30 November 1999).

<sup>84</sup> Anna Sandiford *Forensic Science and the Law: A Guide for Lawyers, Police and Expert Witnesses* (2nd ed, Thomson Reuters, Wellington, 2019) at 347–349.

- 6.72 There is, therefore, a need for “constant vigilance against contamination” and adherence to international standards (including laboratory accreditation).<sup>85</sup> The matter of accreditation is discussed in Chapter 7.

### *Persistence and transfer of DNA*

- 6.73 The results of sensitive DNA analysis techniques will nearly always contain a mixture of DNA due to its “super-abundance and persistence”.<sup>86</sup> Therefore, for the forensic scientist, assessing what DNA is relevant to the investigation is a difficult decision.<sup>87</sup>
- 6.74 Studies have shown that DNA can remain or “persist” on surfaces, in some instances, for months.<sup>88</sup> Therefore, DNA collected from a crime scene could have been present prior to the crime having been committed. Studies have also shown that DNA can be transferred from one person to another or from one surface to another.<sup>89</sup> For example, the offender may have shaken hands with someone prior to committing the offence and that person’s DNA may have transferred from the offender’s hand to the knife found at the crime scene, or the murder weapon could have been a kitchen knife that had been handled by multiple people in a household.
- 6.75 There are still questions about the persistence and transfer of DNA, such as how long after a transfer of material can DNA related to that transfer still be recovered or how much DNA will be transferred by a specific type of contact.<sup>90</sup> Without better empirical data on these matters, “interpretations of results by experts in court must remain subjective”.<sup>91</sup>
- 6.76 A lack of understanding of the scientific issues and of probabilistic reasoning by legal professionals means that trace DNA evidence can be given more weight than it deserves. As the House of Lords Science and Technology Committee noted in its 2019 report on forensic science and the criminal justice system:<sup>92</sup>

It is widely (but wrongly) assumed that if the ‘trace’ is DNA or a fingerprint [then] the profile match is equivalent to an identification, i.e. that the trace must have come from the

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<sup>85</sup> The Royal Society and The Royal Society of Edinburgh *Forensic DNA analysis: A primer for courts* (November 2017) at 32.

<sup>86</sup> Robin Williams and Matthias Wienroth *Ethical, Social and Policy Aspects of Forensic Genetics: A Systematic Review* (15 May 2014) at 26.

<sup>87</sup> There is a risk in these situations of confirmation bias, that is “[t]he tendency to interpret new evidence as confirmation of one’s existing beliefs or theories”: Sense About Science and EUROFORGEN *Making Sense of Forensic Genetics: What can DNA tell you about a crime?* (2017) at 37.

<sup>88</sup> The Royal Society and The Royal Society of Edinburgh *Forensic DNA analysis: A primer for courts* (November 2017) at 48.

<sup>89</sup> Transference of DNA through touch depends on a number of factors including whether surfaces are wet or dry, smooth or rough and how absorbent, how intense the contact is (“a brief touch or a robust handshake”) and how long since a person washed their hands. Even instances of tertiary transfer have been identified. Tertiary transfer (or secondary transfer) occurs when DNA from a person is transferred to an object, to a second person and then finally to a second object. Transference of DNA remains the “subject of continuing research”: The Royal Society and The Royal Society of Edinburgh *Forensic DNA analysis: A primer for courts* (November 2017) at 46–48. See also Sense About Science and EUROFORGEN *Making Sense of Forensic Genetics: What can DNA tell you about a crime?* (2017) at 16–22.

<sup>90</sup> The Royal Society and The Royal Society of Edinburgh *Forensic DNA analysis: A primer for courts* (November 2017) at 48.

<sup>91</sup> House of Lords Science and Technology Select Committee *Forensic science and the criminal justice system: a blueprint for change* (House of Lords, 3rd Report of Session 2017–2019, 1 May 2019) at [129].

<sup>92</sup> At [128] (quoting a professor from the Alan Turing Institute).

person. However, because many forensic traces from crime scenes are only ‘partial’ and may be subject to various types of contamination, the resulting ‘profile’ is not sufficient to ‘identify’ the person; many people would have a partial profile that matches.

- 6.77 There is therefore a risk that DNA results produced through sensitive analysis techniques could wrongly implicate someone and could, in a worst-case scenario, contribute to a wrongful conviction.<sup>93</sup> The Royal Society and The Royal Society of Edinburgh note “a DNA ‘match’ alone should never be used to imply a suspect’s involvement in a crime”,<sup>94</sup> and leading experts in the United Kingdom and Europe have called for DNA evidence to never be the sole evidence in a criminal case but to be considered alongside other evidence:<sup>95</sup>

Even if DNA is detected at a crime scene, this doesn’t establish guilt. Accordingly, DNA needs to be viewed within a framework of other evidence, rather than as a standalone answer to solving crimes.

### **Additional risks associated with mixed DNA samples**

- 6.78 As noted above, when a crime scene sample contains a mixture of DNA from a number of contributors, algorithmic software programmes such as STRmix can separate the DNA into the most likely individual contributor profiles. The use of such software programmes relies on the judgement of the forensic scientist at a number of points in the process. For example, for each mixture, the forensic scientist needs to estimate the number of likely contributors in the mixture and input that number. However, if the scientist’s estimate is wrong, the results may be misleading or even result in an adventitious match. As one academic specialising in forensic genetics notes:<sup>96</sup>

The more people that appear to be in the mixture, the less sure you can be about the actual number of contributors. For example, about 40% of mixtures from five people actually look like a three person mixture, and virtually none would show a definite indication of 5 contributors because people share many of the same markers.

- 6.79 As noted above, some mixed DNA samples cannot be resolved into individual contributor profiles. It is ESR’s policy that mixed profiles can be loaded to the CSD if they meet certain quality criteria. However, as we discuss in Chapter 17, there is a greater risk of adventitious matches when using mixed profiles in databank searching.

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<sup>93</sup> One such case involved a British taxi driver, David Butler, whose DNA was recovered from the fingernails of murdered sex worker Anne Marie Foy. The amount of DNA found by police was tiny but enough to generate a hit against the United Kingdom’s National DNA Database (from a burglary complaint he had made years earlier). He denied ever having met the victim. Despite other compelling evidence, the DNA evidence was enough for him to be charged with murder. Butler’s defence established that he had a dry skin condition and suggested his skin cells had transferred to bank notes that were later used to pay Ms Foy – an example of secondary DNA transfer – or they had been transferred to her through other innocent means. Butler was eventually acquitted. See Sense About Science and EUROFORGEN *Making Sense of Forensic Genetics: What can DNA tell you about a crime?* (2017) at 21.

<sup>94</sup> The Royal Society and The Royal Society of Edinburgh *Forensic DNA analysis: A primer for courts* (November 2017) at 35.

<sup>95</sup> Sense About Science and EUROFORGEN *Making Sense of Forensic Genetics: What can DNA tell you about a crime?* (2017) at 7 (citations omitted).

<sup>96</sup> At 15.

## OPTIONS FOR REFORM

- 6.80 In the Issues Paper, we identified several options for reform:<sup>97</sup>
- (a) Prescribing in legislation the DNA analysis techniques that may be used in casework comparisons and databank searching. Parliament could seek independent advice from the scientific community for this purpose.
  - (b) Prescribing in legislation a decision-making process that Police and ESR must follow when deciding whether to introduce new DNA analysis techniques. This could include a requirement to take into account specific considerations such as scientific validity, cost, ethical and legal implications (including the Treaty, tikanga, the Bill of Rights Act and privacy) as well as a requirement to consult with key stakeholders.
  - (c) Requiring independent pre-approval of the use of new DNA analysis techniques in criminal investigations by an independent oversight body. Pre-approval could solely involve consideration of scientific validity or could consider the broader set of considerations identified at (b) above.
  - (d) Recognising the role of Police’s forensic services provider, performed by ESR, in legislation. We address the role of the forensic services provider in Chapter 7.
  - (e) Limiting DNA analysis or routine analysis to those techniques that target non-coding regions of the genome, for example, by defining “DNA profile” in legislation in a way that is limited to information from the non-coding part of DNA.
- 6.81 We also identified reform options to respond to the risks associated with the use of increasingly sensitive DNA analysis techniques and trace DNA. We suggested the following options:<sup>98</sup>
- (a) Requiring the forensic services provider to have policies compliant with international best practice to ensure rigour in the collection of DNA from crime scenes, improvement of laboratory procedures for analysis and more constraints around the extent and timing of communications between a forensic scientist and investigating police officer.
  - (b) Requiring an independent oversight body to review the forensic services provider’s policies for consistency with the Treaty, tikanga and human rights and to play a role in public education on the risks of sensitive DNA analysis techniques.
  - (c) Empowering an independent body, such as the Criminal Cases Review Commission, to review any conviction based solely on trace DNA evidence.
- 6.82 We also noted two options for reform that fall outside of our terms of reference: improving the understanding of jurors and prohibiting convictions based solely on DNA evidence.<sup>99</sup>

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<sup>97</sup> Issues Paper at [7.56]–[7.70] and [7.91]–[7.94].

<sup>98</sup> At [7.82]–[7.83].

<sup>99</sup> At [7.81].

## RESULTS OF CONSULTATION

### General comments on new DNA analysis techniques

- 6.83 We received six submissions that commented generally on the introduction of new DNA analysis techniques. The New Zealand Law Society (NZLS) and the New Zealand Bar Association (endorsing NZLS's submission in its entirety) expressed concern about the funding required for the courts and counsel to understand emerging techniques and the ability to "address them through the usual filters by which admissibility of evidence ... is considered".
- 6.84 The Public Defence Service (PDS) had concerns about the accuracy of new techniques and the risk they may cause a miscarriage of justice. In its view, significant weight is placed on DNA evidence, and "it is imperative that no new technique is introduced until its reliability has been proven over a significant period of time".
- 6.85 The Independent Forensic Practitioners Institute (IFPI) was not concerned with the scientific validity of new techniques, but rather:
- with the subsequent flawed application by forensic scientists of these DNA analytical techniques which in the past have resulted in misleading and prejudicial DNA evidence being admitted into criminal proceedings without the appropriate judicial scrutiny.
- 6.86 The Auckland District Law Society Criminal Law Committee (ADLS) and Sue Petricevic noted that new techniques will need to be introduced to obtain more reliable results. They commented that commercial suppliers will discontinue older DNA kits, which will affect, to some extent, the type of techniques that are used. They noted that there is an advantage to using techniques that are universally adopted as this enables comparison with overseas databases such as through Interpol and enables cross-checking and auditing of existing systems with "a larger pool of agencies" for quality assurance purposes. They submitted that privacy concerns can be managed by restricting permissible analysis to certain sites or loci.
- 6.87 Professor Carole McCartney and Dr Aaron Amankwaa advocated a principles-based approach to the analysis of DNA samples and submitted that any exceptions to established analysis should have to demonstrate that additional DNA information is necessary to defined policing objectives (and new techniques rigorously tested in terms of their effectiveness in meeting such objectives).
- 6.88 Police expressed no concerns about new techniques being introduced as long as certain factors were considered before their introduction to casework.

### Decision-making factors and responsibilities when introducing new DNA analysis techniques

- 6.89 We received nine submissions that commented on what factors should be considered before a new DNA analysis technique is introduced and who should make that decision.
- 6.90 Police considered that the status quo should be maintained — that is, that Police and ESR should consider all new techniques to ensure they are validated, fit for purpose and meet international standards for the admissibility of scientific evidence, including the



*Daubert* factors,<sup>100</sup> and that ESR and individual analysts should have necessary accreditations and qualifications. Police also supported the proposal that mandatory statutory considerations in deciding whether to introduce a new DNA analysis technique include implications in terms of tikanga and the Treaty. ESR also submitted that the *Daubert* factors and the forensic services provider's accreditation should be considered before a new technique is introduced.

- 6.91 The ADLS and Sue Petricevic submitted that the matters to be considered should include the effectiveness and availability of existing techniques, their cost, what research and validation (both scientifically and by the courts) had been conducted and the ability to compare results of analysis internationally. They considered the decision about the adoption of new techniques should be made by technical experts (“including overseas alignment”) with independent oversight. NZLS also submitted that an independent oversight body, if established, should be responsible for approving any new techniques, including assessing them against the *Daubert* factors.
- 6.92 PDS also considered that the *Daubert* factors were important but submitted that there needs to be special consideration of the potential for miscarriages of justice and ethical considerations, and accordingly, factors to be considered should include:
- (a) the degree of support from the international forensic science community;
  - (b) concerns of scientists about a technique's accuracy and potential for miscarriages of justice;
  - (c) the risk of miscarriages of justice as related to the amount of DNA analysed; and
  - (d) any ethical implications arising from a new technique.
- 6.93 PDS submitted that an independent authority made up of members with relevant expertise should make the decision (as with new reproductive and genetic technologies) and that Police should only be involved to the extent of commenting on the efficacy of the new technique as an investigative tool.
- 6.94 Te Mana Raraunga | Māori Data Sovereignty Network similarly submitted that new DNA analysis techniques should only be introduced after independent review and if endorsed by a governance group. They submitted that independence was important to manage real or perceived conflicts of interests. The review should take into account privacy, ethical and Māori data sovereignty considerations and provide an opportunity for public consultation.
- 6.95 In addition to its concerns set out above, IFPI submitted that, as a matter of urgency, Parliament needs to formulate new rules regarding the admissibility of expert evidence that “relies on scientific methodology for its truth”. It considered that an independent oversight body to approve new DNA analysis techniques might prove more scientific and flexible than an approach based on legal precedent. It also submitted that Police

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<sup>100</sup> The *Daubert* factors were originally identified by the United States Supreme Court in *Daubert v Merrell Dow Pharmaceuticals Inc* 509 US 579 (1993) and have since been applied by New Zealand courts. The four factors are usually summarised as follows (see *Lundy v R* [2014] NZCA 576 at [42] and *Lundy v R* [2018] NZCA 410 at [241]): whether the theory or technique can be and has been tested; whether the theory or technique has been subjected to peer review and publication; the known or potential rate of error of the technique or theory or the existence of standards; and whether the theory or technique is generally accepted in the scientific community. Police in its submission added the following factor: “whether the research was conducted independent of the particular litigation or dependent on an intention to provide the proposed testimony”.

should be prevented from employing scientific methods that are commercially sensitive and therefore not fully available for independent review.

### Sensitive DNA analysis techniques and trace DNA

- 6.96 Six submissions expressed concerns about the increased use of highly sensitive DNA analysis techniques.
- 6.97 Sue Petricevic has carried out research in this area, and in her opinion, with adequate controls, trace DNA analysis is a useful tool. She noted that there is a greater risk of contamination effects and “replication mismatch” with LCN analysis. She questioned whether Police should be able to search for a suspect “using shed skin cells which may or may not be from the perpetrator”, noting that the timing of shedding or placement cannot be determined. ADLS made a similar submission.
- 6.98 IFPI submitted that there are significant risks in relying on trace DNA as it can arrive at the scene of a crime through “innocent secondary or tertiary transfer or other means unrelated to the crime”. Its view is “[t]his is no longer a theoretical risk that can be ignored” and suggested that, to mitigate the risk, the prosecution must:
- ... establish **where** the trace DNA come[s] from (i.e. the cellular source), **how** it got there (i.e. the possible mechanism – active or passive transfer) and **when** it had been deposited (i.e. before, during or after the alleged crime).
- 6.99 If the prosecution is unable to do this, then due to the risk of a “false inclusion”, IFPI’s opinion is that trace DNA evidence should not be admissible in court.
- 6.100 NZLS considered it would be unduly restrictive to limit the range of permissible techniques to primary legislation “because the frequency of use and the sensitivity of DNA techniques is increasing”. It submitted it would be more appropriate for legislation to stipulate the process for an independent oversight body to make decisions about the legality of techniques. It considered the Criminal Cases Review Commission would provide an additional safeguard in circumstances where scientific developments can produce exculpatory evidence.
- 6.101 PDS was concerned that miscarriages of justice could result from increased use of highly sensitive DNA analysis techniques. If these techniques were to be used, its view was to prefer the Scottish approach, where there must be other evidence that corroborates the DNA evidence to support a conviction. At the very least, PDS submitted there should be a judicial warning to juries where DNA evidence is uncorroborated by other evidence.
- 6.102 Police and ESR expressed no concerns with the use of sensitive DNA analysis techniques provided appropriate processes were in place. They accepted that there can be issues with LCN but considered that the processes and procedures in place mitigate the concerns raised in the Issues Paper.<sup>101</sup> ESR noted that the LCN technique is

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<sup>101</sup> ESR notes that these steps include extensive consultation with Police, prior to using low copy number analysis, about the circumstances of the case and whether low copy number analysis is suitable. If there are suitability concerns, this technique will not be used. ESR’s low copy number analysis procedures require “replicate testing of the DNA and only results that are reproducible are reported”. Sporadic contamination can be an issue with low copy number analysis, but this is considered during ESR’s interpretation of the results. ESR provides caveats regarding low copy number analysis on court statements alerting the courts to the sensitivity of this technique.

only used in approximately 1.5 per cent of cases — approximately 50 per year. ESR also stated that two appeals in New Zealand against LCN analysis have failed and, in its view, the technique has been accepted by New Zealand courts as “being reliable and scientifically valid”.

### Information included in a DNA profile

- 6.103 We received 36 submissions from five organisations and 31 individuals that supported limits on the information that should be included in a DNA profile. Most of these submitters thought information should be limited to what is needed for the purposes of identification in criminal investigations. One submitter specifically stated this should be limited to what is required for the particular case being investigated. Nine submitters thought profiles should not include information from the coding regions or include the whole genome. Several submitters suggested Police could access additional information with the consent of the donor.
- 6.104 Five submitters were concerned at the potential for misuse of information and considered that the more information included in the profile, the greater the need for tighter guidelines for use. Four submitters, including the Privacy Commissioner, were concerned about the intrusion into people’s privacy and considered that limits are necessary to respect Māori beliefs and customs such as the sanctity of whakapapa. The Privacy Commissioner emphasised the need for a clear law enforcement justification for more extensive analysis on a routine basis. PDS expressed concern about the security of personal information in cloud-based data storage systems and in criminal disclosure to defendants if the amount of information in a profile is expanded.
- 6.105 IFPI considered that “DNA profile” should be defined to limit the information that can be included, as in Ireland. It submitted that regulations developed by a new statutory oversight body should provide further definition to specify:
- (a) the loci that are to be included in the profile;
  - (b) the minimum amount of DNA required to generate a profile;
  - (c) the minimum number of alleles required to minimise the risk of a false inclusion;
  - (d) the complexity of the profiles — that is, the number of contributors; and
  - (e) minimum quality parameters.
- 6.106 ADLS submitted that, if Police and ESR sought to extend analysis beyond known coding regions, compelling reasons and a formal application for pre-approval by a court or oversight body should be required
- 6.107 On the other hand, one individual observed that it was impossible to know what information may become relevant in the future and that the Privacy Act could provide protection from the unauthorised use of information. Another individual submitted that, if a DNA sample has been obtained legally and ethically, there should be no limit to the amount of information included in the profile and this would add to its evidential value.

### DNA ANALYSIS IN COMPARABLE JURISDICTIONS

- 6.108 DNA databanks around the world continue to rely on STR profiling. It is anticipated that this will continue to be the case, in part, due to the “worldwide investment in STR

databases”.<sup>102</sup> STR analysis has, however, begun to be supplemented by other techniques including Y-STR analysis and some trace DNA analysis.

- 6.109 In 2003, the Australian Law Reform Commission expressed concern about the potential extension of forensic analysis to physical and behavioural characteristics but did not make firm recommendations, noting:<sup>103</sup>

If in future law enforcement authorities wish to go beyond mere DNA identification number construction to utilise genetic technology to determine health status or behavioural traits, this would require considerable public consultation and fresh community agreement.

- 6.110 The use of forensic DNA phenotyping (an analysis technique used to predict a person’s physical appearance) in comparable jurisdictions is discussed in Chapter 14.

- 6.111 In England and Wales, steps have been taken to guard against the risk of overstating the probative value of DNA evidence in criminal proceedings. The Royal Society and The Royal Society of Edinburgh have published a primer for the courts on forensic DNA analysis that describes the limitations of DNA profiling as noted at paragraph 6.68 above.<sup>104</sup> In addition, the Code for Crown Prosecutors contains detailed information on DNA analysis and DNA evidence and states that prosecutors should approach DNA evidence with caution, in particular:<sup>105</sup>

... where the evidence submitted by the police turns on the existence of a positive DNA match between the crime scene sample and the suspect’s profile, prosecutors are advised to consider the need for evidence that supports this identification of the suspect as the offender in the case.

- 6.112 The Code goes on to note that the risk of sample handling error or contamination event during processing:<sup>106</sup>

... presents another reason why prosecutors need to give careful consideration to the risks in charging without supporting evidence. The potential risk [of] handling errors or contamination by forces or providers within the same locality handling samples from different offences also highlights why particular caution should be exercised when the only supporting evidence is the fact that the suspect lives within the same locality.

### Information contained in a DNA profile

- 6.113 Legislation in England and Wales, Canada and Australia contain definitions of “DNA profile” that relate broadly to information obtained from biological material.<sup>107</sup> In England and Wales, “DNA profile” is defined as “any information derived from a DNA sample”,

<sup>102</sup> National DNA Database Ethics Group (United Kingdom) *Ethical Dimensions of the Application of Next Generation Sequencing Technologies to Criminal Investigations* (March 2017) at 14.

<sup>103</sup> This was in the context of the Australian Law Reform Commission investigating and issuing, in 2003, a substantial report on several matters relating to the protection of human genetic information: Australian Law Reform Commission *Essentially Yours: The Protection of Human Genetic Information in Australia* (ALRC R96, 2003) at 1029–1030.

<sup>104</sup> The Royal Society and The Royal Society of Edinburgh *Forensic DNA analysis: A primer for courts* (November 2017).

<sup>105</sup> Crown Prosecution Service “Expert Evidence” in *Prosecution Guidance* (2019) <www.cps.gov.uk> at Part 2 – Specific areas of expertise.

<sup>106</sup> At Part 2 – Specific areas of expertise.

<sup>107</sup> For a summary of different approaches in other jurisdictions, see Forensic Genetics Policy Initiative *Establishing Best Practice for Forensic DNA Databases* (September 2017) at Annex N.

and “DNA sample” is defined as “any material that has come from a human body and consists of or includes human cells”.<sup>108</sup> In Canada, “DNA profile” is defined as “the results of forensic DNA analysis of a bodily substance” and “forensic DNA analysis” is defined as “in relation to a bodily substance, means forensic DNA analysis of the bodily substance”.<sup>109</sup> In Australia, Commonwealth legislation does not define “DNA profile”, although it does define each index of the National Criminal Investigation DNA Database as “an index of DNA profiles derived from forensic material ...”.<sup>110</sup> Legislation then defines “forensic material” to include samples taken from a person’s body by a forensic procedure.<sup>111</sup>

- 6.114 In Ireland, however, recent legislation defines a DNA profile more prescriptively to exclude information from the coding part of DNA:<sup>112</sup>

“DNA profile”, in relation to a person, means information comprising a set of identification characteristics of the non-coding part of DNA derived from an examination and analysis of a sample of biological material that is clearly identifiable as relating to the person and that is capable of comparison with similar information derived from an examination and analysis of another sample of biological material for the purpose of determining whether or not that other sample could relate to that person ...

- 6.115 The European Union also restricts DNA profiles to be kept by Member States to the non-coding part of DNA. The available data from Member States DNA analysis files “shall not contain any data from which the data subject can be directly identified. Reference data which is not attributed to any individual ... shall be recognisable as such”.<sup>113</sup>

## RECOMMENDATIONS

### Regulating analysis of all DNA samples

#### RECOMMENDATION

**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.

<sup>108</sup> Police and Criminal Evidence Act 1984 (UK), s 65 definitions of “DNA profile” and “DNA sample”.

<sup>109</sup> DNA Identification Act SC 1998 c 37, s 2 definitions of “DNA profile” and “forensic DNA analysis”.

<sup>110</sup> Crimes Act 1914 (Cth), s 23YDAC definitions of “crime scene index”, “missing persons index”, “serious offenders index”, “suspects index”, “unknown deceased persons index”, “volunteers (limited purposes) index” and “volunteers (unlimited purposes) index”.

<sup>111</sup> Crimes Act 1914 (Cth), s 23WA definition of “forensic material”.

<sup>112</sup> Criminal Justice (Forensic and DNA Database System) Act 2014 (Ireland), s 2 definition of “DNA profile”.

<sup>113</sup> Convention between the Kingdom of Belgium, the Federal Republic of Germany, the Kingdom of Spain, the French Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands and the Republic of Austria on the stepping up of cross-border cooperation, particularly in combating terrorism, cross-border crime and illegal migration (Prüm Convention) 2617 UNTS 3 (opened for signature 27 May 2005, entered into force 1 November 2006), art 2(2). The Convention is discussed in Chapter 23. In 2008, the Prüm Convention was incorporated into European Union legislation. See Council Decision 2008/615/JHA on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime [2008] OJ L210/1.

- 6.116 We recommend that new DNA legislation should provide a comprehensive framework to regulate analysis of all DNA samples obtained in the investigation and prosecution of offences. We consider this is appropriate given the significant implications of DNA analysis on privacy and applicable tikanga Māori and the risk of wrongful conviction if the probative value of profiles generated from the use of sensitive analysis techniques is overestimated or misunderstood. Such a regime will also promote transparency and accountability, which will in turn promote public trust and confidence in the DNA regime. This will become increasingly important in future given the rate of scientific advancement in this area, which will likely only increase, especially if MPS analysis kits are introduced into use in Aotearoa New Zealand.
- 6.117 We also recommend the same framework regulates the analysis of DNA samples obtained when investigating missing and unidentified people. We consider that regulation of techniques is still appropriate in this non-criminal context, as the implications in terms of privacy and tikanga Māori, described above, still arise. However, the purpose of DNA analysis in this context is very different to that in criminal investigations, and the risk of wrongful conviction does not arise. It may therefore be appropriate to permit the use of an analysis technique in the context of identifying a missing or unidentified person but not in criminal investigations. We therefore consider it appropriate that the framework provides for analysis dependent on the purpose for which analysis is undertaken.

### Approved DNA analysis techniques

#### RECOMMENDATIONS

**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.

- 6.118 As we have described in this chapter, the number of DNA analysis techniques has proliferated since the CIBS Act was introduced and more are on the horizon.
- 6.119 We recommend that only those analysis techniques that have been approved in regulations made under the new DNA legislation should be used. Regulations should also set out the purpose for which an analysis technique has been approved and any parameters or other conditions regarding the use of the technique. This will provide additional transparency and the ability to properly oversee and audit the use of analysis techniques. For instance, we consider that STR profiling should be considered an approved technique for use with the current analysis kits that target specified loci.
- 6.120 Any new ways of using approved analysis techniques should require separate approval. For example, had this proposed requirement already been in the CIBS Act, it would

have required separate approval of LCN analysis, as while this uses the same analytical technique as STR profiling, it involves extra copying of the DNA cells (see paragraph 6.31). Similarly, if Police and the forensic services provider wished to use an MPS kit to conduct STR profiling or to increase the number of loci analysed, this would require further approval, as would extending the use of the technique.

- 6.121 Having the approved techniques set out in regulations will provide flexibility to add or remove techniques as science advances. It will also provide transparency that neither the CIBS Act nor any publicly available document currently provides as to which DNA analysis techniques are used by ESR on behalf of Police.

### Adding or removing approved DNA analysis techniques

#### RECOMMENDATIONS

**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.

- 6.122 The DNA Oversight Committee will have a key role in the approval of DNA analysis techniques. In Chapter 5, we recommend that one of the Committee's functions should be to evaluate proposals to make or amend regulations under new DNA legislation approving new DNA analysis techniques and to advise the Minister of Justice whether such regulations should be made. We recommend that such regulations should only be made on the recommendation of the Minister after the Minister has received and considered that advice.<sup>114</sup>

<sup>114</sup> Similar to the statutory requirement on the responsible Minister to consult with and receive advice from the Advisory Committee on Assisted Reproductive Procedures and Human Reproductive Research before making regulations relating to assisted reproductive procedures: Human Assisted Reproductive Technology Act 2004, s 76(2).

- 6.123 When considering a proposal to introduce a new technique, the DNA Oversight Committee should be required to consider several matters including the extent to which the technique has been scientifically validated. For a method to be validated, it must have a scientific backing that is underpinned by peer-reviewed papers in the scientific literature.<sup>115</sup> This ensures the technique has been rigorously tested, is reliable, can produce the same results each time it is used and is widely accepted by the scientific community. We discuss issues relating to validation of techniques in Chapter 7.
- 6.124 The Committee should also consider the broader implications of new DNA analysis techniques. We therefore recommend that the Committee considers whether the proposal is consistent with the proposed purpose of new DNA legislation discussed in Chapter 3. This requires minimising interferences with privacy and bodily integrity, recognising and providing for tikanga Māori and consistency with other human rights values. In addition, the Committee should consider the proposal against Treaty obligations and consider any other matters that it considers appropriate. These considerations are all important to ensure that DNA analysis is conducted in a manner that is reasonable and proportionate to the public interest in the investigation and prosecution of offending.
- 6.125 When providing advice to the Minister, the Committee should advise on the purpose for which a technique should be approved and any other parameters or conditions around its use. For example, parameters might include that a technique is only approved for use or results are only permitted to be reported if:
- (a) a certain amount of DNA is present in a sample;
  - (b) analysis is conducted on a specified part of the genome;
  - (c) specified genetic markers are analysed; or
  - (d) the information reported from analysis relates only to specified genetic markers, with any extraneous analysed information destroyed.
- 6.126 We envisage that conditions that could be imposed on the use of a technique may include that it is only used in serious cases or only for databank searching or in missing or unidentified person cases. For example, Y-STR profiling might be subject to conditions that it only be used in sexual offending or in cases where the crime scene DNA is too degraded to enable standard STR profiling.
- 6.127 Consideration will need to be given to whether the approval process should apply to all techniques currently in use or only to some. For instance, we consider that STR profiling should be an approved technique. However, other techniques currently in use may need to be subject to limits in terms of when they are used. For example, given the concerns we have identified above, in our view Y-STR and MtDNA analysis should only be used in criminal investigations to analyse samples for casework comparisons and not for databank searching (although we note that the use of these analysis techniques could be useful and appropriate in missing and unidentified person investigations). There is therefore a question as to whether these techniques should be deemed to be approved techniques until such time as they may be evaluated by the Committee and it

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<sup>115</sup> Sense About Science and EUROFORGEN *Making Sense of Forensic Genetics: What can DNA tell you about a crime?* (2017) at 29.



has provided advice to the Minister. We note that we address the use of forensic analysis phenotyping in Chapter 14.

- 6.128 In Chapter 5, we recommend that 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 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. We expect that, when evaluating a proposal to approve a new analysis technique, the Committee would meet with Police and the forensic services provider and consult with others as is appropriate in the circumstances. In Chapter 5, we also recommend that the Committee reports to the House of Representatives on the performance of its functions. It could also publish a report on the results of any work undertaken pursuant to its functions, such as the outcome of any advice it provides to the Minister on new DNA analysis techniques.

### New definition of DNA profile

#### RECOMMENDATION

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.

- 6.129 In the context of criminal investigations, the primary reason for obtaining DNA and for maintaining DNA databanks is to identify the source of unknown crime scene DNA. Similarly, obtaining DNA and maintaining a DNA databank for the investigation of missing and unidentified people is to enable identification of an unidentified person or deceased person. This requires analysis of the DNA in biological material to generate a DNA profile.

- 6.130 To minimise the intrusive nature of DNA analysis, we recommend that new DNA legislation adopts a similar definition that is currently used in the CIBS Act but limits the definition of “DNA profile” to information that is necessary to identify the person who is the source of the DNA sample when it is compared to other profiles generated from a DNA sample analysed in the same way while revealing the least amount of personal genetic information about them as possible. As commentators and academics acknowledge, the information that results from STR profiling meets these requirements, and therefore, a DNA profile does not need to contain personal genetic information.

- 6.131 While some jurisdictions limit analysis to “non-coding regions” of the genome, we have opted not to use this terminology as scientists now consider that these regions may in fact have some coding function (see paragraph 6.15 above). Nevertheless, we recommend above that a DNA profile should reveal as little genetic information about the source of the DNA as possible. In addition, all analysis techniques used in criminal investigations must be approved and set out in regulations, together with the parameters for each analysis technique. The parameters for an approved analysis technique could specify which part of the genome can be analysed to avoid analysis revealing personal genetic information.
- 6.132 This definition will futureproof new DNA legislation. For instance, it may (subject to approval as discussed above) enable use of MPS analysis kits to conduct STR profiling. If a kit routinely generates personal genetic information about a person such as ancestry information or hair or eye colour, this recommendation would ensure that this information could not be recorded in the DNA profile and therefore could not be used for databank searching or casework comparisons.<sup>116</sup>
- 6.133 Consideration could be given to broadening the definition of “DNA profile” to capture analysis of other parts of the genome. For instance, a term such as “genetic information profile” could be used or could be separately defined.

## Guidance for criminal proceedings

### RECOMMENDATIONS

**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.

- 6.134 As outlined above, issues of transference and persistence of DNA, the risk of contamination and the increasing sensitivity of DNA analysis kits raise the real risk that, if DNA evidence alone is relied on in support of any charges, this may result in a wrongful conviction.
- 6.135 We therefore recommend that consideration be given to amending the Solicitor-General’s prosecution guidelines to reflect that caution must be exercised when considering prosecuting cases based on DNA evidence alone. Police is required to

<sup>116</sup> The personal genetic information generated through analysis would nevertheless need to be destroyed, even were it not recorded in a profile. However, we have been advised that it is not yet clear how this could occur. Alternatively, as suggested by the National DNA Database Ethics Group:

A way to address many of the ethical concerns is to create analysis pipelines as a safeguard to ensure that only forensically useful information is obtained rather than sensitive information. In the future, discussions will be needed in order to determine whether information which has been identified as forensically useful but also as sensitive can be included in forensic analyses.

National DNA Database Ethics Group (United Kingdom) *Ethical Dimensions of the Application of Next Generation Sequencing Technologies to Criminal Investigations* (March 2017) at 19.

apply the Solicitor-General's prosecution guidelines in making charging decisions. This recommendation reflects the approach in England and Wales discussed at paragraphs 6.111–6.112 above.

- 6.136 We also recommend that consideration is given to amending the Evidence Act to require a Judge to warn the jury of the special need for caution before finding a defendant guilty in reliance on DNA evidence alone.
- 6.137 An alternative approach may be to require corroborative evidence when tendering DNA evidence. However, considerably more work would need to be done on this issue, as New Zealand has dispensed with requiring corroboration in a criminal proceeding except with respect to perjury, false oaths statements or declarations or treason. Currently, a Judge is not required to caution the jury that it is dangerous to act on uncorroborated evidence or comment on the absence of corroboration.<sup>117</sup>
- 6.138 We note that another safeguard discussed in Chapter 5 is the Criminal Cases Review Commission, which would be able to review cases where a conviction is based solely on DNA evidence.<sup>118</sup>

### Providing for other types of genomic analysis

#### RECOMMENDATION

#### R34

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

- 6.139 Finally, we recommend that new DNA legislation should anticipate and provide for other genetic or genome-based analysis techniques, in order for the legislation to be sufficiently flexible to respond to future advances in technology. We outlined at paragraph 6.44 some of the upcoming analysis techniques and the parts of the genome these techniques target for analysis.

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<sup>117</sup> Evidence Act 2006, s 121. We note that, although Scotland has a rule of requiring evidence of corroboration in all instances, this has been under scrutiny since a 2011 report by Lord Carloway on Scotland's Criminal Law and Practice: see *The Carloway Review: Report and Recommendations* (17 November 2011). Various follow-up reports have been investigating what protections might be needed were the rule to be dispensed with.

<sup>118</sup> Criminal Cases Review Commission Act 2019, s 11.

## CHAPTER 7

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# The forensic services provider

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## INTRODUCTION

7.1 The forensic services provider, ESR, performs an important role in the DNA regime. ESR's responsibilities include the forensic analysis of DNA samples and conducting casework comparisons but also responsibilities in relation to the DNA databanks, including maintaining the databanks and undertaking databank searching. These services are integral to the operation of the DNA regime and to the wider criminal justice process as:<sup>1</sup>

... [i]n many criminal cases forensic science evidence is pivotal. The delivery of justice depends on the integrity and accuracy of that evidence, and the trust that society has in it.

7.2 However, as we identify in Chapter 3, the role of forensic services provider is not recognised in the CIBS Act. Instead, the provision of forensic services is largely governed by an agreement between Police and ESR.

7.3 In this chapter, we consider whether new DNA legislation should recognise the role of forensic services provider and, if so, how it should be regulated.

## CURRENT LAW AND PRACTICE

7.4 While the CIBS Act makes no reference to a forensic services provider, the provisions of the Act are broad enough to enable forensic services to be provided by a third party on Police's behalf. For example, section 58 anticipates analysis of a DNA sample being conducted "on behalf of" a police officer, and sections 24O and 25 respectively provide for the maintenance of the Temporary Databank and DNA Profile Databank (DPD) "by or on behalf of the Police". Other provisions of the CIBS Act are broadly worded to permit any person to access DNA samples and the DNA databanks for the purposes prescribed in the Act.<sup>2</sup>

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<sup>1</sup> House of Lords Science and Technology Select Committee *Forensic science and the criminal justice system: a blueprint for change* (House of Lords, 3rd Report of Session 2017–2019, 1 May 2019) at 3.

<sup>2</sup> Criminal Investigations (Bodily Samples) Act 1995, ss 24R(1)(a), 24S, 27(1)(a) and 28.

## ESR's role as forensic services provider

- 7.5 ESR is Police's sole provider of forensic services. It provides these services under a Forensic Science Services Agreement (Services Agreement) which is currently negotiated every three years.
- 7.6 The Services Agreement acknowledges the specialist skills and expertise provided by a forensic scientist. It notes that the ESR scientist who carries out the services in a particular case may be accorded 'expert' standing during criminal proceedings and may be required to give opinion evidence based on their expertise. The Services Agreement therefore provides that ESR scientists must remain impartial and objective in their examinations and that Police must ensure the ESR scientist's status as an independent expert is maintained.
- 7.7 Relevant services provided under the Services Agreement include:
- (a) **DNA analysis.** ESR screens DNA samples, chooses the appropriate analysis technique, conducts analysis and reports the results. The DNA analysis techniques available to ESR are set out in the Services Agreement and are described in Chapter 6 of this Report.
  - (b) **DNA databank operations.** ESR is responsible for maintaining the Crime Sample Databank (CSD), the DPD and the Temporary Databank. In doing so, ESR must ensure security and proper use of the DNA databanks and the information stored on the databanks. This must include appropriate back-up and disaster recovery procedures. ESR must also comply with relevant requirements of the CIBS Act.
  - (c) **Storage, retention and destruction of samples and profiles.** ESR is responsible for managing the storage, return or destruction of samples and any profiles retained on case files or the DNA databanks in accordance with agreed policy and relevant legal requirements.
- 7.8 Other services provided under the Services Agreement include assistance in crime scene examinations, other types of forensic analysis such as drug testing and land transport-related forensic services. As we note in Chapter 4, ESR also maintains two elimination DNA databanks. One contains profiles from ESR staff and people who have visited ESR's forensic laboratories. The second, the Police Criminal Investigators Elimination Database (CIED), is maintained pursuant to the Services Agreement. This database is established under Part 5 of the Policing Act 2008 and contains profiles from Police employees and forensic practitioners. The Services Agreement also makes provision for two future databases: a pre-employment vetting database and a missing persons database.

## Quality assurance under the Services Agreement

- 7.9 The Services Agreement identifies several measures that ESR must use to ensure consistency and quality of service along with timeliness in delivery. Relevant measures include:
- (a) ensuring each forensic discipline is "quality assurance based" and meets internationally approved accreditation standards;
  - (b) complying with agreed protocols and procedures and formally addressing any incidents of non-compliance;

- (c) maintaining accreditation with the internationally recognised accrediting body ANAB<sup>3</sup> and complying with any requirements ANAB imposes;
  - (d) maintaining a chain of evidence in the management and handling of samples and ensuring their appropriate storage (including keeping secure from inappropriate access or misuse); and
  - (e) returning and/or destroying samples and case files in accordance with policies agreed with Police.
- 7.10 The Services Agreement also imposes reporting obligations on ESR and provides for Police to undertake an annual audit of the processes and procedures concerning the DNA databanks to ensure compliance with the requirements of the CIBS Act. Police may also ask to undertake an IT security audit of the DNA databanks and other audits related to casework from time to time.

### *ESR's responsibilities as a Crown Research Institute*

- 7.11 ESR is a Crown Research Institute (CRI) and, in addition to its responsibilities under the Services Agreement, it has a range of responsibilities under the Crown Research Institutes Act 1992. That Act states that the purpose of every CRI is to undertake research, and in fulfilling its purpose, each CRI shall operate in a financially responsible manner so that it maintains financial viability.<sup>4</sup> CRIs must also:<sup>5</sup>
- (a) carry out research for the benefit of New Zealand;
  - (b) pursue excellence in all activities;
  - (c) comply with all applicable ethical standards;
  - (d) promote and facilitate the application of the results of research and technological developments;
  - (e) be a good employer; and
  - (f) exhibit a sense of social responsibility.
- 7.12 The government sets out the strategic role for each CRI in a “Statement of Core Purpose” that is expected to be relevant for 10–15 years. Currently, ESR’s core purpose is to:<sup>6</sup>

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<sup>3</sup> This organisation is now known as the ANSI National Accreditation Board. It was formerly known as “American National Standards Institute American Society for Quality National Accreditation Board” and is referred to by that name in the Services Agreement between Police and ESR. For simplicity, we refer to it as ANAB in this Report. Prior to ANAB’s formation, ESR was accredited by ANAB’s predecessor, the American Society of Crime Laboratory Directors/Laboratory Accreditation Board (ASCLD/LAB). ANAB is a non-profit wholly owned subsidiary of American National Standards Institute. It is the largest multi-disciplinary accreditation body in the western hemisphere, with more than 2,500 organisations accredited in approximately 80 countries: ANSI National Accreditation Board “About ANAB” <<https://anab.ansi.org>>.

<sup>4</sup> Crown Research Institutes Act 1992, ss 4 and 5(2).

<sup>5</sup> Section 5(1). Crown Research Institutes also have obligations under the Companies Act 1993 and the Crown Entities Act 2004. For further discussion of the legislative and governance requirements with which Crown Research Institutes must comply, see Hīkina Whakatutuki | Ministry of Business, Innovation and Employment “Legislation and governance guidelines for CRIs” <[www.mbie.govt.nz](http://www.mbie.govt.nz)>.

<sup>6</sup> ESR *Statement of Corporate Intent 2020–2025* (2020) at 5. The core purpose is set out annually in ESR’s corporate documents. However, Hīkina Whakatutuki | Ministry of Business, Innovation and Employment has expressed ESR’s core purpose using different terms. On its website, the Ministry notes that ESR’s purpose is to:

... deliver enhanced scientific and research services to the public health, food safety, security and justice systems, and the environmental sector to improve the safety of, and contribute to the economic, environmental and social wellbeing of people and communities in New Zealand.

- 7.13 In the area of justice and security, ESR’s current strategy is to “increase the effectiveness of forensic science services applied to safety, security and justice investigations and processes”.<sup>7</sup> ESR’s vision for forensic services is as follows:<sup>8</sup>

We will develop and evolve our science to ensure our forensic expertise is accessible at all stages of the system to inform and support prevention, detection and resolution of crime. In partnership with stakeholders, we will develop, validate and implement rapid, point-of-care solutions, together with high-end science research and consultancy, to ensure the right information is available at the right quality and time. ESR will provide a responsive and flexible approach to crime scene science, and its forensic services and expertise will be in demand worldwide.

- 7.14 As part of its continued growth strategy, ESR notes its commitment to continue to expand the international take-up of STRmix,<sup>9</sup> as well as to develop new products and services.<sup>10</sup>

### **Accreditation against international standards**

- 7.15 As noted above, under the Services Agreement, ESR must maintain accreditation with ANAB. Internationally, accreditation is often relied on to provide quality assurance in respect of the forensic sciences (including DNA analysis) as an alternative to direct regulation of forensic services providers.<sup>11</sup> Accreditation involves being measured against international standards by an independent accreditation body, which, in ESR’s case, is ANAB.

- 7.16 ANAB assesses ESR against ISO/IEC 17025 *General requirements for the competence of testing and calibration laboratories*.<sup>12</sup> This standard is not specifically designed for forensic laboratories, but it is the standard used internationally for accrediting forensic

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... deliver world class knowledge, research and laboratory services to help New Zealand get the most out of its investment in science and innovation. ESR use the power of science to help its partners and clients solve complex problems and protect people and products in New Zealand, and around the world. ESR’s science lies behind the decisions that safeguard people’s health, protect our food-based economy, improve the safety of our freshwater and groundwater resources and provide the justice sector with expert forensic science.

See Hīkina Whakatutuki | Ministry of Business, Innovation and Employment “Crown Research Institutes” <[www.mbie.govt.nz](http://www.mbie.govt.nz)>. It is unclear whether this is ESR’s previous purpose or a different part of the same purpose statement.

<sup>7</sup> ESR *Statement of Corporate Intent 2020–2025* (2020) at 5.

<sup>8</sup> At 29.

<sup>9</sup> At 12. STRmix is algorithmic software co-developed by ESR and Forensic Science South Australia used with mixed DNA samples to statistically calculate which are the most likely DNA profiles, resolving the mixture into individual DNA profiles. ESR uses STRmix to resolve mixtures from up to five people. According to ESR’s website, STRmix “uses a fully continuous approach for DNA profile interpretation” and it “combines biological modelling and mathematical processes to achieve results not possible with traditional DNA interpretation methods”: ESR “STRmix” <[www.esr.cri.nz](http://www.esr.cri.nz)>. We discuss the use of STRmix in Chapters 6 and 17.

<sup>10</sup> ESR *Statement of Corporate Intent 2020–2025* (2020) at 9.

<sup>11</sup> James Robertson, Karl Kent and Linzi Wilson-Wilde “The Development of a Core Forensic Standards Framework for Australia” (2013) 4 *Forensic Science Policy & Management* 59 at 60.

<sup>12</sup> ISO/IEC 17025 is published by the International Organization for Standardization and the International Electrotechnical Commission. For further information on this standard, see <[www.iso.org](http://www.iso.org)>.

laboratories in different disciplines, including DNA analysis.<sup>13</sup> In broad terms, the standard includes requirements around impartiality and confidentiality, legal and management structures, resourcing standards (including personnel, facilities, equipment, systems and support services), processes (including the selection, verification and validation of methods) and management systems (for example, undertaking risk assessments and audit programmes).

- 7.17 In the absence of specific international standards for forensic laboratories, the International Laboratory Accreditation Cooperation (ILAC)<sup>14</sup> has developed guidance for forensic laboratories to assist in meeting ISO/IEC 17025.<sup>15</sup> ANAB bases its accreditation programmes on this guidance.<sup>16</sup>
- 7.18 ESR's biology laboratory (at which DNA analysis is conducted) has been accredited by ANAB to the latest (2017) version of ISO/IEC 17025. It was most recently assessed in March 2020. ESR's scope of accreditation consists of "DNA profile determination" for STR and Y-STR samples services, conducting physical comparisons of DNA profiles using software and providing qualitative determinations of body fluids and epithelial cells.<sup>17</sup> ESR has also met all requirements for use of an "Individual Characteristic Database".

### *ESR's internal quality management system*

- 7.19 To meet and maintain accreditation, ESR has in place a quality management system that consists of policies, procedures and methods. It also involves, at the conclusion of a case, checking and reviewing all records from the beginning to end (known as a technical review).<sup>18</sup> In addition, ESR must undertake annual proficiency testing,<sup>19</sup> internal audits and management reviews.<sup>20</sup>

<sup>13</sup> James Brandi and Linzi Wilson-Wilde "Standard Methods" in Jay A Siegel and Pekka J Saukko (eds) *Encyclopedia of Forensic Sciences* (2nd ed, Academic Press, London, 2013) 522 at 524.

<sup>14</sup> International Laboratory Accreditation Cooperation is the international organisation for accreditation bodies involved in the accreditation of calibration and testing laboratories (using ISO/IEC 17025), medical testing laboratories (using ISO 15189), inspection bodies (using ISO/IEC 17020) and proficiency testing providers (using ISO/IEC 17043). See International Laboratory Accreditation Cooperation "About ILAC" <[www.ilac.org](http://www.ilac.org)>.

<sup>15</sup> International Laboratory Accreditation Cooperation *Modules in a Forensic Science Process* (ILAC-G19, 26 August 2014).

<sup>16</sup> ANSI National Accreditation Board "Forensic Accreditation" <<https://anab.ansi.org>>.

<sup>17</sup> Epithelial cells are those from the mouth lining obtained in buccal sampling.

<sup>18</sup> A technical review is conducted internally by someone independent of the case but with relevant experience. ESR conducts a technical review for every case (this exceeds what the accreditation standard requires of ESR).

<sup>19</sup> "Proficiency tests" are defined in Forensic Science Regulator *Codes of Practice and Conduct: for forensic science providers and practitioners in the Criminal Justice System* (Home Office, FSR-C-100 Issue 5, 2020) at 76:

Tests to evaluate the competence of analysts and the quality performance of a laboratory. Open or declared proficiency test: a test in which the analysts are aware that they are being tested. Blind or undeclared proficiency test: a test in which the analysts are not aware that they are being tested. External proficiency test: a test conducted by an agency independent of the analysts or laboratory being tested.

<sup>20</sup> Internal audits and management reviews are both internal processes conducted annually by ESR to maintain accreditation. An internal audit confirms everything in the management system works as it should. As part of the audit. Case files, processes and laboratory staff are all reviewed. A management review involves the management team meeting to discuss certain matters as required by the relevant accreditation standards such as internal audit results, equipment and resourcing.



- 7.20 ANAB monitors conformity of ESR's quality management system through receiving results of external proficiency testing, ESR's self-disclosure of significant events and non-conformities and ANAB surveillance. The surveillance schedule consists of:
- (a) an on-site surveillance visit every two years that focuses on a subset of accreditation requirements applicable to the management system and one or more disciplines listed on the scope of accreditation;
  - (b) an off-site surveillance visit every other year that focuses on a subset of accreditation requirements applicable to the management system; and
  - (c) a full on-site assessment every four years.

### **International involvement**

- 7.21 In addition to maintaining its accreditation, ESR is involved in and draws guidance from scientific working groups. This includes the United States-based Scientific Working Group on DNA Analysis Methods (SWGDM),<sup>21</sup> which issues guidance on DNA analysis methods and on the validation of new DNA techniques.<sup>22</sup> ESR also participates in and draws guidance from the joint Australia-New Zealand forensics body, the National Institute of Forensic Science (NIFS) and its specialist working group on biological forensic sciences (of which it is a member).<sup>23</sup> In addition, ESR is involved in a number of international forensic science committees to ensure its scientific methods align with peer thinking.<sup>24</sup>

### **Validation of new methods**

- 7.22 In its role as forensic services provider and as part of maintaining its accreditation, ESR needs to conduct internal validation of any "methods" it wishes to introduce into use.<sup>25</sup> For DNA analysis, this includes any analysis method or technique, DNA analysis kit or means of interpretation (such as software to interpret mixed DNA samples).<sup>26</sup> Validation

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<sup>21</sup> The Scientific Working Group on DNA Analysis Methods is a body of administrators, scientists and academics working in forensic DNA laboratories across the United States. It acts as a hub for research and discussion on issues of importance to the DNA community. Its principal responsibility is to make recommendations to the Director of the FBI concerning revisions to the FBI's Quality Assurance Standards for DNA analysis. Laboratories must adhere to these standards to participate in the National DNA Index System. See Scientific Working Group on DNA Analysis Methods "About Us" <[www.swgdam.org](http://www.swgdam.org)>.

<sup>22</sup> Guidance issued by the Working Group can be found here: Scientific Working Group on DNA Analysis Methods "Publications" <[www.swgdam.org](http://www.swgdam.org)>. We discuss introduction of new techniques below.

<sup>23</sup> See Australia New Zealand Policing Advisory Agency National Institute of Forensic Science (ANSPAA NIFS) "About" <[www.anzpaa.org.au/nifs](http://www.anzpaa.org.au/nifs)>. The Biology Specialist Advisory Group provides guidance to member Australian laboratories and ESR on various biological disciplines including DNA analysis: ANZPAA NIFS "Specialist Advisory Groups (SAGs)" <[www.anzpaa.org.au/nifs](http://www.anzpaa.org.au/nifs)>.

<sup>24</sup> It is represented on committees of the European Network of Forensic Science Institutes (ENFSI) and the Asian Forensic Sciences Networks (AFSN).

<sup>25</sup> "Method" is defined by Forensic Science Regulator *Codes of Practice and Conduct: for forensic science providers and practitioners in the Criminal Justice System* (Home Office, FSR-C-100 Issue 5, 2020) at 75:

A logical sequence of operations, described generically for analysis (e.g. for the identification and/or quantification of drugs or explosives, or the determination of a DNA profile) or for comparison of items to establish their origin or authenticity (e.g. fingerprint/footwear mark/toolmark examination; microscopic identifications).

<sup>26</sup> For example, when ESR shifted from using Identifiler (a DNA profiling kit that targets 15 STRs) to GlobalFiler (a DNA profiling kit that targets the same 15 STRs plus six extra STRs), ESR used GlobalFiler to retest biological samples that had previously been profiled with Identifiler. In this way, it could confirm the accuracy of the new kits.

“involves demonstrating that a method used for any form of analysis is fit for the specific purpose intended, i.e. the results can be relied on”.<sup>27</sup> It is a key part of any forensic science discipline.

- 7.23 When a new method is being developed by a manufacturer or a forensic services provider, it will undergo developmental validation. This involves the manufacturer or developer thoroughly testing the method to the point there is evidence and data demonstrating a method’s repeatability, reproducibility and accuracy.<sup>28</sup> An expected part of validation is to publish, in a peer-reviewed journal, the results validating the method “so that experts in the field can review, question, and check the repeatability of the results”.<sup>29</sup>
- 7.24 Once a developmental validation has been completed, a forensic services provider intending to employ that method then needs to conduct its own internal validation to ensure it can reproduce the same results accurately in its own laboratory or environment and on a repeated basis. Internal validation is necessary even where a method is considered standard and is in widespread use. In conducting internal validation, ESR follows the specific requirements regarding method validation as set out in the ISO/IEC 17025 accreditation standards, as well following SWGDAM’s validation guidance.<sup>30</sup>
- 7.25 The important final step of internal validation is ensuring the method will work in practice. For DNA analysis, this requires checking the method with samples and profiles that have been obtained under the CIBS Act. The importance of this step is emphasised by the Forensic Science Regulator in England and Wales:<sup>31</sup>

Where methods are not completely validated before use in casework the result may be that the final stages of validation occurs on casework samples — but not in the controlled environment normally employed for validation. The release of methods which have not been appropriately tested therefore poses a real and significant risk to the Criminal Justice System ...

- 7.26 Standard operating procedures (SOPs) are generated from the validation testing results. They are written to “ensure that the scientists within an organisation make consistent interpretation decisions, supported by analytical data”.<sup>32</sup>

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<sup>27</sup> Forensic Science Regulator *Guidance: Validation* (Home Office, FSR-G-201 Issue 2, 2020) at [1.1.1]–[1.1.2]. The Regulator goes on to state that it is her expectation that all methods routinely employed within the “Criminal Justice System”, whether for intelligence or evidential use, will be validated prior to their use on live casework material: at [1.1.2].

<sup>28</sup> Forensic Science Regulator *Codes of Practice and Conduct: for forensic science providers and practitioners in the Criminal Justice System* (Home Office, FSR-C-100 Issue 5, 2020) notes at [21.2.4] that there needs to be “a clear boundary between development and validation”.

<sup>29</sup> National Research Council *Strengthening Forensic Science in the United States: A Path Forward* (National Academies Press, August 2009) at 114.

<sup>30</sup> See generally Scientific Working Group on DNA Analysis Methods *Validation Guidelines for DNA Analysis Methods* (5 December 2016).

<sup>31</sup> Forensic Science Regulator *Protocol: Validation – Use of Casework Material* (Home Office, FSR-P-300 Issue 2, 2020) at [1.1.3].

<sup>32</sup> The Royal Society and The Royal Society of Edinburgh *Forensic DNA analysis: A primer for courts* (November 2017) at 31.

- 7.27 ESR advises that its internal validation of new methods, including its SOPs, is checked as part of ANAB's ongoing surveillance. Surveillance includes witnessing staff use of SOPs and review of casework to ensure compliance. Compliance with SOPs is also part of the technical review process for each case.
- 7.28 When considering whether to introduce a new method into use, ESR aligns with international peer thinking and ensures that the *Daubert* factors are met (these involve assessing scientific validity and reliability).<sup>33</sup>

### **Anonymised population data**

- 7.29 As described in Chapter 6, when conducting a casework comparison of two DNA profiles, ESR generates a likelihood ratio statement that compares the likelihood of the DNA profile being that of the person in question as compared to the likelihood of it being that of someone in the general population.
- 7.30 To do this, ESR needs to know the frequency with which certain genetic information occurs within the population of Aotearoa New Zealand.<sup>34</sup> It is not possible to rely on population data from international forensic laboratories, as this does not contain information on Eastern and Western Polynesian subpopulations.<sup>35</sup> Therefore, when the CIBS Act was enacted, ESR started collecting information on the subpopulations of Aotearoa New Zealand.<sup>36</sup> To do this, Police gave a "voluntary ethnicity form" (on behalf of ESR) to those sampled.<sup>37</sup> The volunteered information enabled ESR to build an autosomal<sup>38</sup> population databank of anonymised profiles.<sup>39</sup> When ESR introduced Y-STR analysis in 2003, it created the Y-STR population databank also containing anonymised profiles.<sup>40</sup> Both these databanks enable ESR to correctly weight DNA profile evidence

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<sup>33</sup> These factors emerged from overseas case law and were originally identified by the United States Supreme Court in *Daubert v Merrell Dow Pharmaceuticals Inc* 509 US 579 (1993). These factors have since been applied by New Zealand courts. They are also noted in Chapter 6.

<sup>34</sup> The genetic information is the frequency of alleles occurring within populations. Having this information ensures that DNA evidence is not overstated nor understated by making allowances for the different subpopulations within New Zealand.

<sup>35</sup> According to ESR's research, Aotearoa New Zealand has four main sub-populations – Eastern Polynesian (Māori and Cook Island Māori), Western Polynesian (Samoan, Tongan and Niuean), Caucasian and Asian. Some combinations of DNA are found more frequently in Eastern and Western Polynesians (due to their geographical isolation until recent times). See Institute of Environmental Science and Research "Submission to the Law and Order Select Committee on the Criminal Investigations (Bodily Samples) Amendment Bill 2002" at 2.

<sup>36</sup> ESR can match the ethnicity information contained in the ESR form to the DNA profile generated from the biological sample. This then gives ESR information on the frequency of certain genetic markers in the New Zealand population.

<sup>37</sup> Police still gives this form to those sampled. See discussion of ESR's voluntary ethnicity form in chs 6 and 11 of the Issues Paper.

<sup>38</sup> Humans have 23 pairs of chromosomes. One pair are the sex chromosomes, and the other 22 are known as autosomal chromosomes.

<sup>39</sup> ESR collected over 10,000 profiles this way for the autosomal population databank. ESR advises that it is not adding to this databank currently. If ESR did wish to introduce a new analysis kit targeting additional loci on the autosomal chromosomes, it would need to obtain further ethnicity information on the frequency of the new alleles. However, this only requires a further 100 samples (200 alleles) to be statistically accurate.

<sup>40</sup> There are currently around 4,000 profiles on the Y-STR population databank. This population databank is also used by ESR to determine likely ethnicities or ancestries of the source of crime scene DNA samples. This is a more recent method of DNA analysis known as ancestry inferencing and is a form of forensic DNA phenotyping. This is discussed in Chapter 14. Y-STR analysis is discussed in Chapter 6.

when calculating STR and Y-STR likelihood ratio statements. The population databanks are kept entirely separately from the DPD and Temporary Databank.

- 7.31 As we set out in the Issues Paper, the voluntary ethnicity form is still used to collect information and add the anonymised profile to the Y-STR population databank.<sup>41</sup>

## REGULATION IN COMPARABLE JURISDICTIONS

- 7.32 As noted above, accreditation is often relied on to provide quality assurance in the provision of forensic services, especially in jurisdictions where multiple private laboratories provide forensic science services to local and federal police.
- 7.33 However, in England and Wales, where multiple private laboratories operate, a Forensic Science Regulator has been established to ensure the provision of forensic science services is subject to an appropriate regime of scientific quality standards.<sup>42</sup> The Regulator has developed codes of practice that forensic service providers must comply with in addition to ISO/IEC 17025, including a code of practice in relation to DNA analysis.<sup>43</sup> The Regulator has also provided technical guidance on aspects of DNA analysis such as avoidance of crime scene contamination, validation, DNA mixture interpretation and allele frequency databases and reporting for DNA profiling.<sup>44</sup>
- 7.34 In some jurisdictions, including Ireland and Canada, services relating to DNA databank administration and the DNA analysis are performed by the same body. In Ireland, Forensic Science Ireland has the responsibility for DNA analysis and for administering the databank. Its duties as databank administrator include generating and entering profiles, conducting and reporting searches, destroying and removing samples and maintaining the security of the databank.<sup>45</sup> In Canada, the Royal Canadian Mounted Police Force (RCMP) conducts DNA analysis on samples submitted<sup>46</sup> and administers the National DNA Data Bank.<sup>47</sup>
- 7.35 In other jurisdictions, however, services relating to databank administration and DNA analysis are kept separate. In the United Kingdom, as noted above, there are multiple forensic services providers, but the Home Office has responsibility for administering the National DNA Database.<sup>48</sup> In Australia, the Australian Criminal Intelligence Commission administers the National Criminal Investigation DNA Database, and various approved

<sup>41</sup> As we note in the Issues Paper at [11.89], most people who are given this form are being compelled to provide a sample under Part 2B of the CIBS Act (due to the fact that most samples are now obtained under this Part). Overall, very few ESR voluntary ethnicity forms are completed, and therefore, few people have their profiles included in the Y-STR population databank. ESR thinks that, on average, approximately 15 per cent of people sampled by Police complete the voluntary ethnicity form.

<sup>42</sup> Forensic Science Regulator “Forensic Science Regulator” <[www.gov.uk](http://www.gov.uk)>.

<sup>43</sup> Forensic Science Regulator *Codes of Practice and Conduct: DNA Analysis* (Home Office, FSR-C-108 Issue 2, 2020).

<sup>44</sup> Technical guidance relating to DNA issued by the Forensic Science Regulator is available at Forensic Science Regulator “Forensic Science Regulator: technical guidance” (14 July 2017) <[www.gov.uk](http://www.gov.uk)>.

<sup>45</sup> Criminal Justice (Forensic Evidence and DNA Database System) Act 2014 (Ireland), s 67.

<sup>46</sup> Royal Canadian Mounted Police “National DNA Data Bank” (14 November 2017) <[www.rcmp-grc.gc.ca/en/home](http://www.rcmp-grc.gc.ca/en/home)>.

<sup>47</sup> Its duties are set out in the DNA Identification Act SC 1998 c 37.

<sup>48</sup> Since 1 October 2012, the UK National DNA Database has been run by the Home Office on behalf of UK police forces: National DNA Database Strategy Board *Biennial Report 2018–2020* (Home Office, September 2020) at 8.

state laboratories act as forensic services providers.<sup>49</sup> Similarly, in the United States, the FBI administers the National DNA Index System, and various approved state laboratories act as forensic services providers.<sup>50</sup>

## ISSUES

- 7.36 In this review, we have not identified any systemic concerns relating to ESR’s practices and procedures in relation to its work as Police’s forensic services provider. We consider that accreditation provides an appropriate level of assurance that services are being provided pursuant to international best practice. We are also satisfied that the operational arrangements between Police and ESR are appropriate. The current approach of Police choosing and contracting its own forensic services provider provides flexibility and allows for market forces to have an impact on quality and cost.
- 7.37 However, the lack of transparency as to ESR’s role as forensic services provider under the CIBS Act is a concern, given that this role carries a considerable amount of social responsibility:<sup>51</sup>
- ... the outcome of any investigation or trial impacts on society, either as a whole or as individuals. Society has an expectation that services and products comply with national or international standards; forensic science laboratories should not be exempt from the same expectations.
- 7.38 Key aspects of ESR’s role, including its obligation to act impartially and to maintain appropriate accreditation, are set out in the Services Agreement, which is confidential, rather than in legislation. Without this transparency, there is a risk that ESR’s role in the DNA regime and its relationship with Police may be misunderstood, undermining public trust and confidence in the DNA regime. This is particularly a risk given the “fee for service” model under which ESR provides services to Police. As a former General Manager of Forensics at ESR noted, the model necessitates a close working relationship between the police officers in charge of investigations and ESR case managers to enable Police to prioritise and triage work as part of its internal cost-benefit analysis.<sup>52</sup> There is, therefore, a risk that ESR may be perceived as aligned with Police.
- 7.39 The lack of provision for the role as forensic services provider also stands in contrast to ESR’s very clear statutory responsibilities as a CRI under the Crown Research Institutes Act described above. Those responsibilities are focused on ESR’s research purpose and require ESR to remain financially viable and may create uncertainty as to ESR’s role in the DNA regime.

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<sup>49</sup> Australian Criminal Intelligence Commission “Biometric and forensic services” <[www.acic.gov.au](http://www.acic.gov.au)>.

<sup>50</sup> Pursuant to the DNA Identification Act of 1994 (42 USC § 14132). See Federal Bureau of Investigation “Frequently Asked Questions on CODIS and NDIS” <[www.fbi.gov](http://www.fbi.gov)>.

<sup>51</sup> James Brandi and Linzi Wilson-Wilde “Standard Methods” in Jay A Siegel and Pekka J Saukko (eds) *Encyclopedia of Forensic Sciences* (2nd ed, Academic Press, London, 2013) 522 at 524.

<sup>52</sup> Keith Bedford “Forensic science services” [2011] NZLJ 285 at 287. He also notes, however, that this has benefits as there is no backlog of work, which is a common issue in other jurisdictions. Arguably, though, “not all the work that could be justified is necessarily submitted”: at 287.

7.40 In addition to the lack of transparency, we also have the following concerns:

- (a) **There is a gap in accountability regarding databank administration.** ISO/IEC 17025 does not cover databank administration services. Therefore, the services ESR provides in relation to DNA databank operations are not covered by its accreditation (other than accreditation confirming that the databank has been set up in accordance with the correct standards). Instead, requirements to ensure security and proper use of the DNA databanks and the information stored on them are imposed on ESR under the Services Agreement. However, it does not specifically cover matters such as:
- (i) the quality threshold for loading profiles to the DPD and Temporary Databank;
  - (ii) matching rules for databank searching and reporting of matches;
  - (iii) one-off speculative searching where a profile is below the quality threshold; and
  - (iv) loading mixed crime scene profiles to the DPD and Temporary Databank and searching and reporting in relation to those profiles.
- (b) **The CIBS Act does not expressly authorise the use of DNA samples and profiles for internal validation.** As noted above, an important step in the internal validation of a method is ensuring it will work with DNA samples and profiles that have been obtained in the course of criminal investigations. However, it is unclear whether the CIBS Act provides the authority for ESR to use profiles obtained under the CIBS Act for internal validation. Access to profiles is permitted for the purpose of “administering the databank”,<sup>53</sup> but it is unclear if this was intended to include the use of profiles for internal validation purposes.
- (c) **There is no regulation of ESR’s collection and use of anonymised population data.** In the Issues Paper, we highlighted our concerns about the use of the voluntary ethnicity form to collect information for the population databanks, especially at a time when the State suspects a person of criminal offending.<sup>54</sup> We also noted that the form frames ethnicity with reference to blood quantum. This is out of line with how the government collects ethnicity data in other contexts and is viewed internationally as somewhat outdated.<sup>55</sup> We accept that there is a need to accurately calculate the likelihood ratios that are used to provide DNA evidence in court and that, to do so, ESR needs to analyse New Zealand-specific ethnicity data. However, we question whether this data is still required and, if so, whether there is

<sup>53</sup> Criminal Investigations (Bodily Samples) Act 1995, ss 24R(1)(c) and 27(1)(c).

<sup>54</sup> Issues Paper at [11.89]. We noted at [11.90] that ESR proposed an amendment to the CIBS Act in 2002 to facilitate the collection of this ethnicity information. This amendment was not made, but it was agreed by the Law and Order Select Committee, ESR, Police and the Privacy Commissioner that the form could be given out, without a statutory mandate, but only to those providing databank consent samples under Part 3 of the Criminal Investigations (Bodily Samples) Act 1995. The Privacy Commissioner reviewed the form, and Police and ESR audited their practices around the collection and storage of this information. When Part 2B of the Act was introduced, the consent-based requirement for collection of the information was overlooked, and the information continued to be collected from those being compelled under Part 2B to provide a sample.

<sup>55</sup> See Tatauranga Aotearoa | Stats NZ “Māori Descent” <<http://archive.stats.govt.nz/#gsc.tab=0>>; and Tahu Kukutai “The Problem of Defining an Ethnic Group for Public Policy: Who is Māori and Why Does it Matter?” (2004) 23 Social Policy Journal of New Zealand 86.

a more appropriate way to collect it. We note that, in the United Kingdom, the ethnicity information for this purpose is obtained from volunteer donors “mainly drawn from student populations and police forces in several UK cities”.<sup>56</sup>

## OPTIONS FOR REFORM

- 7.41 In the Issues Paper, we expressed a preliminary view that the role of forensic services provider should be recognised in legislation.<sup>57</sup> We considered that legislation could empower Police (potentially in conjunction with Parliament or another appropriate body) to appoint a forensic services provider whose appointment could be conditional on meeting certain requirements such as:
- (a) complying with specified international laboratory accreditation standards; and/or
  - (b) arranging for staff to undertake regular proficiency tests.
- 7.42 We considered that this would promote accessibility and greater legal certainty as to the rights and obligations between Police and ESR.

## RESULTS OF CONSULTATION

### Recognition of the forensic services provider in legislation

- 7.43 Nine submitters commented on whether the role of Police’s forensic services provider should be recognised in legislation, and all agreed that it should. The New Zealand Law Society (NZLS) and the New Zealand Bar Association (adopting NZLS’s submission in its entirety) submitted that referring to the functions of the forensic services provider in legislation would promote efficacy, transparency and accountability. However, to ensure future flexibility, the legislation should not specify the name of the provider. It also considered that the forensic services provider’s independence from Police should be stated in legislation and that it should be represented on or provide guidance to the proposed oversight body.
- 7.44 The Public Defence Service (PDS) noted its concern about the actual or perceived lack of independence arising from the close alignment between Police and ESR. It expressed a preference for an independent forensic services provider that contracts with both prosecution and defence. PDS considered that defence lawyers should be able to arrange retesting or reanalysis. Such requests should not be processed by Police but through an independent body with the possibility for review of the matter. (We address access to crime scene samples for reanalysis in Chapter 16). PDS submitted that, if a Police forensic services provider is to continue, the individual organisation should not be recognised in legislation but the factors that the Police must be satisfied of prior to appointing such a provider should be.

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<sup>56</sup> Forensic Science Regulator *Guidance: Allele Frequency Databases and Reporting Guidance for the DNA (Short Tandem Repeat) Profiling* (Home Office, FSR-G-213 Issue 2, 2020) at [7.1.2].

<sup>57</sup> Issues Paper at [7.67]–[7.70].

- 7.45 The Privacy Commissioner was supportive of the proposal to recognise the forensic services provider's role in legislation, noting that the provider has a huge amount of personal and sensitive information in its hands. Karaitiana Taiuru was also supportive but submitted that a specific Māori forensic services provider should also be considered.
- 7.46 ESR and Police both agreed that a forensic services provider should be recognised but not named in legislation. Police noted this would allow for flexibility and the ability to tender. ESR emphasised the role of the forensic services provider should be independent of Police (including that the forensic services provider be able to process requests from other enforcement agencies), appropriately accredited and supported by a research and development work programme.

### The voluntary ethnicity form and anonymised population data

- 7.47 While we did not seek submissions on the use of the voluntary ethnicity form or anonymised population data, the concerns identified at paragraph 7.40(c) were identified by Te Mana Raraunga | Māori Data Sovereignty Network, which submitted:

44...the Y-STR population databank ... categorises population groups as “Caucasian”, “Asian”, “Western Polynesian”, “Eastern Polynesian” and “Other”... We are concerned about the inconsistent application of terminology and concepts in this space, specifically the use of ethnicity, alongside what appear to be ‘racial’ categorisations, when the testing presumably relates to concepts of genetic ancestry/geographic origins.

45.The Law Commission document notes that ethnicity is collected voluntarily by Police alongside the sample (whether the sample itself is collected voluntarily or by compulsion). There are known issues with the quality of ethnicity data from the Police historically, including inconsistent and inappropriate approaches to ethnicity data collection. (Cormack 2010).

46.Ethnicity is not a measure of ancestry or geographic origins, and should not be conflated as such. This risks stigmatising population groups, and is contrary to the Māori data sovereignty principle of Manaakitanga. The ESR ‘Voluntary Ethnicity Form’ includes the question “What is your ancestral origin (tribal group/language group/island)?” The example on the form includes reference to “full blood”. This approach is highly problematic and unscientific (Yudell et al 2016) and suggests ESR are confusing a number of different concepts in their approach. References on the form to “full blood” and “biological parents” allude to racialised, biological conceptualisations of ethnicity.

47.The relationship between the Y-STR population databank maintained by the ESR and the other databanks is unclear. The Review document notes that prior to 2010 most of the samples will have been obtained by consent, while most are now obtained by compulsion. There need to be clear policies governing the transfer of samples to the Y-STR population databank and/or their use.

- 7.48 ESR and Police have both advised that, although the population data still needs to be obtained, they are open to collecting it in a different way.



## RECOMMENDATIONS

### Recognising the role of forensic services provider in legislation

#### RECOMMENDATIONS

**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.

7.49 We recommend that the role of the forensic services provider be expressly recognised in new DNA legislation. As noted above, this role carries a considerable amount of social responsibility, and recognising and providing for it in new DNA legislation would promote accessibility and provide greater legal certainty as to the rights and obligations between Police and the forensic services provider.

7.50 We do not, however, consider that ESR should be named in legislation as the forensic services provider. Rather, to ensure the legislation is flexible, it should provide for the possibility that, in the future, another forensic services provider might undertake the role. Similarly, we do not consider that the current contractual relationship between Police and ESR should be replaced by legislation. As noted above, their current operational relationship appears to work well. Our concerns regarding the lack of transparency as to the role performed by ESR are best achieved by identifying the forensic services provider in new DNA legislation and imposing general statutory requirements that the forensic services provider must meet, reflecting the integral role the forensic services provider performs in the DNA regime.

7.51 We recommend that new DNA legislation should require the forensic services provider to:

- (a) **Act impartially.** This enshrines the current contractual requirement under the Services Agreement and recognises the specialist expertise of forensic scientists. We also consider that the need for impartiality is applicable to any responsibilities that the forensic services provider may take on, on behalf of Police, in administering the proposed DNA databank (see R39).
- (b) **Maintain relevant accreditation and other requirements and apply all quality standards and assurance processes in accordance with its accreditation.** We consider it necessary that the forensic services provider continues to hold and maintain accreditation in accordance with accepted international standards, together with any relevant additional requirements considered broadly applicable

to forensic services providers and laboratories. This will ensure continued best practice and would reassure the public that any provider contracted by Police will continue to be appropriately qualified.

- 7.52 Our recommendations in other chapters of this Report also impose obligations on the forensic services provider, including obligations to develop, with Police and in consultation with the DNA Oversight Committee, practice, policy and procedure relating to the DNA regime. In Chapter 5, we also recommend that the Independent Police Conduct Authority (IPCA) has a role in auditing the collection, use, storage and retention of DNA samples and profiles by Police and the forensic services provider. We also envisage that the forensic services provider will have a key role in proposals for new DNA analysis techniques discussed in Chapter 6. These recommendations all underscore the need to recognise and provide for the forensic services provider's role in new DNA legislation.

### Accessing samples and profiles for internal validation

#### RECOMMENDATION

**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.

- 7.53 In Chapter 6, we recommend that new DNA analysis techniques or new uses of an existing technique should be approved in regulations made under new DNA legislation. The DNA Oversight Committee will play an important role in advising the Minister on whether to recommend new regulations and should consider to what extent scientific validity has been established. To assist the Committee to perform its role, the forensic services provider should be able to conduct internal validation and report the results of that process to the DNA Oversight Committee. Such validation may be to ensure proposed analysis techniques can be conducted accurately and reliably.

### Maintaining anonymised population data

#### RECOMMENDATION

**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.

- 7.54 We recognise that it is necessary to obtain allele frequency data in respect of the subpopulations of Aotearoa New Zealand in order to ensure the strength of DNA evidence is correctly interpreted, particularly when likelihood ratio assessments are being made as part of a full casework comparison.
- 7.55 We recommend that the forensic services provider should develop a policy, in consultation with Police and the DNA Oversight Committee, on how it obtains and stores anonymised population data for this purpose. The policy should specify how the information will be obtained in a way that upholds human rights and privacy and recognises and provides for tikanga Māori (in accordance with the purpose of new DNA legislation) and how it will ensure recognition of cultural and spiritual values.

### Powers and responsibilities in relation to the proposed DNA databank

#### RECOMMENDATIONS

- R39** New DNA legislation should require the proposed DNA databank to be maintained in a way that:
- complies with all relevant requirements in new DNA legislation;
  - ensures the security of the databank, including the maintenance of appropriate back-up and disaster recovery procedures; and
  - 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.

- 7.56 We recommend that new DNA legislation include specific responsibilities in relation to the maintenance of the proposed DNA databank. This would address the existing gap identified above in relation to accreditation and databank administration. These responsibilities would fall to whoever is responsible for administering the proposed DNA databank, which may be Police, but in the interests of transparency, it would be preferable if this is the forensic services provider.
- 7.57 Specifically, the proposed DNA databank should be maintained in a way that:
- complies with all relevant requirements of new DNA legislation, including requirements relating to uploading profiles, conducting databank searching, reporting links and removing profiles;
  - ensures the security of the proposed DNA databank, including the maintenance of appropriate back-up and disaster recovery procedures; and
  - keeps information held on the proposed DNA databank secure from inappropriate access or misuse.

- 7.58 In addition to these responsibilities, in Chapter 17, we recommend that Police and the forensic services provider develop a Crime Scene Index Protocol to govern practice, policy and procedure relating to the crime scene index of the proposed DNA databank. Compliance with that Protocol and other procedures developed in accordance with new DNA legislation would then be subject to independent audit by IPCA (see Chapter 5).
- 7.59 We also recommend that new DNA legislation should permit the matching within and between the offenders and pre-conviction indices of the proposed DNA databank. This will enable the detection of duplicate profiles and inconsistencies or errors relating to profiles on the offender and pre-conviction indices, which may otherwise not be identified. For example, this may identify that a person is using an alias, or it may identify an error made in transcribing or inputting the identifying information in the index.<sup>58</sup>
- 7.60 This will also enable reporting on the total number of known people who have their profiles on the databank, which may be lower than the total number of profiles contained on each index. For example, a person may have their profile stored on the offenders index and also have a suspect profile stored on the pre-conviction index in relation to separate charges.
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<sup>58</sup> For discussion of these issues, see NSW Ombudsman *DNA sampling and other forensic procedures conducted on suspects and volunteers under the Crimes (Forensic Procedures) Act 2000* (October 2006) at [10.4.1].

**PART B**

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**DNA IN CRIMINAL  
CASEWORK**



## CHAPTER 8

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# Suspect sampling

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## INTRODUCTION

- 8.1 In this part of the Report, we consider the use of DNA in criminal casework. We start by looking at the criteria for obtaining DNA samples from known people for the purpose of casework comparison. We refer to these samples as “casework samples”. In later chapters of this part of the Report we consider casework sampling procedures, indirect sampling, the collection of samples from crime scenes and emerging issues including forensic DNA phenotyping and genetic genealogy searching. Finally, in Chapter 16, we address the storage and retention of casework and crime scene samples.
- 8.2 In this chapter, we consider the suspect sampling regime in Part 2 of the CIBS Act — that is, when Police should be able to obtain a DNA sample directly from a suspect (suspect sample) for the purposes of casework comparison.
- 8.3 The suspect sampling regime only applies to DNA samples collected directly from a suspect. The CIBS Act is silent on the indirect collection of suspect samples from a secondary source, including the collection of DNA samples from discarded objects (such as a coffee cup or cigarette butt) or from a biobank of human tissue samples maintained for a different purpose (such as blood spot cards collected for the Newborn Metabolic Screening Programme). Indirect sampling is discussed in Chapter 12.

## CURRENT LAW AND PRACTICE

### Criteria for obtaining suspect samples

- 8.4 The suspect sampling regime is based on the concept of informed consent.<sup>1</sup> A suspect sample may be obtained from an adult suspect (of or over the age of 18 years) only if:<sup>2</sup>
- (a) the suspect consents to the taking of the sample, having been informed of the prescribed matters both verbally and in writing; or

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<sup>1</sup> While the CIBS Act does not use the term “informed consent”, the information and procedural requirements in Part 2 as a whole make it clear that Parliament intended that a suspect’s consent must be “informed” and describe what informed consent means in this context. This was confirmed by the Court of Appeal in *R v Toki* [2017] NZCA 513, [2018] 2 NZLR 362 at [15], where it observed that Parliament “has provided a comprehensive and prescriptive regime for obtaining a person’s informed consent”. While that case concerned obtaining a sample for the DNA Profile Databank by consent under Part 3 of the CIBS Act, the requirements concerning consent in Part 2 are mirrored in Part 3. It is also of note that, prior to the CIBS Act coming into force, the Court of Appeal held that the common law allowed police officers to obtain suspect samples by consent as long as the consent was obtained “without artifice or deception as to the purpose for which the sample is required, from a person in a position to give a free and informed consent”: *R v Pengelly* [1992] 1 NZLR 545 (CA) at 549.

<sup>2</sup> Criminal Investigations (Bodily Samples) Act 1995, s 5.

- (b) the suspect refuses to consent and a District Court or High Court Judge makes an order requiring the suspect to give a DNA sample (compulsion order).
- 8.5 The CIBS Act prescribes different requirements for suspects under the age of 18 years. These are discussed below.
- 8.6 The suspect sampling regime has broad application. It applies to any suspect in any criminal investigation in respect of an imprisonable offence or the non-imprisonable offence of “peeping and peering”.<sup>3</sup> A “suspect” is also broadly defined:<sup>4</sup>
- suspect**, in relation to an offence, means any person whom it is believed has or may have committed that offence, whether or not—
- (a) that person has been charged with that offence; or
- (b) there is good cause to suspect that person of having committed that offence

### *Collecting suspect samples from adults by consent*

- 8.7 When investigating an offence that has been committed or is believed to have been committed, a police officer may request an adult suspect to give a DNA sample if the police officer has “reasonable grounds to believe that analysis of the sample would tend to confirm or disprove the suspect’s involvement in the commission of the offence”.<sup>5</sup>
- 8.8 When requesting a DNA sample from a suspect, the police officer has a duty to inform them “in a manner and in language that the suspect is likely to understand” of the offence in respect of which the request is made and that:<sup>6</sup>
- (a) the police officer has reasonable grounds to believe that analysis of the suspect sample would tend to confirm or disprove their involvement in the commission of that offence;
- (b) they are under no obligation to give the sample;
- (c) they may withdraw their consent at any time before the sample is obtained;
- (d) they may wish to consult a lawyer before deciding whether to consent to the taking of the sample;
- (e) the suspect sample will be analysed and may provide evidence that may be used in criminal proceedings; and
- (f) if they do not consent and there is good cause to suspect them of committing the offence (or a related offence), the police officer may apply to the District Court or High Court for a suspect compulsion order.
- 8.9 The police officer must also hand the suspect a written notice that sets out the above matters and summarises the relevant provisions of the CIBS Act relating to the procedure for taking a DNA sample, how that sample is to be used and held and when it will be destroyed.<sup>7</sup> The notice must also state that:<sup>8</sup>

<sup>3</sup> Section 5(a) authorises the taking of suspect samples if the offence is an imprisonable offence or an offence against any of the provisions listed in Part 3 of Schedule 1. However, all but one of the offences listed in Part 3 of Schedule 1 are imprisonable. The single exception is the offence of peeping or peering into a dwellinghouse, which is an offence under s 30 of the Summary Offences Act 1981 punishable by a maximum fine of \$500. We discuss the inclusion of this offence at [8.49] below.

<sup>4</sup> Criminal Investigations (Bodily Samples) Act 1995, s 2 definition of “suspect”.

<sup>5</sup> Section 6(1).

<sup>6</sup> Section 6(2)(b).

<sup>7</sup> Sections 6(2)(a), 7(b)(ii)–(v), (vii)–(ix), (xi)–(xii) and (xiv)–(xv).

- (a) it is believed that the suspect has or may have committed a qualifying offence and is being requested to consent to the taking of a suspect sample;
  - (b) the suspect will be deemed to have refused to consent if they do not consent within 48 hours after the request is made;
  - (c) the suspect may request that the sample be taken in the presence of a lawyer or another person of the suspect's own choice; and
  - (d) if the suspect is convicted of the offence in respect of which the sample is obtained or a related offence, information derived from the analysis of the sample will be held on a DNA profile databank.
- 8.10 A suspect does not need to be under arrest or otherwise detained by Police for a suspect request to be made. However, if a suspect is in custody at the time a suspect request is made, they are entitled to consult privately with a lawyer.<sup>9</sup>
- 8.11 Consent can be given in writing (by signing the notice) or given orally.<sup>10</sup> If consent is given orally, it must be recorded on a video record that clearly shows the making of the request to the suspect, the handing to the suspect of the required notice and the giving of consent to the taking of the sample.<sup>11</sup>
- 8.12 A person may withdraw their consent before a sample is collected.<sup>12</sup> If consent is not given within 48 hours of a request being made, the suspect shall be deemed to have refused to consent for the purposes of applying for a suspect compulsion order.<sup>13</sup>

### *Suspect compulsion orders*

- 8.13 If a suspect refuses to consent to the taking of a suspect sample, a police officer of or above the position of inspector may apply to a District Court or High Court Judge for a suspect compulsion order.<sup>14</sup> Notice of the application must be served on the respondent suspect, and both the applicant and the respondent are entitled to appear and to adduce evidence at the hearing of the application.<sup>15</sup>
- 8.14 The Judge may issue a suspect compulsion order if satisfied that:<sup>16</sup>
- (a) there is "good cause to suspect" that the suspect has committed a relevant offence;<sup>17</sup>

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<sup>8</sup> Section 7(b)(j), (vi), (x) and (xiii).

<sup>9</sup> Section 12(1). See also s 23(1)(b) of the New Zealand Bill of Rights Act 1990, which affirms the right of any person who is arrested or detained under any enactment to consult and instruct a lawyer without delay and to be informed of that right.

<sup>10</sup> Criminal Investigations (Bodily Samples) Act 1995, s 9(1) and (2).

<sup>11</sup> Section 9(3).

<sup>12</sup> Section 10.

<sup>13</sup> Section 11.

<sup>14</sup> Section 13.

<sup>15</sup> Section 13(3). This is subject to the power to order that information be withheld from the respondent under s 15. There is a general prohibition on publishing the name or identifying particulars of the respondent unless the Judge orders otherwise or the respondent is charged with the offence to which the application relates under s 14.

<sup>16</sup> Section 16. The Judge must also be satisfied that the respondent (the suspect in relation to whom the application for a suspect compulsion order relates) has refused to consent to the taking of a bodily sample.

<sup>17</sup> The term "good cause to suspect" requires "a reasonable ground of suspicion upon which a reasonable [person] may act": *Police v Anderson* [1972] NZLR 233 (CA) at 242. It is a question of fact to be decided objectively by reference to



- (b) material reasonably believed to be from or genetically traceable to the body of a person who committed the offence has been found or is available;<sup>18</sup>
  - (c) there are “reasonable grounds to believe” that analysis of a DNA sample from the suspect would tend to confirm or disprove their involvement in the commission of the offence; and
  - (d) in all the circumstances, it is reasonable to make the order.
- 8.15 The CIBS Act sets out the relevant factors that the Judge must have regard to when considering whether to make a suspect compulsion order, which are:<sup>19</sup>
- (a) the nature and seriousness of the offence to which the application relates;
  - (b) any reasons given by the suspect for opposing the making of the order sought;
  - (c) any evidence regarding the importance of obtaining a suspect sample to the investigation; and
  - (d) any other matter the Judge considers relevant.
- 8.16 If a suspect compulsion order is granted, the Judge may direct the issue of a warrant to arrest and detain the person to whom the order or notice relates until a suspect sample is taken, and a police officer may use or cause reasonable force to be used to assist a suitably qualified person to take a sample.<sup>20</sup> Sampling procedures and the use of reasonable force are addressed in Chapter 11.

### *Collecting suspect samples from people aged under 18 years*

- 8.17 If the suspect is a young person (of or over 14 years of age but under 18 years of age),<sup>21</sup> both the suspect and a parent of the suspect must consent to the taking of a DNA sample,<sup>22</sup> and modified notice and information requirements apply.<sup>23</sup> If consent is refused (either by the suspect or by a parent of the suspect or both), a police officer of or above the position of inspector may apply to a District Court Judge for an order requiring the suspect to give a DNA sample (a juvenile compulsion order).<sup>24</sup> The Judge

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all the surrounding and relevant circumstances: *New Zealand Police v Penhale* HC Wellington CRI-2010-485-04, 25 February 2010 at [4].

<sup>18</sup> Criminal Investigations (Bodily Samples) Act 1995, s 16(1)(b). This includes material found or available at the scene of the offence, on the victim of the offence, from within the body or from any thing coming from within the body of the victim of the offence that is reasonably believed to be associated with or having resulted from the commission of the offence, on any thing reasonably believed to have been worn or carried by the victim when the offence was committed or on any person or thing reasonably believed to have been associated with the commission of the offence.

<sup>19</sup> Section 16(2). In addition, s 16(3) requires the Judge to also have regard to whether the suspect has offered or been given an opportunity to provide a specimen from their body other than a blood sample or buccal sample from which a DNA profile may be obtained for the purposes of confirming or disproving their involvement in the commission of the offence and, if such a specimen has been given, whether or not a suitable DNA profile has been obtained from that specimen.

<sup>20</sup> Sections 45 and 54(2).

<sup>21</sup> Section 2 definition of “young person”. Prior to amendments on 1 July 2019 to the Oranga Tamariki Act 1989, a young person was defined as a person of or over 14 years of age but under 17 years of age.

<sup>22</sup> Criminal Investigations (Bodily Samples) Act 1995, s 5(b)(ii). The term “parent” is defined to include a guardian, step-parent and, in certain circumstances, a person who is acting in the place of a parent: s 2 definition of “parent”.

<sup>23</sup> Section 8(2).

<sup>24</sup> Section 18.

may issue a juvenile compulsion order if satisfied of the same matters set out at paragraph 8.14 in relation to suspect compulsion orders.<sup>25</sup>

- 8.18 If a suspect is a child (of or over the age of 10 years but under the age of 14 years) or was a child at the time the offence was committed,<sup>26</sup> the process for obtaining a suspect sample depends on whether the child can be lawfully prosecuted for the offence.<sup>27</sup> For serious offending for which a child can be lawfully prosecuted, a suspect sample can only be obtained pursuant to a juvenile compulsion order.<sup>28</sup>
- 8.19 For offending for which a child cannot be lawfully prosecuted, a suspect sample can only be obtained under Part 2A of the CIBS Act if both the child and a parent consent.<sup>29</sup> The purpose of Part 2A sampling is to determine whether a child is in need of care and protection on the ground that the child has committed an offence or offences of sufficient number, nature or magnitude to cause serious concern for their wellbeing.<sup>30</sup> Suspect samples can only be requested under Part 2A if there is good cause to suspect the child has or may have committed the offence.<sup>31</sup> Similar notice, information and procedural requirements apply to Part 2A requests as detailed above in relation to suspect consent requests.<sup>32</sup> If consent is not given, Police cannot seek a juvenile compulsion order.
- 8.20 The CIBS Act does not authorise the collection of a suspect sample from any child under the age of 10 (that is, below the legal age of criminal responsibility).

### Use of suspect samples

- 8.21 While the criteria for collecting suspect samples is relatively broad, the use of suspect samples is strictly confined. The CIBS Act does not authorise the use of suspect samples for any purpose other than the investigation (including any resulting criminal prosecution) for which the sample was obtained.<sup>33</sup>
- 8.22 If a suspect is convicted of the offence (or a related offence) for which the suspect sample was obtained, their DNA profile can be stored on the DNA Profile Databank.<sup>34</sup> Only at that point can their profile be compared against crime scene profiles from other

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<sup>25</sup> Section 23.

<sup>26</sup> Section 2 definition of “child” and ss 8(1)(a), 23(1)(b) and 24C(1).

<sup>27</sup> In accordance with s 272 of the Oranga Tamariki Act 1989, which sets the age of criminal responsibility for offending. Section 272(1) provides that a child aged 10 or 11 may only be prosecuted for murder or manslaughter and that a child aged 12 or 13 may only be prosecuted for murder, manslaughter or any offence for which the maximum penalty available is or includes imprisonment for life or for at least 14 years. If a child aged 12 or 13 years is a “previous offender” within the meaning of s 272(1A) or (1B), they may also be prosecuted for any offence for which the maximum penalty available is or includes imprisonment for at least 10 years but less than 14 years: s 272(1)(c).

<sup>28</sup> Criminal Investigations (Bodily Samples) Act 1995, ss 5(b)(iii), 8(1) and 23.

<sup>29</sup> Section 24C.

<sup>30</sup> Section 24D(b)(ii) referring to Oranga Tamariki Act 1989, s 14(1)(e).

<sup>31</sup> Section 24D(a). There must also be reasonable grounds to believe that the analysis of a buccal sample would tend to confirm or disprove their involvement in the commission of the offence: s 24D(c).

<sup>32</sup> Sections 24E–24H.

<sup>33</sup> Section 5 only permits taking a suspect sample “in any criminal investigation in respect of an offence ... for the purposes of that investigation”. See and *R v Hoare* CA310/04, 21 April 2005 at [18].

<sup>34</sup> Section 26(a).

unsolved crimes.<sup>35</sup> Even then, if the comparison results in a match, the result is not admissible against that person in criminal proceedings.<sup>36</sup> A second suspect sample is required.<sup>37</sup>

### Current suspect sampling practice

- 8.23 In practice, the number of suspect samples collected is relatively low compared to collection of samples from people arrested or intended to be charged (under Part 2B) or for databank purposes (under Part 3). This is illustrated in Table 3 in Appendix 3. This is despite the broad application of the suspect sampling regime and the need to obtain a suspect sample in order to rely on the results of a casework comparison as evidence in criminal proceedings.<sup>38</sup>
- 8.24 In fact, over the nine-year reporting period from 2010/11 to 2018/19, collection of suspect samples never reached above five per cent of all DNA samples collected by Police in any given year. The use of reasonable force to obtain suspect samples over that period is also very low.<sup>39</sup> Police has only reported the use of reasonable force to obtain a DNA sample on six occasions pursuant to either a compulsion order or a databank compulsion notice.<sup>40</sup> While Police is not required to report on whether the use of reasonable force is in relation to a child, young person or adult, Police has advised us that, to date, reasonable force has not been used to collect a DNA sample from a child or young person.

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<sup>35</sup> Unless Police made a “dual request”, which involves a databank request made in conjunction with a suspect request under s 33 of the Criminal Investigations (Bodily Samples) Act 1995 and the suspect agreed to provide a DNA sample in response to both requests. In that case, Police can upload the suspect’s DNA profile to the DNA Profile Databank and compare it to DNA profiles from unsolved crimes regardless of the outcome of the specific investigation for which the suspect request was made. Dual requests are discussed at [8.30].

<sup>36</sup> Section 71(1)–(2).

<sup>37</sup> The reason for requiring a second suspect sample is two-fold. First, from a scientific point of view, to be a valid forensic comparison, two DNA profiles need to be analysed under the same laboratory conditions using the most up-to-date analysis kits. For example, a DNA profile that was generated in the early days of the CIBS Act would have been analysed with a kit that only tested six loci (specific areas or sites on a chromosome), whereas a crime scene sample analysed today would be tested at 19 loci and a known person sample at 21 loci. Second, relying on a databank match as evidence in court would be inconsistent with the established principle that evidence of a previous conviction is not admissible in criminal proceedings. This was noted by the Select Committee in 2002 when reporting back on proposed amendments to the Act. See Criminal Investigations (Bodily Samples) Amendment Bill 2002 (221-2) (select committee report) at 5, n 2:

There is no basis for departing from [this] general principle in relation to DNA evidence. Should the fact of a databank match be made available to the jury, this may indicate a person has a prior criminal conviction.

<sup>38</sup> Section 71(1)–(1A) of the Criminal Investigations (Bodily Samples) Act 1995 provides that DNA profiles stored on a DNA profile databank or derived from a sample taken under Part 2B are inadmissible in criminal proceedings against that person. Only suspect samples taken pursuant to Part 2 are admissible and only in proceedings for the offence in respect of which the sample was taken or for any related offence: s 71(2).

<sup>39</sup> The power to use reasonable force to take DNA samples is discussed in Chapter 11.

<sup>40</sup> Section 76(1)(e) of the Criminal Investigations (Bodily Samples) Act 1995 requires Police to report on:

[T]he number of occasions on which any constable has used or caused to be used force to assist a suitably qualified person to take a fingerprint or buccal sample pursuant to a compulsion order or databank compulsion notice ...

Figures reported are not further broken down into samples taken pursuant to compulsion orders and databank compulsion notices.

## ISSUES WITH A CONSENT-BASED REGIME

- 8.25 In the Issues Paper, we questioned whether a suspect sampling regime based on informed consent is appropriate.<sup>41</sup> We acknowledged that a consent-based regime promotes individual autonomy and may be more consistent with applicable tikanga Māori, including by upholding the mana of the person providing the sample.<sup>42</sup> However, we were concerned that suspects may not always be able to provide “free and informed consent” because of:
- (a) the inherent power imbalance between the suspect and the requesting police officer;
  - (b) the volume and complexity of the information suspects must be given; and
  - (c) the difficulty in obtaining legal advice.
- 8.26 These concerns are particularly acute for children and young people, as we discuss below.

### Inherent power imbalance

- 8.27 Due to the inherently coercive nature of a criminal investigation, there is an imbalance of power when a police officer asks a suspect to provide a suspect sample. This power imbalance is heightened by the fact that, if consent is refused, a police officer has the power to seek a compulsion order and, if an order is issued, obtain a suspect sample using reasonable force if necessary.<sup>43</sup>
- 8.28 As the Australian Law Reform Commission has previously observed, this power imbalance “challenges the free nature of any consent given to a forensic procedure”.<sup>44</sup> A suspect may feel confusion or pressure to consent. They may think that there is no real choice about the matter as a DNA sample will be taken regardless, by force if necessary. This may suggest that informed consent is an unsuitable concept to apply to criminal investigations.<sup>45</sup>
- 8.29 Cultural factors might worsen this power imbalance. As the Commission observed in an earlier paper on the privilege against self-incrimination,<sup>46</sup> the criminal justice system in Aotearoa New Zealand is based upon a concept of individual rights, whereas the traditional Māori approach is built around collective kinship obligations. When responsibility is collective, the burden of culpability and punishment is more evenly spread and power is likely to be more evenly balanced between two whānau resolving

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<sup>41</sup> Issues Paper at [8.62]–[8.88].

<sup>42</sup> At [8.92].

<sup>43</sup> By way of contrast, where informed consent is required in the health context when patients are considering medical treatment, an individual's refusal to consent is the end of the matter. Individual autonomy is given precedence. See discussion in Australian Law Reform Commission *Essentially Yours: The Protection of Human Genetic Information in Australia* (ALRC R96, 2003) at [41.6].

<sup>44</sup> At [41.7].

<sup>45</sup> This was the conclusion of the Australian Law Reform Commission, which, in 2003, recommended that suspect samples should only be obtained pursuant to a court order or a statutory power exercised by an authorised officer rather than by informed consent: at 1012.

<sup>46</sup> Te Aka Matua o te Ture | Law Commission *The Privilege Against Self-Incrimination: A Discussion Paper* (NZLC PP25, 1996) at 38–40.

the dispute than it is between the Crown and an individual.<sup>47</sup> Māori within the criminal justice system may therefore be more likely to make admissions of guilt than Pākehā and less likely to invoke the privilege against self-incrimination, given its apparent foreignness to tikanga.<sup>48</sup> Whānau, seeing themselves as collectively responsible, may sometimes pressure the individual into confessing guilt.<sup>49</sup> These factors might also be at play when a police officer asks a suspect who is Māori to provide a suspect sample.

### Volume and complexity of information

- 8.30 The volume and complexity of information that needs to be provided to a suspect when a police officer requests a suspect sample, set out at paragraphs 8.8 and 8.9 above, is significant. The relevant form is described as a “five-page densely worded document containing a large amount of legal and complex terms and language”.<sup>50</sup> In addition, current Police practice is to make a “dual request” for both a suspect sample and a databank sample if the suspect has not previously provided a DNA sample for the DNA Profile Databank.<sup>51</sup> This increases the volume and complexity of the information the suspect must be told. It also conflates the two requests. We have serious concerns about obtaining databank samples by consent, which we discuss in Chapter 18.
- 8.31 Some suspects may not be able to comprehend the information given to them and apply that information to their individual circumstances in order to make a truly informed decision. A recent report by Professor Ian Lambie, Chief Science Adviser for the justice sector, identified that people with brain and behaviour issues are over-represented in the criminal justice system.<sup>52</sup> For example, Lambie observed that:<sup>53</sup>
- About 5% to 10% of the general population experience language difficulties but at least around 50% of those involved with the criminal justice system do, and as many as 90% of justice-involved young people demonstrate language skills that are below average for their age.
- 8.32 The processes of the justice system itself may compound negative outcomes for individuals.<sup>54</sup> Lambie cited a New Zealand forum on neurodisabilities, which explained:<sup>55</sup>

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<sup>47</sup> At [131].

<sup>48</sup> At 39–40.

<sup>49</sup> At [132].

<sup>50</sup> *New Zealand Police v FG* [2020] NZYC 328 at [56].

<sup>51</sup> Ngā Pirihimana o Aotearoa | New Zealand Police “DNA Sampling” in *Police Manual* at 36–37. This involves asking the suspect to consent to their sample being used both for the case in which they are a suspect and for databank purposes in order to identify links to past or future offending.

<sup>52</sup> The term “brain and behaviour issues” includes traumatic brain injury, foetal alcohol spectrum disorder, cognitive impairment/intellectual disability, communication disorders, attention-deficit/hyperactivity disorder, learning difficulties, dyslexia and autism spectrum disorder: Ian Lambie *What were they thinking? A discussion paper on brain and behaviour in relation to the justice system in New Zealand* (Office of the Prime Minister’s Chief Science Advisor, 29 January 2020) at 9.

<sup>53</sup> Stavroola AS Anderson, David J Hawes and Pamela C Snow “Language impairments among youth offenders: A systematic review” (2016) 65 *Children and Youth Services Review* 195 as cited in Ian Lambie *What were they thinking? A discussion paper on brain and behaviour in relation to the justice system in New Zealand* (Office of the Prime Minister’s Chief Science Advisor, 29 January 2020) at [138]; Sarah A Lount, Suzanne C Purdy and Linda Hand “Hearing, Auditory Processing, and Language Skills of Male Youth Offenders and Remandees in Youth Justice Residences in New Zealand” (2017) 60 *JSLHR* 121; and Susan Young, Ben Greer and Richard Church “Juvenile delinquency, welfare, justice and therapeutic interventions: a global perspective” (2017) 41 *BJPsych Bull* 21.

<sup>54</sup> Ian Lambie *What were they thinking? A discussion paper on brain and behaviour in relation to the justice system in New Zealand* (Office of the Prime Minister’s Chief Science Advisor, 29 January 2020) at 5. See also Jill Bowman “Assessing the Literacy and Numeracy of Prisoners” (2014) 2(1) *Practice: The New Zealand Corrections Journal* 39 at

In the justice system, where all procedures are essentially word-based, a person’s inability to quickly process and comprehend information in written or verbal form leaves them open to manipulation and entrapment. Propensities to take statements literally, to become confused by information and sensory overload, to act impulsively, to not see their actions in context, and to speak before thinking make it difficult to navigate the complexities and nuances of the legal process.

- 8.33 While a police officer has a duty to “inform” the suspect of the information at paragraph 8.8 above “in a manner and in language that the suspect is likely to understand”,<sup>56</sup> there is no duty on the officer to check the suspect does in fact understand the information given to them.<sup>57</sup> In the Issues Paper, we also noted that Police’s reliance on its computer system (Biotrak) to automatically generate the correct sampling notice may have ‘routinised’ the process, making officers less familiar with the CIBS Act and the notices as they do not have to engage directly with the provisions of the CIBS Act itself in the way they used to.<sup>58</sup> This may also affect a police officer’s ability to convey the necessary information to a suspect in an understandable way.

### Availability of legal advice

- 8.34 In the Issues Paper, we said that, although suspects are entitled to legal advice before they consent, we are not aware of many people seeking it.<sup>59</sup> This may in part be because proceedings under the CIBS Act are civil proceedings for the purposes of the Legal Services Act 2000, which means that only lawyers who are civil legal aid providers can provide advice under the legal aid scheme in this context. There is little cross-over between civil and criminal legal aid providers, and criminal lawyers are more likely to appreciate the context of a suspect sample request.
- 8.35 Another possible factor is the limited availability of the Police Detention Legal Assistance (PDLA) service, which provides free legal advice and assistance to any unrepresented person who has been detained by police.<sup>60</sup> The service is available 24 hours a day, 7 days a week either by phone or face to face.<sup>61</sup> It is therefore available

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40–41; and Marama Edwards and Stephen Cunningham “Supporting Offenders Into Employment – A Joint Initiative” (2016) 4(2) Practice: The New Zealand Corrections Journal 42 at 42.

<sup>55</sup> Nessa Lynch “Neurodisability in the Youth Justice System in New Zealand: How Vulnerability Intersects with Justice” (2018) 8 VUWLRP 16/2018 at 4 as cited in Ian Lambie *What were they thinking? A discussion paper on brain and behaviour in relation to the justice system in New Zealand* (Office of the Prime Minister’s Chief Science Advisor, 29 January 2020) at 5.

<sup>56</sup> Criminal Investigations (Bodily Samples) Act 1995, s 6(2)(b).

<sup>57</sup> In *R v R* CA162/99, 1 June 1999 at [14], the Court held that the phrase “likely to understand” clearly intended an objective assessment and that “[t]he prosecution need not prove what [the suspect] actually understood, but whether, in the circumstances, the language used was such that he was likely to understand it”.

<sup>58</sup> Issues Paper at [8.73].

<sup>59</sup> At [8.79].

<sup>60</sup> “Establishment of the Police Detention Legal Assistance Service as a Specified Legal Service” (23 June 2011) 86 *New Zealand Gazette* 2108 at 2108–2109. Operational policy suggests that the PDLA can also be accessed by people being questioned by Police: Tāhū o te Ture | Ministry of Justice *Police Detention Legal Assistance Service: Operational Policy* (April 2018) at 4. Further, the Chief Justice’s 2007 Practice Note on Police Questioning provides that people who Police believes it has sufficient evidence to charge with an offence must be formally cautioned before they are questioned. The caution requires Police to advise the person they can exercise their right to consult a lawyer free of charge under the PDLA: Chief Justice Sian Elias “Practice Note on Police Questioning (s 30(6) Evidence Act 2006)” (16 July 2007) at [2].

<sup>61</sup> Tāhū o te Ture | Ministry of Justice *Police Detention Legal Assistance Service: Operational Policy* (April 2018) at 4.

where a suspect in police detention is asked to provide a suspect sample,<sup>62</sup> but it is *not* available to suspects who are not in police detention when a suspect sample is requested, such as in the case of *Police v FG*, discussed at paragraph 8.44 below, where police officers visited FG at his home to obtain a suspect sample.<sup>63</sup>

### Vulnerability of children and young people

- 8.36 Our concerns with the consent-based regime discussed above are heightened in respect of children and young people, given their inherent vulnerability due to their age and developing maturity. Studies of anatomical and functional brain development have shown that executive function (properties often called, in lay terms, wisdom and judgement) does not fully mature for many people until well into their mid-20s.<sup>64</sup>
- 8.37 Young people in the criminal justice system also experience higher rates of mental illness and developmental disorders compared to children and adolescents in the general population.<sup>65</sup> This is likely to undermine their ability to provide informed consent to the taking of a suspect sample. As noted at paragraph 8.31 above, as many as 90 per cent of justice-involved young people demonstrate language skills that are below average for their age.<sup>66</sup> In addition, life-course-persistent adolescent offenders, relative to other adolescents, are distinguished by “neurological abnormalities, volatile temperament, low intellectual ability, reading difficulties and poor performance on neuropsychological testing”.<sup>67</sup>
- 8.38 Given their inherent vulnerability, children and young people who encounter the criminal justice system are afforded special protections under the United Nations Convention on the Rights of the Child (UNCROC).<sup>68</sup> These protections are reflected in the Oranga Tamariki Act and are discussed in detail in Chapter 21. Particularly relevant in this context, however, is the specific youth justice principle:<sup>69</sup>

[T]hat the vulnerability of children and young persons entitles a child or young person to special protection during any investigation relating to the commission or possible commission of an offence by that child or young person.

<sup>62</sup> The right to access legal advice when in Police detention is preserved under s 12 of the Criminal Investigations (Bodily Samples) Act 1995.

<sup>63</sup> *New Zealand Police v FG* [2020] NZYC 328 at [51]–[56].

<sup>64</sup> Peter Gluckman *It's never too early, never too late: A discussion paper on preventing youth offending in New Zealand* (Office of the Prime Minister's Chief Science Advisor, 12 June 2018) at 13. For discussion of brain development during adolescence, see also Sarah-Jayne Blakemore and Suparna Choudhury “Development of the adolescent brain: implications for executive function and social cognition” (2006) 47 *JCPP* 296; and BJ Casey, Rebecca M Jones and Todd A Hare “The Adolescent Brain” (2008) 1124 *Ann NY Acad Sci* 111.

<sup>65</sup> For a summary of research on mental health, developmental disorders and neurophysiological differences in young offenders, see Peter Gluckman *It's never too early, never too late: A discussion paper on preventing youth offending in New Zealand* (Office of the Prime Minister's Chief Science Advisor, 12 June 2018) at 18–19.

<sup>66</sup> Susan Young, Ben Greer and Richard Church “Juvenile delinquency, welfare, justice and therapeutic interventions: a global perspective” (2017) 41 *BJPsych Bull* 21 as cited in Ian Lambie *What were they thinking? A discussion paper on brain and behaviour in relation to the justice system in New Zealand* (Office of the Prime Minister's Chief Science Advisor, 29 January 2020) at 32.

<sup>67</sup> Peter Gluckman *It's never too early, never too late: A discussion paper on preventing youth offending in New Zealand* (Office of the Prime Minister's Chief Science Advisor, 12 June 2018) at 19 citing findings relating to the Dunedin Longitudinal Study published in Terrie E Moffitt and others “Males on the life-course-persistent and adolescence-limited antisocial pathways: Follow-up at age 26 Years” (2002) 14 *Development and Psychopathology* 179.

<sup>68</sup> Convention on the Rights of the Child 1577 UNTS 3 (opened for signature 20 November 1989, entered into force 2 September 1990), art 40. New Zealand signed UNCROC on 1 October 1990 and ratified it on 6 April 1993.

<sup>69</sup> Oranga Tamariki Act 1989, s 208(2)(h).

- 8.39 We are not satisfied that the CIBS Act grants children or young people adequate special protections.
- 8.40 For example, as noted at paragraph 8.33 above, the “duty to inform” the suspect of the necessary information “in a manner and in language that the suspect is likely to understand” does not extend to an obligation to check that the suspect has actually understood that information. Further, the notice that must be given to a child or young person when a suspect sample is requested uses the language prescribed in the CIBS Act and is not simplified for children or young people. In contrast, the Oranga Tamariki Act imposes a “duty to explain” to a child or young person their rights before questioning and on arrest in a manner and language that is appropriate to their age and level of understanding.<sup>70</sup> This has been interpreted by the Court of Appeal as requiring police officers to ensure that the child or young person has understood what they have been told.<sup>71</sup> Merely informing a young person of their rights, even in age-appropriate language, would not satisfy the duty to explain because it would not be dealing with the level of understanding of the particular young person.<sup>72</sup>
- 8.41 However, we question whether all the necessary information could be understood by a child as young as 10 years old regardless of how it is framed.<sup>73</sup> For example, research in 2017 looked at comprehension of the child/young person version of the “rights caution” and found that it is not readily understood by children and young people.<sup>74</sup> The rights caution is much less complicated than the information that needs to be provided when a suspect sample is requested.
- 8.42 The only special protection given to children and young people in the suspect sampling regime is the requirement that a parent of the child or young person also consents to the taking of the sample. We have reservations as to whether this is adequate protection. The CIBS Act does not require the parent to be present at the time the police officer provides the young person with the necessary verbal and written information, nor is there any requirement for the parent to have the information explained to them (except in relation to a request for a sample from a child under Part 2A). Consequently, the parent may not be able to help the young person to understand their rights or even be able to properly consent in an informed way on the young person’s behalf.
- 8.43 The value of this protection also depends on the degree to which the parent is able to understand the information and make an informed decision about whether to consent to the sample being obtained. Overseas research has shown that some parents may simply encourage their children to cooperate with police.<sup>75</sup> In addition, if a young person

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<sup>70</sup> Sections 215–218.

<sup>71</sup> *R v Z* [2008] NZCA 246, [2008] 3 NZLR 342 at [35], [39] and [42].

<sup>72</sup> *New Zealand Police v FG* [2020] NZYC 328 at [96], discussing the effect of “explain” as opposed to “inform” in *R v Z* [2008] NZCA 246, [2008] 3 NZLR 342.

<sup>73</sup> A child of or over the age of 10 years but under the age of 14 years may be requested to provide a suspect sample under Part 2A of the Criminal Investigations (Bodily Samples) Act 1995.

<sup>74</sup> Frances Gaston “Young People’s Comprehension of the Rights Caution in New Zealand” (Master of Science in Forensic Psychology Thesis, Victoria University of Wellington, 2017) at 62–64.

<sup>75</sup> For a discussion of the overseas research, see Nessa Lynch *Youth Justice in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2016) at 105–106. As noted at [8.29], whānau, seeing themselves as collectively responsible, may sometimes pressure the individual into confessing guilt: Te Aka Matua o te Ture | Law Commission *The Privilege Against Self-Incrimination: A Discussion Paper* (NZLC PP25, 1996) at [132].



is experiencing brain and behaviour issues that affect their ability to participate in the consent process, it is also possible that their parent may experience similar issues.<sup>76</sup>

8.44 These issues were considered in *Police v FG*.<sup>77</sup> In that case, police officers visited FG, a 14-year-old, at his home to obtain a suspect sample. FG had a significant communication disorder that entitled him to a communication assistant in court, but this only occurred after an assessment was undertaken following his first court appearance.<sup>78</sup> FG had no such assistance when the suspect sample was taken. FG’s mother was present, but at the time, she was busy cooking and caring for a toddler.<sup>79</sup> The Court identified three features of the CIBS Act that were of concern:<sup>80</sup>

- (a) First, that the “duty to inform” under the CIBS Act is “out of step” with the “duty to explain” under the Oranga Tamariki Act, as discussed above.
- (b) Second, the “form, length and content” of the document the officers were required to inform FG about orally, given FG’s communication disability.
- (c) Third, that these procedures, which are “a substantial intrusion into a young person’s rights and privacy, can be permitted by the CIBS Act without providing legal advice”.<sup>81</sup>

8.45 The Court explained that, for FG’s rights under UNCROC to be respected, his disability needed to be accommodated with the use of child-friendly language at all stages, and he needed access to a lawyer as well as having his mother present “from the moment of contact with the system”.<sup>82</sup> FG would only have been able to waive his right to have a lawyer present “if he expressed it unequivocally after all reasonable steps were taken to ensure he was fully aware of his rights”.<sup>83</sup> The Court found that:<sup>84</sup>

It was completely inappropriate to seek to obtain [FG]’s informed consent to the giving of a DNA sample seated with two police officers at a table while his mother was preoccupied with other things to such an extent that she did not get to perform her basic nominated person duties adequately.

8.46 The suspect sample was ruled inadmissible on the basis that the necessary consent had not been obtained. The Court made a note of the CIBS Act’s “non-conformity” with FG’s rights under UNCROC and that there can be no solution short of legislative change.<sup>85</sup>

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<sup>76</sup> Although the causes of neurological difficulties vary, there is clear evidence that some such difficulties have a genetic origin. See, for example, Yue Huang and others “Genetics of hereditary neurological disorders in children” (2014) 3 *Transl Pediatr* 108.

<sup>77</sup> *New Zealand Police v FG* [2020] NZYC 328.

<sup>78</sup> The assessment identified that FG had limited understanding of legal terminology, including terms such as “victim” and “guilty”, and that this “would have a significant impact on his ability to understand in settings that use such information”: at [75(a)] and [75(d)]. FG also had difficulties formulating a cohesive narrative, which impacted on his ability to effectively communicate novel information, and he displayed significant difficulties attending to and understanding spoken information that was embedded in longer and syntactically complex sentences and short paragraphs: at [75(b)]–[75(c)].

<sup>79</sup> At [57]–[59].

<sup>80</sup> At [176].

<sup>81</sup> At [176].

<sup>82</sup> At [172].

<sup>83</sup> At [170].

<sup>84</sup> At [182].

<sup>85</sup> At [184]. This case is discussed further in Chapter 21.

## ISSUES WITH THE OFFENCE THRESHOLD

- 8.47 A separate issue is whether the offence threshold for obtaining a suspect sample is proportionate to the degree of intrusion on privacy, bodily integrity and applicable tikanga, such as tikanga associated with personal tapu, mana and whakapapa.<sup>86</sup>
- 8.48 When the Criminal Investigations (Blood Samples) Act 1995 (as it then was) was first enacted, a compulsion order could only be issued in respect of serious sexual or violent offending.<sup>87</sup> In 2003, the range of qualifying offences was broadened to include any offence punishable by seven years' imprisonment or more and other lesser offences that either had some propensity to link to more serious offending or were offences for which DNA was often left at a crime scene.<sup>88</sup>
- 8.49 In 2009, the range of qualifying offences was further expanded to include all imprisonable offences as well as the non-imprisonable offence of “peeping and peering”, which was considered a precursor to more serious sexual offending.<sup>89</sup> Parliament had rejected earlier attempts to include this offence after an examination found no compelling evidence to suggest such a connection.<sup>90</sup> More recently, the Ministry of Justice has advised that fewer than one per cent of the people convicted of a violent or sexual offence in 2015 had a previous conviction for peeping and peering (34 out of a total of 11,531).<sup>91</sup>
- 8.50 This gradual expansion of the suspect sampling regime reflected advances in DNA analysis and the changing use of DNA evidence over time. As we explore in Chapter 3, in 1995, it was still relatively novel for Police to use DNA in criminal investigations, and the process of analysing DNA samples was expensive. Blood sampling was the only reliable way of obtaining a DNA profile from a suspect, and therefore requiring a suspect sample, particularly if reasonable force was necessary, was considered a grave intrusion on bodily integrity. The introduction of buccal sampling in 2003 significantly reduced the physical intrusion that sampling posed, thereby reducing to some extent the intrusion on applicable tikanga and human rights values.
- 8.51 Over time, DNA has become more important in solving property crime, which includes less serious offending. Now, most of the cases that Police refer to ESR for DNA analysis relate to “non-suspect volume crime” — that is, investigations into burglary, general theft or vehicle crime where there is no suspect and therefore no suspect sample is

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<sup>86</sup> We discuss the relevant human rights values and tikanga Māori engaged by the collection and use of DNA in criminal investigations in Chapter 2.

<sup>87</sup> Criminal Investigations (Blood Samples) Act 1995, s 2 definition of “relevant offence” and ss 16 and 23. A suspect sample could, however, be given by consent in respect of any “indictable” offence under s 5(a). An indictable offence was any offence for which the defendant may be proceeded against by indictment, prior to the amendments made under the Criminal Procedure Act 2011.

<sup>88</sup> Tāhū o te Ture | Ministry of Justice *Criminal Investigations (Bodily Samples) Amendment Bill: Regulatory Impact Statement* (10 February 2009) at 2. See also Criminal Investigations (Bodily Samples) Amendment Bill 2009 (14-1) (explanatory note) at 15.

<sup>89</sup> See, for example, discussion in Criminal Investigations (Bodily Samples) Amendment Bill 2002 (221-2) (select committee report) at 7–8. Peeping or peering into a dwellinghouse is an offence under s 30 of the Summary Offences Act 1981 and is punishable by a maximum fine of \$500.

<sup>90</sup> Criminal Investigations (Bodily Samples) Amendment Bill 2002 (221-2) (select committee report) at 8.

<sup>91</sup> Email from Ministry of Justice to Law Commission regarding DNA data request with attached table on the number of people convicted of violent or sexual offences in 2015 who had a previous conviction for peeping or peering (22 November 2016).

submitted for analysis and comparison. If a potential suspect is identified through a link to the DNA Profile Databank, Police can then obtain a suspect sample that can be used as evidence in court. However, we do not know whether the lower offence threshold has increased the resolution of low-level crime. Police is required to report on how often a DNA profile obtained from a suspect sample is used as evidence against a person in a trial and how many such trials result in a conviction against the person.<sup>92</sup> However, Police advise that it is unable to report on this information as it is not captured nationally. This makes it difficult to evaluate the effectiveness of the lower offence threshold.

## OPTIONS FOR REFORM

8.52 In the Issues Paper, we identified three broad options for reform of the suspect sampling regime:<sup>93</sup>

- (a) Retain a consent-based regime for adults and young people but make improvements to the process, including:
  - (i) simplifying the information provided to suspects and providing that information in te reo Māori and other languages;
  - (ii) raising the threshold for requesting a suspect sample to require a police officer to have “good cause to suspect” the suspect of committing the offence;
  - (iii) removing the requirement to inform the suspect of Police’s ability to seek a compulsion order to compel a sample if consent is refused;
  - (iv) removing the ability to make dual requests to suspects for a suspect sample and a voluntary databank consent sample;
  - (v) enabling criminal legal aid providers to give advice to suspects who are asked to give a sample by consent;
  - (vi) requiring officers to video record the request for a sample and the suspect’s response; and
  - (vii) for young people, requiring officers to explain the information that must be given to the suspect and their parent and/or removing the requirement that both the young person and their parent give consent.
- (b) Remove the ability to obtain a suspect sample by consent and require a police officer to apply to the court for a compulsion order, either in relation to all suspects, only suspects under the age of 18 and/or suspects who are not capable of providing informed consent.
- (c) Replace the consent-based regime with a contestable notice procedure, similar to the databank compulsion notice procedure under Part 3 of the CIBS Act.

8.53 Feedback received on these options, and our conclusions, are discussed below.

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<sup>92</sup> Section 76(1)(d) of the Criminal Investigations (Bodily Samples) Act 1995.

<sup>93</sup> Issues Paper at [8.89]–[8.99].

## RESULTS OF CONSULTATION

- 8.54 In the Issues Paper, we sought feedback on the collection of suspect samples by consent. We received 50 submissions that addressed this matter, comprising 11 submissions from organisations and 39 submissions from individuals. Submissions on the offence threshold for collection of DNA samples from suspects, people arrested or intended to be charged and offenders are summarised in Chapter 18.
- 8.55 During consultation, we also met with young people at Korowai Manaaki Youth Justice residence to seek views on the collection and retention of DNA from young people with experience in the youth justice system. Their views on collection of DNA are discussed separately below. Their views on the retention of DNA are discussed in Chapter 21.

### Concerns with the consent-based regime

- 8.56 Thirteen submissions on the Issues Paper expressly raised concerns with the existing consent-based regime.
- 8.57 The Public Defence Service (PDS), the Office of the Children’s Commissioner (OCC) and YouthLaw Aotearoa (YouthLaw) shared the concerns identified in the Issues Paper and discussed above. While the New Zealand Law Society (NZLS) and the New Zealand Bar Association (endorsing NZLS’s submission in its entirety) recognised the advantages that a consent process has for efficient policing, they considered the “primary concern” with a consent-based regime was the “risk of abuse or coercion, or uninformed consent being provided”.
- 8.58 Nine individuals also expressed concerns with the consent-based regime. For example, one individual submitted:

The request for a DNA sample is fundamentally unfair. There is a huge power imbalance between the police and the person. The person will almost invariably be poorly informed and under pressure. Reasonable informed consent is impossible in those circumstances. However, it is hard to conceive of anything more intimately personal than DNA, and the deeply invasive nature of the information obtained is difficult to overstate.

- 8.59 Another individual submitted:

My concern is that there may often be uninformed consent, as the information about DNA – the process, the storage times, when it can be used etc – may be too complex to process or to find someone specialised enough to offer impartial advice and explain it in a way the donor can understand. Consider in addition to this, DNA samples can be taken at any time of day. How sound is a person’s judgement and decision-making ability if they have been arrested at 3am and then asked to provide a DNA sample?

### Support for a consent-based regime

- 8.60 Most submissions expressed support for retaining a consent-based regime:
- (a) Five submitters had no concerns with the current approach (Police and four individuals).
  - (b) Fourteen submitters expressly endorsed a consent-based regime with appropriate safeguards in order to ensure that free and informed consent is given (including NZLS, Te Mana Raraunga | Māori Data Sovereignty Network, the Independent Forensic Practitioners Institute (IFPI), the Sensible Sentencing Trust and nine

individuals). Te Mana Raraunga submitted that “free, prior and informed consent” “should be a fundamental principle to the collection of bodily samples and/or use of derived data from Māori”, in line with its *Principles of Māori Data Sovereignty*.<sup>94</sup>

- (c) Twenty submitters implicitly supported a consent-based regime, by focusing on the need for appropriate safeguards (the Auckland District Law Society Criminal Law Committee (ADLS), the Privacy Commissioner and 18 individuals).
- (d) Two individuals thought that suspect samples should only be obtained with consent, with no ability to seek a compulsion order.

8.61 Many submitters supported the following safeguards:<sup>95</sup>

- (a) **The provision of all relevant information to the suspect.** This was emphasised in 18 submissions from six organisations and 12 individuals. These submitters considered that suspects need to be fully informed, in clear and simple language, of all relevant matters relating to the collection, use, storage and retention of suspect samples. IFPI submitted that this information should address the fact that a suspect is providing genetic information not only of themselves but also of their relatives and any relatives yet to be born and the risks of false accusations and wrongful convictions that could unwittingly arise from the use of that sample, which, it considered, could be in the order of 5–10 per cent. Karaitiana Taiuru submitted that the information provided to the suspect should also address the impacts of giving a sample on their whānau and iwi.
- (b) **Access to independent legal advice.** This was mentioned in 16 submissions, from two organisations and 14 individuals. Some submitters felt that consent is not meaningful unless a person understands their rights and has received legal advice. Other submitters were concerned that a suspect would be at an unfair disadvantage or may feel vulnerable and intimidated if legal advice was not available. Some submitters, including PDS, supported legal advice being provided free of charge, and some suggested that this could be provided by duty lawyers/PDLA lawyers properly trained and available to provide advice.
- (c) **Written information to be given in plain English, te reo Māori and other languages.** Several submitters commented on the need for information to be provided in simplified form and to be available in te reo Māori and in other languages. Some submitters also supported the use of translators, where appropriate, to ensure the information is properly understood by the suspect.
- (d) **Information to be explained to the suspect.** PDS submitted that, if the consent-based regime is to remain, Police should be required to explain the information to the suspect rather than just inform them and ensure, as far as possible, that the information has been understood. PDS pointed to the complexity of the information, the intrusion on privacy the sampling and analysis involves and the potential consequences of providing a sample as reasons for adopting such an approach.

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<sup>94</sup> Te Mana Raraunga Submission to Law Commission at 7; and Te Mana Raraunga | Māori Data Sovereignty Network *Principles of Māori Data Sovereignty* (October 2018).

<sup>95</sup> This includes some submitters who opposed a consent-based regime for some or all suspects, such as the Public Defence Service and YouthLaw Aotearoa, but who submitted on the need for additional safeguards if a consent-based regime was to remain.

- (e) **Raising the grounds for requesting a suspect sample.** Several submitters commented on the grounds for requesting a suspect sample. PDS supported requiring good cause to suspect the person of committing an offence if a consent-based regime is retained. IFPI submitted that suspect samples should only be requested if a meaningful profile has been obtained from a crime scene sample, in order to mitigate the risk of cognitive bias unduly influencing an investigation. Karaitiana Taiuru submitted that Police discretion to request a suspect sample should be subject to clear guidelines, and three other individuals also emphasised the need for Police to have reasonable grounds to request a suspect sample.
  - (f) **Giving a suspect adequate time to consider a request.** Several individuals emphasised the need for a suspect to be given an adequate amount of time to consider a request and that people should not be asked to give a sample when they are panicked or upset.
- 8.62 Other procedural safeguards were also suggested. IFPI submitted that the informed consent process should be approved by a Human Ethics Committee. PDS submitted that, ideally, the consent process should be video recorded. NZLS considered that the information to be provided to a suspect should be prescribed in legislation and that the notice should be included in a schedule to the legislation to reflect the need for clear and detailed rules in order to safeguard against the risk of abuse and arbitrariness.
- 8.63 Views were mixed on whether a suspect should be informed of Police's ability to compel a sample with a compulsion order if consent is refused. ADLS considered that suspects should not be informed of this. NZLS and PDS had a different view. NZLS acknowledged the risk that a suspect may feel they have no choice but to consent, but they thought this risk could be adequately managed by using clear language specifying that police *may* apply for a compulsion order and that the court *may* grant a compulsion order and by Police not expressing an opinion on whether an application for a compulsion order would be successful. PDS submitted that the ability to compel a sample "is an imperative and often deciding factor in giving consent and is what legal advice provided at the time will typically focus on". Like NZLS, PDS submitted that the wording of such advice should make it clear that Police will not automatically be able to get a compulsion order. However, it suggested that the officer requesting the sample could be required to disclose where a compulsion order is realistic — that is, whether they have good cause to suspect the person and the basis for that suspicion.
- 8.64 Some submitters, including NZLS, the Privacy Commissioner, PDS and several individuals, supported additional safeguards for people with limited decision-making capacity or agency. However, while NZLS supported introducing a simplified notice for people with intellectual or learning disabilities, it questioned whether this would provide adequate protection or whether a more robust process is required whereby a person who shows signs of an inability to comprehend the relevant information is referred to a medical practitioner for assessment as to whether they have capacity to consent. One individual also supported an approach like that in Ireland (see paragraph 8.100 below) where the requesting police officer is responsible for ensuring that the suspect is capable of giving informed consent. That submitter argued that this would limit the number of suspects consenting to a suspect sample when they do not understand the situation they are in and/or the consequences that could flow from it.
- 8.65 Some submitters favoured a different approach for children and young people. These submissions are discussed below.

## Opposition to a consent-based regime

- 8.66 Just five submitters (PDS and four individuals) favoured requiring all suspect samples to be obtained by compulsion order.
- 8.67 PDS considered that requiring a compulsion order in all cases would afford greater protection to suspects, particularly given the higher standard that would apply (good cause to suspect, rather than belief that the person may have committed an offence). PDS doubted that fully informed consent could ever be possible under the suspect sampling regime and did not think that requesting consent instilled in suspects a sense of control over the process, given that a compulsion order may be sought if consent is refused. PDS did not think that requiring a compulsion order in every case would be particularly onerous for Police, given the relatively low number of suspect consent samples obtained each year, nor would it be unduly onerous for suspects. However, to the extent that this is a concern, PDS said that there could be an ability to file a notice consenting to a compulsion order, which could occur after receiving legal advice and would not require an appearance at court, similar to a guilty plea being entered on a minor charge.
- 8.68 No submitters favoured a contestable notice regime. PDS considered that this would put a suspect in a worse position than currently. One individual also submitted:

While avoiding the complexity behind 'free and informed consent', this [contestable notice] process presents comprehension issues as it requires the suspect to be proactive, effectively placing an onus on them. This raises issues of the state of mind and circumstances of the suspect at the time that the request is made. It also raised the relative inequalities of the suspect and the person requiring the sample. I suggest that this method is not supported by Tikanga. As the observance of Tikanga is a stated goal of the reforms, I submit that this is the least valid of the options.

## Obtaining suspect samples from children and young people

- 8.69 Several submitters supported extra safeguards for children and young people, including OCC, YouthLaw, NZLS, PDS, the Privacy Commissioner, Associate Professor Nessa Lynch and Karaitiana Taiuru.
- 8.70 OCC did not think that improving the consent process for children and young people could sufficiently address the power imbalance between a police officer and a young person and was strongly in favour of requiring all suspect samples to be taken from a child or young person pursuant to a compulsion order made by the Youth Court, submitting:

We consider it is neither possible nor appropriate for any child or young person to provide a sample through consent. Children and young people are inherently vulnerable; however those likely to come in contact with the criminal justice system can face further challenges. Young people in youth justice residences often have a range of neurological issues, including traumatic brain injury, communication disorders, ADHD, literacy impairments, foetal alcohol spectrum disorder, or trauma related lack of cognitive and emotional development. All these factors impact on their ability to understand what they are being told – often quite simple things – and their ability to understand the consequences of their actions. In some cases, these children and young people will often pretend they understand more than they do, and comply to placate adults to get out of situations, or to get things over with. In other cases, they may behave in a disruptive or aggressive manner. Both complying and acting out can mask their understanding, and lead adults to think they understand more than they do.

- 8.71 YouthLaw also had significant concerns in relation to the ability of young people (including people under the age of 24) to evaluate the information they are provided with and to give informed consent. YouthLaw pointed to young people’s developing maturity and the prevalence of neurodisability and mental illness among young people in the youth justice system. It did not think that relying on parental consent was a sufficient safeguard, noting that parents or caregivers may have little experience or understanding of the law, what is at stake and the implications of the decision in terms of how this may affect their child in future. YouthLaw said that, in practice, it has seen that, where young people have some form of neurodisability or mental health diagnosis, their parents or caregivers may also have similar issues that might limit their ability to understand what they are being asked and give informed consent.
- 8.72 YouthLaw submitted that young people must be screened for any neurodisabilities, mental health disorders or communication disorders upon entry to the youth justice system, and those young people who are identified as having a disability or disorder must be provided with appropriate support, such as a communication assistant to facilitate their understanding. YouthLaw also submitted that the Youth Court’s jurisdiction should include young adults up to the age of 25 and seeks corresponding changes to the treatment of those in this age group in all aspects of the justice system including in the collection and retention of DNA samples.
- 8.73 NZLS also submitted that serious consideration should be given to the option of removing the ability to obtain a sample by consent from young people, stating:
- There may be little difference in the cognitive and comprehension abilities of a 13 year old (a child) and a 14 year old (a young person), and they may be from vulnerable families where the power imbalance between their parents and the police is more pronounced
- 8.74 Nessa Lynch submitted that suspect samples should only be taken from children pursuant to a court order, as these instances “should be rare and clearly justified”. For young people, she said that any regime based on consent must focus on the young person understanding the consent process and being able to participate meaningfully in that process. Nessa Lynch supported retaining the extra requirement for parental consent and noted that age-appropriate language and documentation is vitally important. Consideration should be given to the extensive case law and experience with age-appropriate explanations in the context of police questioning under the Oranga Tamariki Act.
- 8.75 Karaitiana Taiuru submitted that police officers should not be able to obtain suspect samples from prosecutable children or young people without consultation with their parents or kaumātua and with a detailed explanation of what DNA is and the tikanga that surrounds DNA.

### Views of young people with experience in the youth justice system

- 8.76 In October 2019, we visited Korowai Manaaki Youth Justice residence to seek the views of young people with experience in the youth justice system.<sup>96</sup> We asked about the collection of DNA and, in particular, whether there is anything that is confusing about

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<sup>96</sup> Our engagement proposal was approved by Oranga Tamariki, which facilitated contact with the staff of Korowai Manaaki on our behalf. We worked closely with Voyce Whakarongo Mai, Talking Trouble Aotearoa NZ and YouthLaw Aotearoa to present a workshop on collection of DNA samples and retention of DNA profiles to each of the six units and to record young people’s comments.



DNA being taken, who should be present when DNA is taken from a young person and whether young people should be able to decide for themselves that Police can take their DNA.

- 8.77 The young people we spoke with consistently expressed uncertainty about whether they could refuse a request for a DNA sample and whether Police had the power to compel a sample if they refused. Responses to the question: “Is there anything that’s confusing about DNA being taken?” included: “If you can say no or not”; “Do you have to give it? How do you know?”; “Confused about ‘can they force you to do it?’.” One young person said:

When they took my DNA [Police said] we can do it the easy way or the hard way. I was like I better comply, they might chop my [finger]. I was like [aged] 13/14. Sitting in the police station.

- 8.78 Other comments from young people expressing similar concerns included: “They say it’s optional then they start being really hard on you”; “Sometimes we get tricked”; “Sometimes we agree to things we don’t know”; and “Too young – don’t know what’s going on”.

- 8.79 Young people expressed a range of different views on who should be present when DNA is taken,<sup>97</sup> with most focusing on the broader matter of who should support young people throughout the process, including when they are asked to give consent to the collection of a sample. Some young people mentioned parents, family and whānau, legal guardians and caregivers. However, others doubted whether family members provided adequate support. Some young people mentioned a professional, such as a lawyer, social worker, psychologist or youth advocate or “someone who has experience and knows what they’re on about”. Reasons given for having someone present when DNA is taken included “In case [Police] doing something or against the law”; “So young people don’t feel threatened”; “Because the police aren’t always right”; “Because it might be forced”; “Young people feel it just them v Police”; “To make sure your voice is what happens”. One young person said:

Pissed no one by my side. Don’t know if [Police is] playing games. Don’t know if to believe them or [Police is] making stuff up.

- 8.80 Some young people expressed doubt about the presence of an independent person nominated by Police.<sup>98</sup> For example, one young person said:

A person Police put there (that’s a bit rip-off) cos they don’t care. Biased opinion. They’re trying to get you locked up.

- 8.81 A range of views were also expressed on whether young people should be able to decide for themselves whether Police can take their DNA. Some thought that they should be able to make their own decisions, although some thought they needed legal advice first. Others said that it depended on age, with 14 being too young to know what was going on. Some young people thought that they should not decide, because they

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<sup>97</sup> A suspect is entitled to have someone of their choice present when a sample is taken, and children and young people can also have a parent or other person responsible for their care present: Criminal Investigations (Bodily Samples) Act 1995, s 50.

<sup>98</sup> An independent adult must be present when a suspect aged under 18 has elected to consent to give a suspect sample by taking a buccal sample themselves, and an independent adult may include someone nominated by a police officer: Criminal Investigations (Bodily Samples) Act 1995, ss 2A and 52A. See also the requirement for an independent person to support a child or young person during questioning: Oranga Tamariki Act 1989, s 222.

might make the wrong decision, get tricked or be taken advantage of. One young person said:

It's not fair cos they have the reasons why they want to. Not fair for some as they might be peer pressured into it.

- 8.82 Young people had different views on who should decide, if not them. Some thought that Police should get a court order, others said that parents should decide and one young person thought Police should be able to decide “if they have enough”, but other young people expressed suspicion about these options.
- 8.83 Overall, it was clear that these young people recognised the vulnerability of their situation when being asked to provide a DNA sample. They were uncertain about the process and their rights to refuse to consent and identified that they needed effective adult support. They appreciated adults who were able to explain what was happening and support them to make an informed decision.

## SUSPECT SAMPLING IN COMPARABLE JURISDICTIONS

- 8.84 Given the issues above, we have considered the approach to suspect sampling in the comparable jurisdictions of Australia, England and Wales, Scotland, Ireland and Canada.

### Authority for collecting suspect samples

- 8.85 Many comparable jurisdictions authorise the collection of suspect samples by consent, including England and Wales and all Australian jurisdictions except South Australia. In these jurisdictions, if consent is refused, a suspect sample can be compelled by order of a senior police officer or a magistrate.
- 8.86 There is no provision for suspects to consent to give a suspect sample in Ireland, Scotland or South Australia. Instead, a suspect sample can be compelled by order of a police officer. This must be a senior police officer (of or above the position of inspector) in Ireland and South Australia and only applies to suspects in Police custody in Scotland and Ireland.<sup>99</sup>
- 8.87 A different regime operates in Canada. The Canadian Criminal Code only authorises the collection of suspect samples by warrant issued by a provincial court judge.<sup>100</sup>

### Grounds for collecting a suspect sample

- 8.88 Most Australian jurisdictions that provide for suspect samples to be obtained by consent require the requesting police officer to be satisfied of three matters:<sup>101</sup>
- (a) First, that the person is suspected on reasonable grounds of having committed a qualifying offence.

<sup>99</sup> Criminal Law (Forensic Procedures) Act 2007 (SA), s 15; Criminal Justice (Forensic Evidence and DNA Database System) Act 2014 (Ireland), s 13; and Criminal Procedure (Scotland) Act 1995, s 18.

<sup>100</sup> Criminal Code RSC 1985 c C-46, s 487.05(1).

<sup>101</sup> These are requirements in Australian Commonwealth legislation and in New South Wales and the Australian Capital Territory. The first two criteria are also requirements in Western Australia and Victoria. In Tasmania and Northern Territory, only the first criterion applies, and in Queensland, a police officer can request a DNA sample without satisfying these requirements.

- (b) Second, that there are reasonable grounds to believe that the procedure is likely to produce evidence tending to confirm or disprove that the suspect committed the offence.
- (c) Third, that the request “is justified in all the circumstances”.
- 8.89 Some jurisdictions provide statutory guidance on the third requirement. Australian Commonwealth legislation provides that the police officer must:<sup>102</sup>
- ... balance the public interest in obtaining evidence tending to confirm or disprove that the suspect committed the offence concerned against the public interest in upholding the physical integrity of the suspect.
- 8.90 That legislation further provides that, in balancing those interests, the police officer must have regard to a prescribed list of relevant matters that address the seriousness of the offending, the degree of the suspect’s alleged participation in the offending, the suspect’s age, physical and mental health, whether there is a less intrusive but reasonably practicable way of obtaining relevant evidence and any other relevant matter.<sup>103</sup> Similar guidance is also found in New South Wales, Australian Capital Territory and Queensland legislation.<sup>104</sup>
- 8.91 If consent is refused and a police officer or magistrate is considering whether to order a suspect to provide a sample, they must themselves be satisfied of these matters.<sup>105</sup> South Australia imposes similar requirements on a police officer considering whether to order a suspect to provide a sample,<sup>106</sup> and a police officer requiring a sample in Ireland must be satisfied that the first two criteria at 8.88(a)–(b) are met.<sup>107</sup>
- 8.92 Similarly, in Canada, a suspect sample can be ordered by a provincial court judge if there are reasonable grounds to believe that a qualifying offence has been committed, that a crime scene sample has been found, that a person was a party to the offence and that DNA analysis will provide evidence about whether the crime scene sample was from that person. The judge must also be satisfied that it is “in the best interests of the administration of justice” to authorise the taking of a sample, having regard to all relevant matters including a list of prescribed matters.<sup>108</sup>
- 8.93 In Scotland, a suspect sample can be taken from a person arrested or in custody if a constable “reasonably considers it appropriate”.
- 8.94 In contrast, in England and Wales, there is no statutory criteria that must be met before requesting a person to consent to providing a sample. However, a sample can only be

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<sup>102</sup> Crimes Act 1914 (Cth), s 23WI(2)(b). See also ss 23WO(2) and 23WT(2).

<sup>103</sup> Section 23WI(3). See also ss 23WO(3) and 23WT(3).

<sup>104</sup> Crimes (Forensic Procedures) Act 2000 (NSW), s 24(4) (applies in relation to a Magistrate’s decision to order a suspect sample); Crimes (Forensic Procedures) Act 2000 (ACT), s 23(3); and Police Powers and Responsibilities Act 2000 (Qld), s 461(3) (applies in relation to a Magistrate’s orders).

<sup>105</sup> With the exception of Tasmania, where there is no requirement that the request be justified in all the circumstances, and Northern Territory, where the police officer need only reasonably suspect the person of committing a relevant offence: Police Administration Act 1978 (NT), s 145A.

<sup>106</sup> Rather than requiring collection to be justified in all the circumstances, a senior police officer must be satisfied that the public interest in obtaining evidence tending to prove or disprove guilt outweighs the public interest in ensuring that private individuals are protected from unwanted interference: Criminal Law (Forensic Procedures) Act 2007 (SA), s 19(2).

<sup>107</sup> Criminal Justice (Forensic Evidence and DNA Database System) Act 2014 (Ireland), s 13.

<sup>108</sup> Criminal Code RSC 1985 c C-46, s 487.05(1).

required if a person has been detained, charged or reported for an imprisonable offence.<sup>109</sup>

### Offence threshold

8.95 Most comparable jurisdictions adopt a low offence threshold, permitting the collection of suspect samples in respect of “any offence”,<sup>110</sup> “any indictable offence”,<sup>111</sup> “any imprisonable offence”<sup>112</sup> or any offence punishable by 12 months’ imprisonment or more.<sup>113</sup> The notable exceptions are Ireland and Canada, where the offence threshold is much higher and includes a list of specified offences and any offence punishable by five years’ imprisonment.<sup>114</sup>

### Safeguards for vulnerable people

8.96 Many comparable jurisdictions have special protections for vulnerable people.<sup>115</sup>

8.97 In Australia, some jurisdictions provide that a suspect sample can only be taken from a person under the age of 18 by order of a magistrate or a specialist children’s court,<sup>116</sup> while other jurisdictions require the consent of a parent or guardian (either instead of or in addition to the suspect).<sup>117</sup> Several jurisdictions prohibit the collection of a suspect sample from a child under the age of 10.<sup>118</sup> In Ireland, a suspect sample can be taken from a person under the age of 18 only after the relevant information has been

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<sup>109</sup> Police and Criminal Evidence Act 1984 (UK), ss 63 and 118 definition of “recordable offence”; and The National Police Records (Recordable Offences) Regulations 2000.

<sup>110</sup> Criminal Procedure (Scotland) Act 1995, s 18 (permits the collection of samples from any person arrested and in custody); Crimes (Forensic Procedures) Act 2000 (NSW), ss 11(3), 20(b) and 24(3) (for self-administered buccal samples only, the threshold of any indictable offence applies to other sampling methods); and Police Powers and Responsibilities Act 2000 (Qld), ss 447–448 (for requests for a suspect sample only, a court order requiring a sample to be provided can only be made in relation to an indictable offence under s 457).

<sup>111</sup> Crimes Act 1914 (Cth), s 23WA definition of “suspect”; Crimes Act 1958 (Vic), s 464R(1); Forensic Procedures Act 2000 (Tas), s 3 definition of “serious offence”; Criminal Law (Forensic Procedures) Act 2007 (SA), s 3 definition of “serious offence”; and Police Administration Act 1978 (NT), s 145A.

<sup>112</sup> Police and Criminal Evidence Act 1984 (UK), ss 63 and 118, which provides that “recordable offence” means any offence to which regulations under s 27 apply; and The National Police Records (Recordable Offences) Regulations 2000.

<sup>113</sup> Crimes (Forensic Procedures) Act 2000 (ACT), s 9 definition of “serious offence”; and Criminal Investigation (Identifying People) Act 2002 (WA), s 3 definition of “serious offence”.

<sup>114</sup> In relation to Ireland, see Criminal Justice (Forensic Evidence and DNA Database System) Act 2014 (Ireland), s 9(1), and in relation to Canada, see Criminal Code RSC 1985 c C-46, s 487.04.

<sup>115</sup> Excluding England and Wales, Scotland, South Australia and the Northern Territory. No special protections exist in Canada either. However, all suspect samples must be taken by court order in any event.

<sup>116</sup> Crimes Act 1914 (Cth), s 23WC; Crimes (Forensic Procedures) Act 2000 (NSW), s 5; Crimes Act 1958 (Vic), s 464U; and Crimes (Forensic Procedures) Act 2000 (ACT), s 32(d).

<sup>117</sup> In Queensland, if a child is aged between 10 and 14, consent must be given by a parent and the sample can only be used for the purpose for which the consent was given, and if a child is aged between 14 and 18, the child must consent in the presence of a support person: Police Powers and Responsibilities Act 2000 (Qld), ss 450–451 and 479. In Tasmania, if a suspect is aged between 10 and 14 (both years inclusive), both the suspect and their parent must consent: Forensic Procedures Act 2000 (Tas), s 8(3). In Western Australia, a parent or guardian must consent instead of the child: Criminal Investigation (Identifying People) Act 2002 (WA), ss 3 definition of “protected person” and 38.

<sup>118</sup> Crimes Act 1914 (Cth), s 23YQE; Crimes Act 1958 (Vic), s 464U(1)(a); and Forensic Procedures Act 2000 (Tas), s 4.

explained to them “in a manner and in language that are appropriate to the age and level of understanding of the child”.<sup>119</sup>

8.98 Several jurisdictions also extend these special protections to adults with impaired decision-making capacity.<sup>120</sup> Each jurisdiction defines the scope of these protections differently. For example, several jurisdictions apply protections to an “incapable person”, defined as a person who:<sup>121</sup>

(a) is incapable of understanding the general nature and effect of, and purposes of carrying out, a forensic procedure; or

(b) is incapable of indicating whether he or she consents or does not consent to a forensic procedure being carried out.

8.99 Other jurisdictions refer to a person who is “incapable of giving informed consent by reason of mental impairment”<sup>122</sup> or:<sup>123</sup>

... a person whose capacity to look after or manage his or her own interests is impaired because of either of the following—

(a) an obvious loss or partial loss of the person’s mental functions;

(b) an obvious disorder, illness or disease that affects a person’s thought processes, perceptions of reality, emotions or judgment, or that results in disturbed behaviour.

8.100 Special protections also apply to “protected persons” in Ireland,<sup>124</sup> and there is a duty on the person in charge of the police station in which a person is lawfully detained to, as soon as practicable, determine whether or not that person is a protected person for the purposes of taking a DNA sample.<sup>125</sup> A “protected person” is defined as:<sup>126</sup>

a person (including a child) who, by reason of a mental or physical disability—

(a) lacks the capacity to understand the general nature and effect of the taking of a sample from him or her, or

<sup>119</sup> Criminal Justice (Forensic Evidence and DNA Database System) Act 2014 (Ireland), s 14(2). If an intimate sample is required (a sample of blood rather than saliva), the consent of a parent or guardian of the child (and, if a child is aged between 14 and 18 years, the child themselves) is required, unless an order of the District Court is obtained: s 15.

<sup>120</sup> In some jurisdictions, a suspect sample can only be taken from an “incapable person” by order of a magistrate: Crimes Act 1914 (Cth), s 23WC; Crimes (Forensic Procedures) Act 2000 (NSW), s 5; Crimes Act 1958 (Vic), s 464T; and Crimes (Forensic Procedures) Act 2000 (ACT), s 32(d). In other jurisdictions, special protections apply, similar to those for children and young people. In Queensland, if a police officer reasonably suspects the relevant person is a person with impaired capacity, a support person must be present when information is given to the suspect before a suspect sample is requested and when consent is given, and a police officer must ensure a support person is present when the sample is being taken if it is reasonably practicable to do so. If the person does not have the capacity to give consent, the police officer may ask a parent of the person to give consent: Police Powers and Responsibilities Act 2000 (Qld), ss 452 and 480. See also Criminal Investigation (Identifying People) Act 2002 (WA), s 38; and Criminal Justice (Forensic Evidence and DNA Database System) Act 2014 (Ireland), ss 14(1) and 15.

<sup>121</sup> Crimes Act 1914 (Cth), s 23WA definition of “incapable person”. A similar definition applies under the Crimes (Forensic Procedures) Act 2000 (NSW), s 3 and the Crimes (Forensic Procedures) Act 2000 (ACT), s 15. See also the definition of “incapable person” in the Criminal Investigation (Identifying People) Act 2002 (WA), s 3.

<sup>122</sup> Crimes Act 1958 (Vic), s 464T(1)(a).

<sup>123</sup> Police Powers and Responsibilities Act 2000 (Qld), sch 6 definition of “person with impaired capacity”.

<sup>124</sup> Including a requirement to give information to a protected person in a manner and in language that are appropriate to their level of understanding: Criminal Justice (Forensic Evidence and DNA Database System) Act 2014 (Ireland), s 14(1).

<sup>125</sup> Section 10(1).

<sup>126</sup> Section 2 definition of “protected person”.

(b) lacks the capacity to indicate (by speech, sign language or any other means of communication) whether or not he or she consents to a sample being taken from him or her ...

8.101 Some Australian jurisdictions also make special provision for suspects who identify as an Aboriginal person or Torres Strait Islander, including an obligation to notify an Aboriginal legal aid organisation of an intention to request a suspect sample and the right for a suspect to have an interview friend present when a suspect sample is requested and to communicate in private with that interview friend before giving consent.<sup>127</sup> These requirements do not apply, however, if a senior police officer believes on reasonable grounds that, having regard to the suspect's level of education and understanding, the suspect is not at a disadvantage in relation to the request to consent by comparison with members of the Australian community generally.<sup>128</sup>

### Use of suspect samples

8.102 Comparable jurisdictions adopt different approaches to the use of suspect samples. In Canada, suspect samples can be used only for the investigation for which the sample was obtained, and profiles cannot be uploaded to the databank in order to be compared against other crime scene profiles.<sup>129</sup> Other jurisdictions, however, including Australia, England and Wales, Scotland and Ireland, permit suspect profiles to be loaded to a DNA databank and compared against all crime scene profiles from other unsolved crimes before the charges against them have been resolved.<sup>130</sup>

## RECOMMENDATIONS

### Continuing a consent-based sampling regime for adult suspects

#### RECOMMENDATION

**R41**

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

8.103 Following consideration of submissions and further analysis of the alternative options identified at paragraph 8.52 above, we have concluded that the adult suspect sampling regime should continue to be based on informed consent and that the concerns identified above are best addressed by improving the consent process rather than removing altogether the ability for suspects to consent.

8.104 We have reached this view for several reasons:

(a) First, compared to the alternative options, a consent-based regime better enables suspects to participate in decision making about a procedure that involves an

<sup>127</sup> Crimes Act 1914 (Cth), s 23WG. See also Crimes (Forensic Procedures) Act 2000 (NSW), s 10; Crimes (Forensic Procedures) Act 2000 (ACT), s 24A; and Crimes Act 1958 (Vic), s 464FA.

<sup>128</sup> Crimes Act 1914 (Cth), s 23WG(3)(c).

<sup>129</sup> Criminal Code RSC 1985 c C-46, s 487.08(1)–(2).

<sup>130</sup> Crimes Act 1914 (Cth), s 23YDAF; Police and Criminal Evidence Act 1984 (UK), s 63A; Criminal Procedure (Scotland) Act 1995, s 19C(2); and Criminal Justice (Forensic Evidence and DNA Database System) Act 2014 (Ireland), s 68.

intrusion on their privacy and bodily integrity, thereby promoting individual autonomy. In contrast, the option of requiring all suspect samples to be obtained by compulsion order would remove decision making from suspects and would impose a court process on them even if that were not their preference. While the other option of a contestable notice procedure would ensure suspects have adequate time to consider a notice requiring a suspect sample and seek legal advice before a sample is obtained, we agree with PDS that this would place some suspects in a worse position. It would require a suspect to actively challenge a notice within a specified time. If that did not happen, a police officer would be able to forcibly require a sample without the need for a compulsion order.

- (b) Second, while we recognise that intrusive criminal justice procedures including obtaining DNA samples from suspects will never be fully consistent with tikanga Māori, of the alternative options, a consent-based regime is most likely to minimise intrusions on applicable tikanga Māori, for example, by better respecting a person's mana and providing for the operation of tikanga, such as manaakitanga (as discussed in Chapter 2).<sup>131</sup>
- (c) Third, consultation revealed strong support for retaining a consent-based regime with improved safeguards (see paragraphs 8.60–8.61).
- (d) Fourth, retaining a consent-based regime would be consistent with regimes in many comparable jurisdictions (see paragraph 8.85).
- (e) Fifth, the alternative options would be more administratively burdensome than a consent-based regime. Requiring all suspect samples to be obtained by compulsion order would increase cost, administration and delay and may unduly impede criminal investigations. A contestable notice procedure would also be resource intensive for Police, who would have to first serve a notice on a suspect and then, after the notice period expires, locate the suspect if they do not attend a police station to provide a sample.

8.105 Below we make recommendations to improve the safeguards of the consent-based suspect sampling regime. We note that we have not recommended changing the definition of “suspect”. Our view is that this should continue to be defined in the same way as under current law. This will mean that, if a police officer believes a person *may* have committed an offence, even if they do not have sufficient evidence to charge that person, they must rely on the suspect sampling regime to obtain a DNA sample. This will ensure that the suspect regime and the protections that the regime affords to suspects cannot be circumvented by asking a person suspected of committing an offence for an elimination sample. Elimination sampling is discussed in Chapter 9.

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<sup>131</sup> In Chapter 2, we refer to the tikanga-based processes developed for the collection and use of Māori human tissue and DNA for health research. While those processes operate in a very different context, some could potentially be adapted for use in criminal investigations, such as the use of cultural experts, access to whānau support and the use of Māori language and protocols during the consent process. See Maui Hudson and others *He Tangata Kei Tua: Guidelines for Biobanking with Māori* (Te Mata Hautū Taketake | Māori and Indigenous Governance Centre, October 2016) at 14–15.

## Raising the threshold for requesting suspect samples

### RECOMMENDATION

**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.

8.106 When a police officer wants to obtain a DNA sample from a suspect, they must meet the following requirements.

#### **(a) Reasonable grounds to suspect the suspect has committed an imprisonable offence**

8.107 The police officer must have reasonable grounds to suspect that the suspect has committed an imprisonable offence. This is not a requirement under the current law, which simply requires the suspect notice to include a statement that “it is believed that the suspect has or may have committed” a qualifying offence.<sup>132</sup> It is only where a police officer applies for a compulsion order that they need “good cause to suspect” that a suspect has committed a qualifying offence.<sup>133</sup>

8.108 We consider that a police officer should have reasonable grounds to suspect a suspect of committing an imprisonable offence *before* they ask for a suspect sample. This would ensure appropriate use of this power and is consistent with the approach in most comparable jurisdictions (see paragraphs 8.88–8.92). We prefer this language over “good cause to suspect” as it is consistent with the language used in the Search and Surveillance Act 2012 and with the *Legislation Guidelines*.<sup>134</sup>

8.109 Police should continue to be able to obtain a suspect sample in respect of “any imprisonable offence”. This offence threshold is lower than that proposed for collecting and retaining DNA profiles for databank purposes, discussed in Chapter 18. However, the use and retention of DNA profiles for databank purposes poses a more significant intrusion on privacy and applicable tikanga, particularly tikanga associated with whakapapa information. Offender profiles may be retained for the rest of the offender's life and are constantly searched. In contrast, suspect samples are requested in relation to specific offending, in circumstances where the grounds for requesting a suspect sample are made out. Suspect sampling is therefore likely to result in probative evidence (either confirming or excluding the potential involvement of a suspect). In these circumstances, we consider a lower threshold for suspect sampling is justified.

<sup>132</sup> Criminal Investigations (Bodily Samples) Act 1995, s 7(b)(i).

<sup>133</sup> Sections 13(1)(a) and 18(1)(a).

<sup>134</sup> Legislation Design and Advisory Committee *Legislation Guidelines* (March 2018) at 103–104.



- 8.110 We do not, however, propose retaining peeping and peering into a dwellinghouse as a qualifying offence. The very low proportion of sexual offenders with previous convictions for peeping and peering (see paragraph 8.49) does not, in our view, justify treating this offence differently to other non-imprisonable offences.

***(b) Reasonable grounds to believe DNA evidence is relevant to the investigation***

- 8.111 The police officer must also have reasonable grounds to believe that analysis of a suspect sample would tend to confirm or disprove the suspect's involvement in the commission of the offence. This is already a requirement under section 6 of the CIBS Act and should be retained so that suspect samples are requested only when DNA evidence is relevant to the investigation. This requirement will not be satisfied, for example, if there is no crime scene sample against which a suspect sample can be compared. While we note IFPI's view that suspect samples should only be requested if a meaningful profile has been obtained from a crime scene sample, we recognise that in some situations analysis of a crime scene sample may take some time and there may be good reasons for seeking suspect samples while that analysis is ongoing.

***(c) The request is reasonable in all the circumstances***

- 8.112 Currently, this is not a requirement for a police officer requesting a suspect sample. It is only a requirement for a court when issuing a compulsion order.<sup>135</sup> A decision to request a suspect sample is, however, an exercise of discretion that should be undertaken carefully. A suspect sample given by consent has the same effect as a suspect sample given pursuant to a compulsion order and, as we explored above, the inherent imbalance of power between a requesting police officer and a suspect risks undermining the "free" nature of consent given, particularly as the suspect is informed that a compulsion order may be sought if consent is refused.
- 8.113 We therefore consider it is important that any request for a suspect sample is only made if a police officer is satisfied that the request is reasonable in all the circumstances. This will also mean that the criteria for requesting a suspect sample mirrors the criteria for issuing a compulsion order, which we consider places appropriate limits on the application of the suspect regime (that is, a suspect sample should not be requested if Police has no realistic prospect of obtaining a compulsion order if consent is refused).
- 8.114 When considering whether the request is reasonable in all the circumstances, a police officer will be guided by the statutory purpose proposed in Chapter 3. This will require a police officer to be satisfied that interferences with a person's privacy and bodily integrity are kept to a minimum (in other words, it is necessary to request the sample) and to recognise and provide for applicable tikanga Māori.
- 8.115 Consideration should also be given to whether new DNA legislation should include more specific guidance for police officers considering making a suspect sample request (and for judges when considering an application for a suspect order). The existing guidance in several Australian jurisdictions summarised at paragraphs 8.89–8.90 may provide a helpful starting point.

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<sup>135</sup> Criminal Investigations (Bodily Samples) Act 1995, ss 16(1)(e) and 23(1)(f).

## Improving the requirements for informed consent

### RECOMMENDATIONS

- 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.

8.116 We propose strengthening the safeguards in the consent process by simplifying the information given to suspects to improve understanding, imposing on police officers a “duty to explain” the necessary information rather than simply informing suspects of the information, improving access to legal advice and encouraging the use of video recording to promote transparency and ensure accurate records are available should the suspect process be challenged at a later date.

### Information to be given to the suspect

- 8.117 All relevant information must be given to a suspect orally and in writing before they decide whether to consent and should address the following matters:
- (a) The purpose for which the suspect sample is requested. This includes explaining the investigation for which the sample is requested and that the requesting officer is satisfied the requirements set out in R42 above are met.
  - (b) How the sample will be taken. Sampling procedures are discussed in Chapter 11.
  - (c) How the sample will be used. This should include an explanation that the sample will be used to generate a DNA profile that will be compared to the DNA profile(s) found at the crime scene(s) that are the subject of the investigation.
  - (d) How the sample and any results of analysis, including a DNA profile, will be stored and when they will be destroyed. This should include an explanation of what may happen if the suspect is convicted of the offence for which they are being investigated. We address the ability to retain DNA profiles when a suspect is subsequently convicted in Chapter 18.
  - (e) That the person is under no obligation to consent to the request, but if they do not consent, a police officer *may* apply for a compulsion order and that order *may* be granted if a Judge is satisfied that the relevant grounds are met.
  - (f) That the person is entitled to consult privately with a lawyer before deciding whether to consent to the request and may nominate an adult to act as a support person during the consent process and the collection of the suspect sample.
  - (g) That, if the person consents to the request, they may withdraw their consent before, during or immediately after the sample is obtained and while they are still in the presence of the police officer supervising the sampling procedure.
  - (h) What will happen if a person withdraws their consent (see paragraph 8.132 below).
- 8.118 Giving informed consent requires suspects to understand a large amount of important information and apply that information to their personal situation. As explained at paragraphs 8.31–8.32 above, a high number of suspects face brain and behaviour issues that are likely to affect their ability to quickly process and comprehend information in written or oral form. It is important that the consent process responds to this. We therefore recommend that there should be an obligation on the requesting officer to “explain” the information to the suspect in a manner and language that is appropriate to their level of understanding, similar to the duty on Police before questioning a child or young person under the Oranga Tamariki Act.<sup>136</sup> This would require the requesting officer to check that the suspect has *understood* what they have been told<sup>137</sup> rather than simply “informing” the suspect of the required information.
- 8.119 Procedures and practices for explaining the specified information should be developed in consultation with the DNA Oversight Committee. The information provided to suspects in written form should be in simple and accessible language to support understanding, rather than repeating the legislative language. The information should be available in English and te reo Māori as well as other languages commonly spoken in Aotearoa New Zealand. Procedures and practices should also include the use of visual

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<sup>136</sup> Oranga Tamariki Act 1989, ss 215–218.

<sup>137</sup> See discussion at [8.40].

aids, such as videos or short infographics that can be played to or shared with the suspect. This would promote understanding and comprehension among suspects who are deaf or who experience auditory processing or other brain and behaviour issues.

### **Right to consult lawyer to be guaranteed**

8.120 All suspects should have the right to consult a lawyer before they give consent and must be informed of that right, regardless of whether the suspect is detained at the time of the request. Access to legal advice is a key safeguard in ensuring suspects provide informed consent. However, we are concerned about whether this is being appropriately utilised, given the issues identified at paragraphs 8.34–8.35 above.

8.121 We therefore recommend strengthening this safeguard by requiring a police officer to give a suspect a reasonable opportunity to consult with a lawyer before they give their consent. This will require the government to facilitate access to legal advice in “a real and practicable way”.<sup>138</sup> This might be best provided through extending the current PDLA service so that a PDLA lawyer is always available to give advice on a suspect request at short notice. The cost implications of extending the service to suspects not in custody should not be unreasonable given the relatively low number of suspect samples obtained by consent (approximately 650 each year), many of which may already be obtained from suspects who are in custody and therefore already qualify for the PDLA service. Ultimately, however, it will be a matter for the government as to how best to give effect to this recommendation.

### **Suspects should be able to be supported by a nominated adult**

8.122 As well as being given a reasonable opportunity to consult privately with a lawyer, a suspect who is asked to give a suspect sample should be able to nominate another adult to support them during the consent process.<sup>139</sup> A suspect should be able to consult privately with the nominated adult before giving consent and should be able to elect to have that nominated adult present during the consent process and when the sample is obtained. This would extend the existing entitlement to have a lawyer or another person of the suspect’s choice present during the taking of the sample<sup>140</sup> and would be similar to the entitlements for children and young people when making or giving a statement to Police.<sup>141</sup> We consider that the availability of a nominated adult would improve the transparency of the process, help to address the inherent power imbalance between the requesting officer and the suspect and accommodate tikanga Māori by enabling a suspect to be supported by a representative from their whānau, hapū or iwi consistent with the concept of whanaungatanga. The presence of a nominated adult would also help to meet the needs of members of diverse communities including Pacific peoples, migrant and refugee, and LGBTQI+<sup>142</sup> communities and people

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<sup>138</sup> *Kerr v New Zealand Police* [2020] NZCA 245 at [68].

<sup>139</sup> Limited provision also exists for a child or young person to nominate an independent person to be present when they give a buccal sample by consent: Criminal Investigations (Bodily Samples) Act 1995, ss 52 and 52A.

<sup>140</sup> Section 50.

<sup>141</sup> Oranga Tamariki Act 1989, s 221.

<sup>142</sup> This refers to people who identify as lesbian, gay, bisexual, transgender, queer or questioning or intersex+.

with disabilities.<sup>143</sup> There would need to be reasonable limits on this to ensure that a request for a nominated adult does not unnecessarily delay the consent process (if, for example, that adult cannot be located or is unavailable) and that the presence of the nominated adult does not undermine the consent process.<sup>144</sup>

### **Recording the consent process**

8.123 The CIBS Act currently provides for consent to be recorded on a video record,<sup>145</sup> but this is not mandatory nor is it prescribed as the preferred recording method. We consider that, where reasonably practicable, the entire consent process, including the provision of information and the giving of consent, should be recorded. This would promote transparency of the process and ensure that there is an accurate record of the consent process, should the suspect's ability to consent or the consent process itself be challenged in future. The recording should not, however, be admissible as evidence in proceedings against the suspect for any other purpose.

### **Improving support for adults with brain and behaviour issues in the criminal justice system**

8.124 Professor Ian Lambie's recent report highlights the pressing need for processes in the criminal justice system to better support individuals with brain and behaviour issues.<sup>146</sup> As noted at paragraph 8.32 above, existing processes, including the consent process, may compound negative outcomes for individuals experiencing such issues. Similarly, Te Uepū Hāpai i te Ora | Safe and Effective Justice Advisory Group emphasises the need for early intervention to identify and address mental health and disability issues experienced by those who come into contact with the criminal justice system. It calls for Police policies and practices to be redesigned according to the principles of trauma-informed care and for staff to receive training to apply those principles.<sup>147</sup>

8.125 In light of these findings, consideration should be given to how suspects with brain and behaviour issues could be better supported during the consent process. This might include increasing the availability of speech-language services and communication assistants and additional training for police officers in identifying and communicating with suspects with brain and behaviour issues. We recognise, however, that the issues identified in Lambie's report are not limited to the consent process. They apply across the criminal justice system as a whole and go far beyond the scope of our review. A comprehensive approach is needed. We consider, therefore, that any consideration of improvements to the consent process should take place within the government's broader work on responding to brain and behaviour issues in the criminal justice system.

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<sup>143</sup> Te Uepū Hāpai i te Ora | Safe and Effective Justice Advisory Group recently reported that many people from these diverse communities felt that the justice system did not meet their needs. Migrant and refugee communities of colour expressed their experience of cultural blindness and lack of cultural competency within the system. For many, proceedings were conducted in languages they did not understand and according to rules that are alien to them. Furthermore, there is little or no attempt to explain this system or provide any navigation through it: Te Uepū Hāpai i te Ora | Safe and Effective Justice Advisory Group *Turuki! Turuki! Move Together!* (December 2019) at 12–13.

<sup>144</sup> See, by way of example, the limits on the right of a child or young person to be supported by a nominated person when giving or making a statement: Oranga Tamariki Act 1989, s 222(2).

<sup>145</sup> Criminal Investigations (Bodily Samples) Act 1995, s 9.

<sup>146</sup> See generally Ian Lambie *What were they thinking? A discussion paper on brain and behaviour in relation to the justice system in New Zealand* (Office of the Prime Minister's Chief Science Advisor, 29 January 2020).

<sup>147</sup> Te Uepū Hāpai i te Ora | Safe and Effective Justice Advisory Group *Turuki! Turuki! Move Together!* (December 2019) at 49–51.

### Adults lacking ability to give informed consent

- 8.126 No suspect sample should be obtained by consent from any adult who lacks the ability to give informed consent. A suspect lacks the ability to give informed consent if they:<sup>148</sup>
- (a) are unable to understand the information they are given and apply that information to their personal situation; or
  - (b) are unable to communicate their consent to the requesting officer.
- 8.127 This will require the requesting officer to form a view about whether the suspect lacks ability to consent. Guidance will need to be developed to help police officers to carry out this task.
- 8.128 The inability to consent may be temporary (that is, if a suspect is under the influence of drugs or alcohol), in which case, a police officer must wait until the suspect regains their capacity to consent. In rare cases, the inability to consent will be permanent, such as when a suspect has severe dementia or significant intellectual disability. In these cases, a suspect sample should only be obtained pursuant to a compulsion order.
- 8.129 We do not think that a third party such as a parent or guardian should be able to give consent on the suspect's behalf in circumstances where the suspect lacks the ability to give informed consent themselves. We draw a distinction between suspect sampling and the scenario where an adult who lacks the ability to consent is asked to provide an elimination sample. In the case of elimination sampling, the adult is not under suspicion, and Police cannot use the results of analysis of that sample against that person without court authorisation. Elimination sampling is discussed in Chapter 9.

### Using suspect samples

#### RECOMMENDATION

**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.

- 8.130 Suspect samples should continue to only be used in connection with the investigation for which they are obtained, subject to one exception. We recommend in Chapter 18 that a Judge may authorise a one-off comparison of a DNA profile that is obtained prior to a person's conviction against the crime scene index. As we explain in that chapter, our view is that this will ensure a consistent approach to all DNA profiles obtained pre-conviction and will minimise intrusions on privacy and applicable tikanga Māori, such as tikanga associated with protecting a person's mana and whakapapa, while still providing police officers with an avenue to apply for a one-off comparison in appropriate circumstances.<sup>149</sup> A Judge may only authorise a one-off comparison under R145.a if satisfied that:

<sup>148</sup> This is broadly consistent with the presumption of competence in s 5 of the Protection of Personal and Property Rights Act 1988 and with the approach to incapacity to consent in comparable jurisdictions (see [8.98]–[8.100]).

<sup>149</sup> This will apply to profiles generated from suspect samples as well as profiles generated from samples required on arrest or intention to charge, as discussed in Chapter 18.

- (a) there are reasonable grounds to suspect that the person has committed other offences;
- (b) there are reasonable grounds to believe that a comparison may result in a match; and
- (c) in all the circumstances, it is reasonable to make an order.

8.131 This strikes a balance between the different approaches adopted in comparable jurisdictions. It is similar to the restrictive approach in Canada but provides police officers with greater flexibility to use a suspect sample for a wider purpose with appropriate judicial approval. We do not consider the approach taken in Australia, England and Wales, Scotland and Ireland (permitting comparison of suspect profiles against all crime scene profiles without restriction) is a justified intrusion on a suspect's privacy in circumstances where they have not been convicted of the relevant offence.

### Withdrawing consent

#### RECOMMENDATION

**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.

- 8.132 A suspect who consents to the taking of a suspect sample should be able to withdraw their consent before, during or immediately after the suspect sample is obtained (that is, while the suspect is still in the presence of the police officer supervising the sampling procedure). This extends the existing rights of withdrawal slightly, which are currently limited to withdrawing consent before the sample is obtained.<sup>150</sup> We also considered an alternative option of permitting a suspect to withdraw their consent within a short window of two days after a sample is obtained. This would enable a suspect to seek legal advice and the advice of trusted friends, family or whānau after they have given their sample and to act on that advice.
- 8.133 Ultimately, we are satisfied that this additional protection is not required if the other safeguards recommended above are adopted, namely, guaranteeing the right of suspects to consult a lawyer before giving consent and the right for suspects to be supported by another adult during the consent process. If those safeguards are not adopted, a right to withdrawal consent within two days could be considered as an alternative.

<sup>150</sup> Criminal Investigations (Bodily Samples) Act 1995, s 10.

## Obtaining adult suspect samples pursuant to compulsion order

### RECOMMENDATIONS

**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.

8.134 Police should be able to seek a compulsion order requiring a suspect to provide a suspect sample if they refuse to consent or fail to give consent within two working days of the request being made. This is a slight modification of the current law, which deems consent to be refused after a period of 48 hours.<sup>151</sup> Given that a suspect request may be made outside normal working hours, we consider it is more appropriate to adopt a period of two working days.

8.135 We also recommend, for the reasons explained at paragraphs 8.126–8.129 above, that a suspect sample should *only* be obtained from an adult suspect lacking the ability to give informed consent if a compulsion order is obtained. In addition, if Police has already obtained an indirect sample in relation to that suspect from a secondary source, it should be able to seek a suspect compulsion order to confirm the results of the analysis of that indirect sample. Indirect sampling is discussed in Chapter 12.

8.136 The existing procedural requirements for compulsion orders<sup>152</sup> appear to be generally working well and should continue to apply, subject to the following two modifications.

8.137 First, the matters that a Judge must be satisfied of, before they grant a compulsion order, should mirror the proposed matters for requesting a suspect sample, described at paragraphs 8.107–8.114 above. This would help simplify the regime and assist Police to focus on the grounds for obtaining a compulsion order early in the investigation

<sup>151</sup> Section 11.

<sup>152</sup> Sections 13–24B.



process. Excluded from this list of matters is the current requirement that the Judge be satisfied that material reasonably believed to be from or genetically traceable to the body of a person who committed the offence has been found or is available (that is, a crime scene sample).<sup>153</sup> We have excluded this matter simply because it overlaps with the separate requirement that the Judge must be satisfied that 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. As we note above, we do not consider this requirement could be satisfied if there is no crime scene sample against which a suspect sample can be compared.

- 8.138 Second, the matters the Judge must have regard to when considering a compulsion order should also reflect any statutory guidance given to police officers when considering whether making a request for a consent sample is reasonable in all the circumstances (see paragraphs 8.114–8.115). Other matters that might be relevant to the Judge's consideration of whether making the order is reasonable in all the circumstances could include the suspect's reasons for refusing the request (if relevant) or, if the suspect lacks the ability to give informed consent, their views to the extent they can reasonably be obtained.

### Obtaining suspect samples from children and young people

#### RECOMMENDATION

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.

- 8.139 The consent-based regime described above should only apply to adults. We are satisfied that the vulnerability of children and young people discussed at paragraphs 8.36–8.43 above undermines their ability to provide free and informed consent in this context and that consent from a parent is not an adequate safeguard. This is consistent with the submissions of the Office of the Children's Commissioner and YouthLaw and is reflected in the views of some of the young people we spoke to at Korowai Manaaki Youth Justice residence (see paragraphs 8.76–8.83).
- 8.140 We therefore recommend that suspect samples can only be obtained from a prosecutable child or young person pursuant to an order of the Youth Court. Given the Youth Court's specialist jurisdiction, we consider it is best placed to determine whether a compulsion order in respect of a child or young person meets the criteria discussed at paragraphs 8.107–8.114 above, including that it is "reasonable in all the circumstances". We recognise that this would increase cost, administration and delay in obtaining suspect samples from children and young people, but we think this is justified given the concerns identified above and in light of the relatively low numbers of suspect samples that are collected by consent currently (only a portion of which will relate to suspects under the age of 18).<sup>154</sup> Such an approach would also promote greater consistency with

<sup>153</sup> Sections 16(1)(b) and 23(1)(d).

<sup>154</sup> Police has provided us with the total number of suspect samples collected by consent for the reporting years from 2010/2011 to 2018/2019, and these figures are found in Table 2 in Appendix 3. In 2018/2019, 623 suspect samples were collected by consent. In contrast, in that same reporting year, 13,056 samples were collected on arrest or

UNCROC and the youth justice principle that young people are entitled to special protections during any criminal investigation<sup>155</sup> and is consistent with the approach taken in many other comparable jurisdictions, as discussed at paragraphs 8.96–8.101.

- 8.141 We do not recommend retaining any ability to obtain a suspect sample from a child who cannot be prosecuted for the offence being investigated, either by consent (as currently permitted under Part 2A) or compulsion order. The purpose of sampling a non-prosecutable child is to determine whether that child is in need of care and protection (see paragraph 8.19 above). However, we are concerned that subjecting a child to a Police-controlled sampling procedure unnecessarily increases their contact with the criminal justice system and fails to promote their wellbeing and best interests, which is the first and paramount consideration in care and protection matters.<sup>156</sup> For these reasons and also noting that Part 2A is rarely used,<sup>157</sup> we consider that new DNA legislation should focus on the collection of DNA samples for the investigation and prosecution of offences.<sup>158</sup> It should not include children whose behaviour raises care and protection concerns.

### Classifying legal services as criminal legal aid

#### RECOMMENDATION

#### 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”.

- 8.142 We recommend that the provision of legal services in relation to requests for suspect samples and applications for suspect compulsion orders and for any other legal services provided under new DNA legislation should be categorised as “criminal legal aid”. As noted above, currently all proceedings under the CIBS Act are civil proceedings for the purposes of legal aid, which means only lawyers with approval to provide civil legal aid services are able to provide services in respect of CIBS Act matters.<sup>159</sup> This excludes

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intention to charge under Part 2B of the Criminal Investigations (Bodily Samples) Act 1995. The highest number of suspect samples collected by consent in a reporting year since 2010/2011 was 737 in 2014/2015. Police does not break down the suspect samples data by age.

<sup>155</sup> Oranga Tamariki Act 1989, s 208(2)(h).

<sup>156</sup> Section 4A.

<sup>157</sup> Over the reporting years from 2007–2008 to 2018–2019 (covering a 12-year period), a total of 20 samples were taken as a result of a Part 2A request: Ngā Pirihimana o Aotearoa | New Zealand Police *Annual Report 2007–2008* (October 2008) at 81; Ngā Pirihimana o Aotearoa | New Zealand Police *Annual Report 2008–2009* (October 2009) at 77; Ngā Pirihimana o Aotearoa | New Zealand Police *Annual Report 2009–2010* (October 2010) at 89; Ngā Pirihimana o Aotearoa | New Zealand Police *Annual Report 2010–2011* (October 2011) at 112; Ngā Pirihimana o Aotearoa | New Zealand Police *Annual Report 2011–2012* (October 2012) at 94; Ngā Pirihimana o Aotearoa | New Zealand Police *Annual Report 2012–2013* (October 2013) at 113; Ngā Pirihimana o Aotearoa | New Zealand Police *Annual Report 2013–2014* (October 2014) at 130; Ngā Pirihimana o Aotearoa | New Zealand Police *Annual Report 2014–2015* (October 2015) at 152; Ngā Pirihimana o Aotearoa | New Zealand Police *Annual Report 2015–2016* (October 2016) at 154; Ngā Pirihimana o Aotearoa | New Zealand Police *Annual Report 2016–2017* (November 2017) at 142; Ngā Pirihimana o Aotearoa | New Zealand Police *Annual Report 2017–2018* (October 2018) at 147; and Ngā Pirihimana o Aotearoa | New Zealand Police *Annual Report 2018–2019* (November 2019) at 168.

<sup>158</sup> Consistent with our recommended statutory purpose statement discussed in Chapter 3.

<sup>159</sup> Legal Services Act 2011, s 75.

PDS.<sup>160</sup> As a matter of principle, the collection and use of DNA in criminal investigations is more appropriately regarded as being part of the criminal process generally rather than being classified as a civil matter. Classifying these services as “criminal legal aid” means that people accessing legal aid services are more likely to have access to lawyers who are experienced in and willing to provide legal advice on criminal and DNA matters.

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<sup>160</sup> Public Defence Service “About the Public Defence Service” <[www.pds.govt.nz](http://www.pds.govt.nz)>.

## CHAPTER 9

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# Elimination sampling

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## INTRODUCTION

- 9.1 In a criminal investigation, Police may want to obtain a DNA sample from a person who is not considered a suspect. We refer to this as an “elimination sample”.<sup>1</sup>
- 9.2 Police may seek an elimination sample from:
- (a) a victim in order to identify and exclude their DNA from the DNA found at the crime scene;<sup>2</sup>
  - (b) a third party with a legitimate reason to be at the crime scene (such as the victim’s partner in the case of a sexual assault or the victim’s flatmate in the case of a burglary) in order to identify and exclude their DNA from the DNA found at the crime scene; or
  - (c) any other person who is not a suspect but who Police wants to eliminate entirely from their investigation (or who wants to volunteer a DNA sample in order to eliminate themselves) by establishing that their DNA profile is not a match for the DNA profiles found at the crime scene.<sup>3</sup>
- 9.3 This chapter considers the collection and use of elimination samples.

## CURRENT LAW AND PRACTICE

- 9.4 The CIBS Act does not provide for elimination sampling. In the absence of a statutory regime, elimination samples are obtained on a purely voluntary basis.

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<sup>1</sup> In a criminal investigation, Police might also want to obtain samples from investigators for elimination purposes. ESR maintains two separate elimination databases for this purpose. We discuss these in Chapter 4.

<sup>2</sup> In this Report we use “victim” to refer to a person who has been or who is claimed to have been the victim of criminal offending.

<sup>3</sup> For example, in *R v Taufa* [2016] NZCA 639, the defendant was charged with sexual offending against a 12-year-old girl, who later gave birth to a baby. The complainant told Police that her grandfather was the offender. During the investigation, Police sought DNA samples from other males with whom the complainant had had contact. One was the defendant, Mr Taufa. The Court of Appeal judgment records that he was not a suspect and that he gave a sample voluntarily for elimination purposes: at [2].

## Obtaining elimination samples

- 9.5 Police has developed guidelines, contained in the *Police Manual*, and a standard form to be used when requesting an elimination sample. The standard form records the following:<sup>4</sup>
- (a) The person has been asked to consent to Police obtaining a DNA sample by way of a buccal swab and for a DNA profile to be developed from the sample for comparison with other DNA profiles obtained for “casework elimination”.
  - (b) The form must not be used for any person “who in the circumstances could be an offender”. If in any doubt, the form directs Police to take a suspect sample according to Part 2 of the CIBS Act.
  - (c) The case involves an imprisonable offence or an offence against any provisions listed in Part 3 of Schedule 1 of the CIBS Act (this is the offence threshold for the collection of suspect samples under Part 2 of the CIBS Act).<sup>5</sup>
  - (d) Analysis of the sample “is for elimination purposes only and will be used in connection with this investigation only”.
  - (e) The person providing the elimination sample has been advised and understands that:
    - (i) they do not have to give the sample if they do not wish to;
    - (ii) they can withdraw consent at any time and the sample/profile will be destroyed;
    - (iii) the sample will be analysed on behalf of Police and, along with any information resulting from that analysis, will be held by or on behalf of Police;
    - (iv) the sample and information derived from it will only be used in connection with the reason for the request;
    - (v) the sample and any information derived from it will be destroyed once the information is no longer needed for the purpose for which it was provided; and
    - (vi) they may consult a lawyer before deciding whether to consent to the collection of the sample.
  - (f) If the person providing the elimination sample is under 18 years of age, their parent or caregiver must also consent to the person providing a sample.

## Use of elimination samples

- 9.6 On average, 449 elimination samples were collected by Police and submitted to ESR each year between 2012 and 2020. As indicated in the standard form, elimination samples are only used in connection with the investigation for which they are obtained.

<sup>4</sup> Ngā Pirihimana o Aotearoa | New Zealand Police “DNA Elimination Sample Consent Form” (DNA300 – 08/17) referred to in Ngā Pirihimana o Aotearoa | New Zealand Police “DNA Sampling” in *Police Manual* at 46. This form is used for DNA sampling not governed by the CIBS Act including missing person and disaster victim identification. As noted in the Issues Paper, Police has used this form since 2011. Prior to that, Police relied on the suspect sampling regime in Part 2 of the CIBS Act on the basis that DNA samples sought for elimination purposes would tend to “disprove” the person’s involvement in the commission of the offence: Issues Paper at [8.24].

<sup>5</sup> The only offence listed in Part 3 of Schedule 1 of the Act that is not an imprisonable offence is the offence of peeping or peering into a dwellinghouse, which is an offence under s 30 of the Summary Offences Act 1981.

- 9.7 A DNA profile is derived from the elimination sample (elimination profile), which is then compared to DNA profiles derived from any crime scene sample(s) relevant to that investigation. This helps investigators rule out crime scene profiles deposited by the victim or third parties and isolate any crime scene profiles deposited by the likely offender.
- 9.8 If there is a match between an elimination profile and a crime scene profile, that crime scene profile is not uploaded onto the Crime Sample Databank (CSD). Both profiles are instead stored on the case file for the duration of the case.<sup>6</sup>
- 9.9 However, in some cases, an elimination sample may be obtained after the crime scene profile or profiles for that investigation have already been uploaded onto the CSD. In these circumstances, the CSD may contain crime scene profiles belonging to victims and third parties with legitimate reasons to be at the crime scene. We discuss this issue at paragraph 9.33(b) below.
- 9.10 ESR has advised us that it has several safeguards in place to ensure, wherever possible, that DNA profiles from victims and third parties are not uploaded to or retained on the CSD. This includes:
- (a) encouraging Police to actively seek elimination samples from victims and third parties, where appropriate, to ensure that DNA profiles from individuals who are not the offender are not uploaded to the CSD;
  - (b) immediately removing profiles from the CSD if it comes to ESR's attention during a subsequent comparison or analysis that a profile is from a victim or a third party; and
  - (c) removing any profiles as requested by Police (however, we understand that such requests are rare).<sup>7</sup>
- 9.11 In some investigations, there may be an unexpected match between a crime scene profile and an elimination profile, which implicates the person who provided the elimination sample as a suspect in that investigation.<sup>8</sup> Neither the *Police Manual* nor the standard form explain what action a police officer should take in this situation. The District Court has said that the appropriate Police action would be to obtain a second sample for evidential purposes using the suspect regime in Part 2 of the CIBS Act.<sup>9</sup>

### Storage, retention and destruction of elimination samples and profiles

- 9.12 Police's standard form states that elimination samples and any information derived from that sample, including elimination profiles, will be destroyed once the information is no longer needed for the purpose for which it was provided. ESR advises us that, in practice, it deals with and retains elimination samples and profiles in the same way and for the same length of time as suspect samples and profiles.<sup>10</sup> This means elimination samples and profiles are retained on the case file until any court proceeding is

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<sup>6</sup> Issues Paper at [10.17]–[10.18].

<sup>7</sup> At [10.23].

<sup>8</sup> See, for example, *R v Taufa* [2016] NZCA 639. The facts of this case are discussed above n 3.

<sup>9</sup> *R v Taufa* [2016] NZDC 16263 at [34].

<sup>10</sup> Issues Paper at [8.29].

concluded or for up to 24 months if no charges are filed, at which point Police reviews whether retention is still required.

## ISSUES WITH THE CURRENT ELIMINATION SAMPLING REGIME

- 9.13 We have identified several issues with the current elimination sampling regime:<sup>11</sup>
- (a) The lawfulness of the elimination sampling regime is uncertain.
  - (b) The regime lacks transparency and accountability.
  - (c) There are inadequate safeguards to prevent inappropriate use of the elimination sampling regime.
- 9.14 We discuss these issues below.

### Uncertain legal authority

- 9.15 As noted above, the CIBS Act does not provide for elimination sampling. In the absence of statutory authority, whether Police can lawfully obtain elimination samples by consent is uncertain.
- 9.16 This issue was considered briefly by the Court of Appeal in *R v Taufa*.<sup>12</sup> Counsel for the defendant argued that the CIBS Act is a code prescribing the circumstances in which a person can provide a DNA sample by consent and that there is no power to take samples outside the Act.<sup>13</sup> This was based on section 72(c) of the CIBS Act, which provides:
- Nothing in this Act—
- ...
- (c) shall be taken to limit or affect the circumstances in which any specimen from a person's body (*other than a bodily sample*) ... may be taken from any person with that person's consent.
- (emphasis added)
- 9.17 Ultimately, the Court of Appeal did not have to determine this issue.<sup>14</sup> However, it noted that these were important issues that may in some future case fall to be decided by the Court.<sup>15</sup>
- 9.18 This lack of certainty as to the lawfulness of the elimination sampling regime is undesirable, both from a law enforcement perspective and from the perspective of a person asked to provide an elimination sample. This is particularly so given the degree of intrusion inherent in any DNA sampling by the State and the potentially significant consequences both for the person providing the elimination sample and for the criminal investigation should there be an unexpected match.

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<sup>11</sup> These are similar to but expand on the issues identified in the Issues Paper, which were expressed as legal certainty, the relationship between suspect and elimination sampling and how elimination samples may be used. See Issues Paper at [8.108]–[8.114].

<sup>12</sup> *R v Taufa* [2016] NZCA 639. This case is discussed in Christopher White “Voluntary Bodily ‘Elimination Sample’: Reference Point for Reform?” [2017] NZLJ 395 at 395–396.

<sup>13</sup> At [13].

<sup>14</sup> The Court of Appeal held that, even if the elimination sample had been unlawfully obtained, it met the threshold for admissibility under s 30 of the Evidence Act 2006: at [17].

<sup>15</sup> At [13] and [16].

## Lack of transparency and accountability

- 9.19 The elimination sampling regime sits outside the CIBS Act and is governed largely by Police operating procedures, which are not publicly available. Because the regime operates outside the CIBS Act, the reporting requirements that apply to Police under section 76 of the Act do not apply. This lack of transparency makes it difficult to monitor the regime.
- 9.20 The lack of transparency and accountability in relation to the collection of elimination samples is illustrated in the 2018 case of *R v W*.<sup>16</sup> The defendant, W, faced one charge of aggravated robbery and one of aggravated burglary. W was arrested based on a match between a crime scene profile from the burglary and W's DNA profile, which was being held on the DNA Profile Databank (DPD).<sup>17</sup> At issue was how W's DNA profile had got on the DPD. W had been the victim of a stabbing one year earlier at the age of 17. During Police's investigation into the stabbing, a crime scene sample had been collected and ESR requested that Police obtain an elimination sample from W in order to determine whether the crime scene sample was from W or the offender. However, rather than using the elimination sample standard form, Police used the form for obtaining a voluntary sample for the DPD (databank sample) under Part 3 of the CIBS Act (a DPD sample form).<sup>18</sup> The effect of signing the DPD sample form was that W's DNA profile would be stored on the DPD indefinitely (until W withdrew their consent) and compared against all crime scene profiles on the CSD from past and future offending.
- 9.21 A police officer gave evidence of going through the DPD sample form with W thoroughly and that W's informed consent was obtained. W, however, gave evidence that they thought the DNA sample was being provided only for the purpose of the stabbing investigation and was unaware that their DNA sample could be used for any other purpose. The District Court held that the police officer did not satisfy the statutory requirement to inform W, in a manner and language that W was likely to understand, that giving a DPD sample may result in W being charged with a criminal offence in future.<sup>19</sup> The Judge took into account the defendant's age at the time and that they had been a victim of a stabbing only nine days before the DNA sample was requested and accepted W's evidence that W assumed that the sample was requested for the sole purpose of assisting the Police with the investigation of the stabbing and not to be held indefinitely for use in future investigations.<sup>20</sup> The District Court held that W, as the victim of the stabbing, had a reasonable expectation of privacy in relation to the DNA sample and the wealth of genetic information it provided. Keeping W's DNA profile and continuing to use it beyond the purpose for which the DNA sample had been voluntarily provided went far beyond reasonable State intrusion that could be "demonstrably

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<sup>16</sup> *R v W* DC Manukau CRI-2018-092-847, 29 October 2018. This case is discussed in Hannah Croucher "DNA 'consent' samples; overhauling the Criminal Investigations (Bodily Samples) Act 1995" [2019] NZLJ 279 at 279–280.

<sup>17</sup> As discussed at [9.23] below, a match was also reported between the burglary crime scene profile and another crime scene profile relating to an earlier stabbing, of which W was the victim.

<sup>18</sup> The CIBS Act has since been amended to require a person to be 18 years or over in order to consent to provide a voluntary databank sample under s 30 of the Act.

<sup>19</sup> *R v W* DC Manukau CRI-2018-092-847, 29 October 2018 at [25].

<sup>20</sup> At [26]–[28].



justified in a free and democratic society”.<sup>21</sup> The DNA match and subsequent evidence were held to be improperly obtained and were ruled inadmissible under section 30 of the Evidence Act 2006.

- 9.22 W’s defence counsel were only alerted to the issue because W had no criminal history that could have explained the presence of W’s DNA profile on the DPD.<sup>22</sup> Had that not been the case, the basis of the match might not have been questioned, and there would have been no accountability for Police in using the incorrect form.
- 9.23 *R v W* also illustrates the lack of transparency and accountability in relation to the retention of DNA profiles of victims on the CSD. While ESR’s policy is to immediately remove a profile from the CSD if it is subsequently found to match a profile from a complainant, in *R v W*, the crime scene profile from the stabbing that was identified as belonging to the victim remained on the CSD for nine months.<sup>23</sup> During that time, it was matched to the crime scene profile from the separate burglary incident and, along with the match to W’s profile on the DPD, implicated W as the offender. The District Court held that W’s DNA was retained in breach of W’s rights for the nine-month period after their DNA had served its purpose in the stabbing investigation and that the match between the crime scene samples was improperly obtained.<sup>24</sup>

### Inadequacy of safeguards against misuse

- 9.24 Because the elimination sampling regime sits outside the CIBS Act, there are no statutory safeguards to prevent its misuse, either by requesting an elimination sample when the suspect sampling procedure in Part 2 of the CIBS Act should be used or by using an elimination sample for a different, unauthorised purpose.

### Risk of inappropriate collection of elimination samples

- 9.25 Current Police procedure, set out in the *Police Manual* and standard form, is to not use the elimination sampling regime for any person who in the circumstances could be an offender.<sup>25</sup> If in any doubt, the standard form directs Police to take a suspect sample under Part 2 of the CIBS Act.
- 9.26 However, these rules are not prescribed in legislation. There are, therefore, no clear consequences for contravening them. There may be a temptation, at least in borderline cases, to use the elimination sampling regime to generate information that could then support a suspect compulsion order. As we identified in the Issues Paper, the elimination sampling regime is much less constrained than suspect sampling.<sup>26</sup> For example, in order to request a suspect sample, there must be “reasonable grounds to believe that analysis of the sample would tend to confirm or disprove the suspect’s involvement in the commission of the offence”.<sup>27</sup> No such requirement exists in relation to elimination samples.

<sup>21</sup> At [44].

<sup>22</sup> Hannah Croucher “DNA ‘consent’ samples; overhauling the Criminal Investigations (Bodily Samples) Act 1995” [2019] NZLJ 279 at 280.

<sup>23</sup> ESR advises that removal of a profile in these circumstances is dependent on Police notification.

<sup>24</sup> *R v W* DC Manukau CRI-2018-092-847, 29 October 2018 at [45]–[46].

<sup>25</sup> Ngā Pirihimana o Aotearoa | New Zealand Police “DNA Sampling” in *Police Manual* at 46.

<sup>26</sup> Issues Paper at [8.112].

<sup>27</sup> Criminal Investigations (Bodily Samples) Act 1995, s 6(1).

- 9.27 There are several other concerns with the collection of elimination samples.
- 9.28 First, Police procedure does not clearly or comprehensively define all the circumstances in which an elimination sample can be requested. The *Police Manual* records:<sup>28</sup>
- Elimination samples are always casework related and taken and submitted to ESR when:
- casework relating to an imprisonable offence(s) or offence against any of the provisions listed in Part 3 of the Schedule has:
    - a potential DNA casework related profile;
    - there is a need to separate the donor's DNA from other DNA in a crime sample,
  - there is a possibility of inadvertent cross-contamination.
- 9.29 The *Police Manual* is silent on the third category of elimination sampling, identified at paragraph 9.2(c) above, concerning a person who is not a suspect but who Police wants to eliminate by establishing that their DNA profile is *not* a match for the profiles found at a crime scene. However, we are aware from our review of reported cases that Police does request elimination samples on this basis.<sup>29</sup>
- 9.30 Second, the regime provides few protections for children, young people and adults who lack the ability to consent. The standard form requires a parent or caregiver to also consent if the person asked to provide an elimination sample is under 18 years of age. Like the suspect regime, there is no such protection for adults who lack the ability to consent. This is a concern given the evidence that people with brain and behaviour issues are at greater risk of being victims of crime, that certain impairments are more common among Māori than non-Māori and that Māori with disabilities experience significantly more violent crime than other Māori.<sup>30</sup> Further, the form does not contemplate what should happen if a child is very young and is therefore unable to give informed consent due to their age and maturity.
- 9.31 Third, the (albeit non-statutory) protections that do exist in the elimination sampling regime, most importantly the restriction on the use of elimination samples for another purpose, can be easily circumvented by Police requesting a databank sample under Part 3 of the CIBS Act. If a databank sample is obtained instead of an elimination sample, the person's DNA profile can be matched not only with the crime scene profiles from the investigation but all other crime scene profiles on the CSD. This could implicate them in other offending. DNA profiles from databank samples can then be retained on the DPD indefinitely.<sup>31</sup> If Police do request a databank sample during an investigation from a person who is not a suspect, there is a risk that the reasons for requesting a databank sample are not properly explained and that the person misunderstands the use to which the sample can be put. This was illustrated in the case of *R v W*, discussed at paragraph 9.20 above.

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<sup>28</sup> Ngā Pirihimana o Aotearoa | New Zealand Police "DNA Sampling" in *Police Manual* at 46.

<sup>29</sup> See, for example, *R v Taufa* [2016] NZCA 639 (discussed at above n 3). Similarly, in *Simpson v R* [2016] NZCA 95, a case involving an alleged sexual assault, elimination samples had been obtained from two men, other than the appellant, who had been with the complainant on the relevant night: at [52]. In another case, *R v Burns* [2007] NZCA 308 at [17], the Court observed that elimination profiles had been obtained from several men who owned white Honda Preludes, including the appellant.

<sup>30</sup> Ian Lambie *What were they thinking? A discussion paper on brain and behaviour in relation to the justice system in New Zealand* (Office of the Prime Minister's Chief Science Advisor, 29 January 2020) at 5–6, 13 and 29.

<sup>31</sup> Unless the person withdraws their consent to their profile being held on the DNA Profile Databank. Voluntary sampling is discussed in Chapter 18.

- 9.32 Fourth, if a person is asked to provide an elimination sample but refuses, that refusal could generate suspicion and could potentially be used to support an application for a suspect compulsion order.

### *Risk of misuse of elimination samples*

- 9.33 While the standard form records that elimination samples are obtained for the purpose of “casework elimination”,<sup>32</sup> there are two ways in which an elimination sample could be used to the detriment of the person who provided it (the donor):
- (a) First, if there is an unexpected match between the elimination profile and a crime scene profile that implicates the donor in the commission of the offence, Police may use that match as the basis for obtaining a suspect sample under Part 2 of the CIBS Act.<sup>33</sup>
  - (b) Second, if a crime scene profile that matches an elimination profile from a victim or third party is uploaded to the CSD, it could link them to other crime scene profiles on the CSD, potentially implicating them in other offending. This might occur, for example, if crime scene profiles are uploaded to the CSD before an elimination sample is obtained or if there is a delay in removing a crime scene profile from the CSD after it has been identified as belonging to the victim or third party, as was the case in *R v W*, discussed at paragraph 9.23 above.<sup>34</sup>
- 9.34 These possibilities are not recorded on the standard form. This means the donor has not given their informed consent to the use of their DNA sample in these ways. If these possibilities were explained to a person asked to provide an elimination sample, it would likely disincentivise them from providing a sample, thereby undermining the effectiveness of the elimination sampling regime.
- 9.35 The linking of elimination profiles to crime scene profiles from other investigations (discussed at paragraph 9.33(b)) was the focus of an inquiry conducted by the New South Wales Legislative Council in 2009.<sup>35</sup> The Council identified two conflicting imperatives: the desirability of encouraging victims to report offending and cooperate with police investigations by providing elimination samples on one hand and the desirability of supporting Police to apprehend offenders on the other. To recognise both imperatives, the Council recommended legislative protections to ensure that all

<sup>32</sup> Ngā Pirihimana o Aotearoa | New Zealand Police “DNA Elimination Sample Consent Form” (DNA300 – 08/17).

<sup>33</sup> See *R v Taufa* [2016] NZDC 16263 at [34]; and *R v Taufa* [2016] NZCA 639 at [28]. The facts of this case are discussed at above n 3. The Court of Appeal judgment records that Mr Taufa was not a suspect and that he gave a sample voluntarily for elimination purposes: at [2]. The Court went on to state at [28] that:

The police could have looked at the analysis, formed the view that Mr Taufa was a suspect and asked for a further sample (or obtained one compulsorily in the event of refusal). We agree that the police could have done this — and indeed have now done so.

<sup>34</sup> We are aware of one other situation where a crime scene sample that was compared to a sample provided by the victim for elimination purposes was subsequently linked to two unrelated crime scene samples. In 1998, an unknown DNA profile was identified at the scene of two separate homicides in Wellington, and Police asked ESR to undertake a search among other cases in the laboratory at the same time for any others featuring the same DNA profile. ESR found that the profile matched a crime scene profile and elimination profile provided by a victim of an assault in Christchurch. After extensive enquiries, Police was unable to establish any firm explanation for the presence of the assault victim’s profile at two unrelated homicides. An independent investigation appointed by the Minister of Justice in 1999 concluded, on the balance of probabilities, that the anomalous results were caused by accidental contamination at the ESR laboratory: Thomas Eichelbaum and John Scott *Report on DNA Anomalies for the Minister of Justice* (30 November 1999).

<sup>35</sup> Standing Committee on Law and Justice *The use of victims’ DNA* (New South Wales Legislative Council, Report 41, December 2009).

reasonable steps are taken not to upload victim profiles to the crime scene index of the New South Wales DNA databank and to ensure that any such victim profiles are removed from the crime scene index as soon as they are identified.<sup>36</sup> It also recommended a statutory ban on prosecuting victims for unrelated offending based on an internal match within the crime scene index, except in cases of serious offending.

## OPTIONS FOR REFORM

9.36 In the Issues Paper, we proposed a statutory elimination scheme based on informed consent with protections to ensure that:<sup>37</sup>

- (a) the elimination sampling regime is not used to obtain a DNA sample from someone who is or should be considered a suspect;
- (b) an elimination sample cannot be used inappropriately against the person who provided it;
- (c) clear advice on analysis, retention and destruction of the sample and profile is given to a person to whom a request for an elimination sample is made; and
- (d) there is no power to obtain an elimination sample by compulsion.

9.37 We identified the following possible statutory protections:<sup>38</sup>

- (a) Only permitting a police officer to request an elimination sample where there are reasonable grounds to believe that:
  - (i) the relevant person is not the offender; and
  - (ii) there is a legitimate reason for their DNA to be found in the crime scene sample.
- (b) Prohibiting use of the following information in support of an application for a suspect compulsion order:
  - (i) A match between an elimination profile and a crime scene profile, including a direct match in relation to the investigation for which the elimination sample was obtained or a match discovered through the proposed DNA databank. This could be subject to an exception for serious offending.
  - (ii) A refusal to provide an elimination sample.
- (c) As an alternative to (b)(i), requiring a court or oversight body to review any case where there is an unexpected match between an elimination profile and a crime scene profile to ensure that the decisions in the case were appropriately made.

## RESULTS OF CONSULTATION

9.38 We received 10 submissions on elimination sampling, from Police, ESR, the New Zealand Law Society (NZLS), the New Zealand Bar Association (endorsing NZLS's submission in

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<sup>36</sup> In New South Wales, a formal Victims Protocol, signed by the Minister for Police and the Attorney General in 2007, already contained this policy, but the Legislative Council considered that the Protocol should have legislative standing: Standing Committee on Law and Justice *The use of victims' DNA* (New South Wales Legislative Council, Report 41, December 2009) at 55.

<sup>37</sup> Issues Paper at [8.115].

<sup>38</sup> At [8.116].

its entirety), the Auckland District Law Society Criminal Law Committee (ADLS), the Public Defence Service (PDS), the Privacy Commissioner, Te Mana Raraunga | Māori Data Sovereignty Network, Sue Petricevic and Associate Professor Nessa Lynch.

### Support for a statutory framework

- 9.39 All 10 submitters agreed that a statutory framework should be put in place to govern the collection of elimination samples.
- 9.40 Police submitted that DNA sampling for elimination purposes is essential to ensure crime scene profiles held on the CSD are not from victims, third parties with legitimate access or investigators. ESR also submitted that elimination samples and the ability to eliminate DNA from individuals who are not the offender is extremely important in casework. ESR strongly supported the Commission's preliminary view that victims and third parties need to be encouraged to provide elimination samples to Police. ESR said it would never knowingly load DNA from the victim or a known third party to the CSD and referred to the safeguards discussed at paragraph 9.10 above to ensure, wherever possible, that this does not occur.
- 9.41 NZLS supported a statutory framework for elimination sampling given the strong privacy interests inherent in DNA sampling, the serious consequences that may flow when an elimination sample unexpectedly incriminates the donor and the need for transparency and legal certainty. NZLS did not support using the term "elimination", however, as it was concerned that people who provide elimination samples may reasonably expect the sample is only used for one purpose: to eliminate them from consideration. NZLS submitted that the term "volunteer" may be more apt.
- 9.42 NZLS also supported statutory protections around the unintended use of elimination samples. It said that the options put forward in the Issues Paper required further consideration but that a limited power to request an elimination sample and a statutory ban on using an unexpected match or a refusal to provide an elimination sample to support an application for a suspect compulsion order would likely provide the best protections. NZLS noted that there may be reasons why a person cannot give a sample, including religious, cultural or medical reasons, and neither the law nor Police practice should incentivise a person to "prove their innocence" through the provision of an elimination sample. These statutory protections were also supported by PDS and Nessa Lynch. PDS submitted that, if an exception to the ban on allowing a match between an elimination sample and a crime scene sample being used to support a compulsion order is to be allowed in serious cases, a court or independent body (if one is set up) should be required to review the process and determine whether the match is able to be used to support a compulsion order.
- 9.43 NZLS also submitted that a person providing an elimination sample should be given:
- (a) assurance that they are not a suspect but a caution that the sample may be used against them if it implicates them as a suspect (if that remains permissible under new legislation);
  - (b) an opportunity to obtain legal advice prior to giving an elimination sample; and
  - (c) an opportunity to withdraw consent at any stage after giving an elimination sample.
- 9.44 ADLS also supported strict controls around elimination samples, such as the measure set out at paragraph 9.37(a).
- 9.45 The Privacy Commissioner supported the inclusion of statutory protections around the use of elimination samples, submitting that:

An important privacy safeguard is not retaining elimination samples and related DNA profiles for longer than necessary, once the sample and profile are no longer required. Where elimination samples and profiles are retained, there should be clear limits on their use beyond the particular investigation for which they were obtained.

- 9.46 The Privacy Commissioner further noted that, if unexpected matches are likely to be rare, it may be appropriate for review to be carried out by a judicial officer who could give directions as to its use or more generally in relation to practice in the collection of elimination samples.
- 9.47 Te Mana Raraunga was also concerned about the lack of clarity as to how and for how long elimination samples and any derived data can be retained and used. It submitted that any new legislation needs to include requirements for Police to provide clear, transparent and complete information about what will be involved in analysis, how derived data may be used, how data will be stored and for how long and how consent can be withdrawn.
- 9.48 Sue Petricevic supported a statutory framework on the basis that the same privacy rights exist as those applying to suspect sampling. She also pointed to a need for clear consent, retention and destruction policies and strict controls around use of elimination samples to prevent matching to unrelated cases.

## ELIMINATION SAMPLING IN COMPARABLE JURISDICTIONS

- 9.49 Many comparable jurisdictions authorise the collection of DNA samples for casework from people who are not suspects.<sup>39</sup> Often these people are called “volunteers”. They can include victims,<sup>40</sup> witnesses, consensual sexual partners of victims and participants in a mass screen. As the name suggests, Police can obtain a DNA sample from a volunteer with their informed consent. Legislation often provides for volunteer DNA profiles to be stored on a separate volunteer index of the jurisdiction’s DNA databank. A volunteer can choose whether to allow their DNA profile to be used for “unlimited” purposes, which involves their profile being compared against other indices of the country’s databank, including the crime scene index.<sup>41</sup> Volunteer samples and profiles

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<sup>39</sup> Comprehensive statutory volunteer sampling regimes exist in Ireland and all Australian jurisdictions except Queensland, where legislation preserves Police’s common law powers to take a DNA sample from a person who is not a suspect by consent: Police Powers and Responsibilities Act 2000 (Qld), s 448. Legislation in England and Wales, and Scotland also authorises Police to take DNA samples from any person (suspect or otherwise) with consent: Police and Criminal Evidence Act 1984 (UK), s 63; and Criminal Justice (Scotland) Act 2003, s 56. Canada does not have a statutory voluntary sampling regime, but the DNA Identification Act 1998 does authorise uploading DNA profiles from victims and volunteers onto the DNA databank with their informed consent, although the Commissioner responsible for the databank cannot communicate a match between a victim’s DNA profile and an unrelated crime scene profile: DNA Identification Act SC 1998 c 37, s 6(1).

<sup>40</sup> In some jurisdictions, including New South Wales and Tasmania, victims are expressly excluded from the statutory regime altogether. However, in practice, the same procedures that apply to volunteers generally apply to victims – that is, Police can request a DNA sample, but the use of that sample and its retention are determined by the person providing the sample. See, for example, discussion in NSW Ombudsman *DNA sampling and other forensic procedures conducted on suspects and volunteers under the Crimes (Forensic Procedures) Act 2000* (October 2006) at 175–176.

<sup>41</sup> It is unclear how often volunteer profiles are used for other purposes in practice. One investigation by the New South Wales Ombudsman found that it was very rare for volunteer samples to be used for different purposes in that jurisdiction: NSW Ombudsman *DNA sampling and other forensic procedures conducted on suspects and volunteers under the Crimes (Forensic Procedures) Act 2000* (October 2006) at 75.

are usually retained for as long as the volunteer agrees and are destroyed if consent is withdrawn.

- 9.50 Many jurisdictions also make special provision for obtaining elimination samples from children and young people under the age of 18 and from adults who lack the ability to give informed consent. We refer to these provisions where relevant in the recommendations section below.

## RECOMMENDATIONS

### Establishing a statutory regime for elimination sampling

#### RECOMMENDATION

**R53**

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

- 9.51 We recommend that new DNA legislation prescribes a regime for the collection and use of elimination samples in criminal investigations. This will ensure that elimination sampling is lawful, transparent and accountable. It will also ensure safeguards against inappropriate use of the elimination sampling regime. In addition, a statutory regime would meet our broader objectives of ensuring the DNA regime is fit for purpose, constitutionally sound and accessible.
- 9.52 Like suspect sampling (discussed in Chapter 8), elimination sampling should continue to be based on informed consent. However, unlike suspect sampling, there should be no power to require a person to provide an elimination sample or to use reasonable force to obtain a sample if they refuse to give consent or otherwise object to or resist the taking of a sample. Such powers are unjustified when the donor is not a suspect given the inherent intrusion on a person's mana, privacy, bodily integrity and personal tapu that DNA sampling poses.

### Clarifying when Police may request an elimination sample

#### RECOMMENDATION

**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.

- 9.53 We recommend that, when investigating 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.<sup>42</sup> This will align the elimination sampling regime with our recommendations in relation to suspect sampling discussed in Chapter 8. As we explained in that chapter, this will mean that Police must rely on the suspect sampling regime whenever they believe a person may have committed an offence, even if they do not have sufficient evidence to charge that person. This is consistent with current Police practice, as explained at paragraph 9.5(b) above.
- 9.54 We do not propose further limits on a police officer’s power to request an elimination sample. In the Issues Paper, we considered requiring both reasonable grounds to believe that the person asked to provide an elimination sample is *not* the offender and a legitimate reason for their DNA to be found in the crime scene sample. However, after further consideration, we are of the view that these requirements would be unduly restrictive in two respects:
- (a) First, requiring reasonable grounds to believe that the relevant person is *not* the offender risks creating a gap in the law that could prevent Police from obtaining a DNA sample from someone who is not a suspect (as defined in the CIBS Act) but for whom Police has no objective evidence that would support “reasonable grounds” to believe they are not the offender.<sup>43</sup> A person might not be a suspect, but there may be a lack of positive evidence ruling them out of the investigation without first establishing that their DNA profile is *not* a match to the profiles found at the crime scene.<sup>44</sup>
  - (b) Second, requiring a legitimate reason for the person’s DNA to be found in the crime scene sample would exclude the third category of elimination sampling described at paragraph 9.2(c), namely a person who is not a suspect but who Police wants to eliminate by establishing that their DNA profile is *not* a match for the profiles found at a crime scene.

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<sup>42</sup> In Chapter 8, we express our view that the existing broad definition of “suspect” in s 2 of the Criminal Investigations (Bodily Samples) Act 1995 should continue to apply under new DNA legislation.

<sup>43</sup> Having “reasonable grounds to believe” requires an objective and credible basis for thinking that a state of affairs exists, as opposed to mere suspicion, which means thinking that it is likely that a situation exists. See *R v Williams* [2007] NZCA 52, [2007] 3 NZLR 207 at [213]; *R v Sanders* [1994] 3 NZLR 450 (CA) at 460–461; and *R v Laugalis* (1993) 10 CRNZ 350 (CA) at 354–355.

<sup>44</sup> Similar concerns have been raised in Australia. See NSW Ombudsman *DNA sampling and other forensic procedures conducted on suspects and volunteers under the Crimes (Forensic Procedures) Act 2000* (October 2006) at 119. In its draft report, the NSW Ombudsman proposed that the definition of “volunteer” be amended to mean “a person who is not under suspicion”. However, the Attorney General’s Department was concerned that this may create a lacuna where a person might be neither a suspect nor a volunteer for the purposes of the legislation. The NSW Ombudsman therefore revisited its proposal and recommended that the definition of a volunteer should remain “a person other than a suspect” rather than “a person who is not under suspicion”.



## Obtaining elimination samples with informed consent

### RECOMMENDATIONS

#### 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 to 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.

- 9.55 Elimination samples should usually be obtained with the donor's informed consent. However, in some cases, this will not be appropriate due to the donor's age or inability to give informed consent themselves. In these cases, it should be possible to rely instead on the informed consent of a responsible adult. This is different to our approach to suspect sampling in Chapter 8, where we recommend that suspect samples from children, young people and adults who lack the ability to give informed consent should only be obtained pursuant to a compulsion order issued by a High Court, District Court or Youth Court Judge. As we explain in that chapter, we are not satisfied that obtaining the consent of a responsible adult is an adequate safeguard given the significant consequences for a suspect if a comparison of their DNA against a crime scene sample implicates them in the offending.

9.56 The context of elimination sampling, however, is very different to suspect sampling. A person asked to provide an elimination sample is not a suspect. In many cases, the donor may be a victim of the offending. Below we propose clear restrictions on the use of elimination samples that will ensure an elimination sample cannot be used as evidence against a donor without court authorisation. In these circumstances, we do not consider that prior court approval of the collection of an elimination sample from a child, young person or adult who lacks the ability to consent is necessary or appropriate. We consider it is more appropriate that a responsible adult is asked to give informed consent and that the donor be involved as far as reasonably practicable in making the decision that affects them. We expand on these proposals below.

### Children

- 9.57 We recommend that Police be able to request an elimination sample in respect of any child under the age of 14. We note that, in Chapter 8, we recommend that a suspect sample should only be obtained from a child if that child can be lawfully prosecuted for the offence under investigation. This would exclude all children under the age of 10 (that is, below the age of criminal responsibility) and limits the collection of suspect samples from children aged between 10 and 14 to serious offending.<sup>45</sup> We recognise, however, that it may be important in some investigations for Police to obtain an elimination sample from a child younger than 10, for example, if they are the victim of a serious assault, in order to distinguish their DNA from the DNA of the likely offender in a crime scene sample.
- 9.58 If Police requests an elimination sample from a child, informed consent should be provided on their behalf by a parent or guardian. We do not think it would be appropriate to impose an obligation on a child to give informed consent themselves, given their age, level of maturity and the volume and complexity of information that must be understood in order to give informed consent (discussed below).
- 9.59 Children should, however, still be involved in the consent process to the extent that this is appropriate given their age and maturity. We therefore recommend that there should be an obligation on the requesting officer to ensure that, where reasonably practicable, the request for the elimination sample, the procedure for taking the sample and how the sample will be used is explained to the donor in a manner and language that they are likely to understand.<sup>46</sup>
- 9.60 Further, an elimination sample should not be taken from any child if they object or resist. We do not consider that taking an elimination sample against a child's will is justifiable given that they are not a suspect (and may in fact be a victim) and given the degree of intrusion on a person's mana, privacy, bodily integrity and personal tapu inherent in any form of DNA sampling. This is a safeguard found in many elimination sampling regimes

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<sup>45</sup> In accordance with s 272 of the Oranga Tamariki Act 1989. Section 272(1) provides that a child aged 10 or 11 may only be prosecuted for murder or manslaughter and that a child aged 12 or 13 may only be prosecuted for murder, manslaughter or any offence for which the maximum penalty available is or includes imprisonment for life or for at least 14 years. If a child aged 12 or 13 years is a "previous offender" within the meaning of s 272(1A) or (1B), they may also be prosecuted for any offence for which the maximum penalty available is or includes imprisonment for at least 10 years but less than 14 years: s 272(1)(c).

<sup>46</sup> What this means, in the context of explaining the information necessary for obtaining informed consent, is discussed at [9.69] below.

in comparable jurisdictions.<sup>47</sup> In circumstances where a child does object to or resist a procedure, we consider that a police officer should be able to obtain an elimination sample indirectly from a physical object such as a cup that contains the donor's biological material or from a stored sample of biological material. We discuss indirect sampling in Chapter 12.

### *Young people*

9.61 If Police requests an elimination sample from a young person (aged between 14 and 18 years), we consider that informed consent should be obtained from both the donor and a parent or guardian. We understand this is consistent with current Police procedure. This would put the young person at the centre of the decision affecting them, with the additional safeguard of requiring the informed consent of a parent or guardian (or a judicial authority, discussed below).

### *Donors lacking ability to consent*

9.62 There may be situations where Police wishes to obtain an elimination sample from a person who lacks the ability to consent. For example, if a person suffering from severe dementia is a victim of an assault, an elimination sample may be sought in order to distinguish their DNA from the DNA of the likely offender in a crime scene sample. In Chapter 8, we explain that a person will lack the ability to consent if they:<sup>48</sup>

- (a) are unable to understand the information they are given and apply that information to their personal situation; or
- (b) are unable to communicate their consent to the requesting officer.

9.63 Where a young person lacks the ability to consent, Police should be able to obtain informed consent from a parent or guardian. Where an adult lacks the ability to give informed consent, Police should be able to obtain informed consent from that person's welfare guardian (if one has been appointed under the Protection of Personal and Property Rights Act 1988)<sup>49</sup> or from the donor's principal caregiver, being the person who is most evidently and directly concerned with the donor's care and welfare.<sup>50</sup>

9.64 The safeguards discussed at paragraphs 9.59 and 9.60 in relation to children should also apply to adults who lack the ability to give informed consent. This reflects the need to involve the donor in decisions that affect them to the greatest extent possible. No elimination sample should be taken against the donor's will, given the donor is not a

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<sup>47</sup> Crimes Act 1914 (Cth), s 23XWQ(4); Crimes (Forensic Procedures) Act 2000 (NSW), s 76(3); Crimes (Forensic Procedures) Act 2000 (ACT), s 79(2); Criminal Law (Forensic Procedures) Act 2007 (SA), s 11; and Criminal Justice (Forensic Evidence and DNA Database System) Act 2014 (Ireland), s 57(2).

<sup>48</sup> This is broadly consistent with the presumption of competence in s 5 of the Protection of Personal and Property Rights Act 1988 and with the approach to incapacity to consent in comparable jurisdictions (see discussion in Chapter 8).

<sup>49</sup> A welfare guardian may be appointed by the Family Court in respect of a person who "wholly lacks the capacity to make or to communicate decisions relating to any particular aspect or particular aspects of the personal care and welfare of that person": Protection of Personal and Property Rights Act 1988, s 12(2)(a).

<sup>50</sup> The term "principal caregiver", in relation to adults, is defined in health legislation as:

... the friend of the patient or the member of the patient's family group or whānau who is most evidently and directly concerned with the oversight of the patient's care and welfare

For example, see Substance Addiction (Compulsory Assessment and Treatment) Act 2017, s 4; and Mental Health (Compulsory Assessment and Treatment) Act 1992, s 2. See also Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003, s 5.

suspect and the degree of intrusion on a person's mana, privacy, bodily integrity and personal tapu. If a donor objects to or resists the taking of a sample, a police officer should be able to obtain an elimination sample indirectly, as discussed in Chapter 12.

### *Authorisation of request by court order*

- 9.65 It might not always be possible or appropriate to obtain the informed consent of a responsible adult. For example, a child's parent or guardian may be a suspect in the investigation, or Police may not be able to establish who has principal care of an adult who lacks the ability to consent. In these situations, a police officer should be able to apply to a High Court or District Court Judge for an order authorising the taking of an elimination sample. Such an order would replace the need to obtain the informed consent of a responsible adult, but it would not replace the other relevant requirements for obtaining an elimination sample, such as the requirement to obtain informed consent from a young person or to explain the process to a child or donor who lacks the ability to give informed consent. Similar provisions can be found in Australia and Ireland.<sup>51</sup>
- 9.66 A Judge should be able to grant an order if satisfied that doing so is reasonable in all the circumstances. Consideration should be given to whether new DNA legislation should include statutory guidance for Judges when considering an application. This could be modelled on comparable provisions in several Australian jurisdictions, which include consideration of:<sup>52</sup>
- (a) the best interests of the donor;
  - (b) if the donor is a child or young person, their age;
  - (c) to the extent they can be ascertained, any wishes of the donor with respect to whether the elimination sample should be obtained;
  - (d) any wishes expressed by the donor's parents or guardians, unless they are a suspect in the offending; and
  - (e) the seriousness of the circumstances surrounding the offending.

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<sup>51</sup> Crimes Act 1914 (Cth), s 23XWU; Crimes (Forensic Procedures) Act 2000 (NSW), ss 80 and 81F; Crimes (Forensic Procedures) Act 2000 (ACT), s 83; Criminal Investigation (Identifying People) Act 2002 (WA), ss 31–33; Forensic Procedures Act 2000 (Tas), s 34J; Criminal Law (Forensic Procedures) Act 2007 (SA), s 9 (permitting authorisation by a senior police officer rather than judge or magistrate); and Criminal Justice (Forensic Evidence and DNA Database System) Act 2014 (Ireland), s 54(4) and (7).

<sup>52</sup> See, for example, Crimes Act 1914 (Cth), s 23XWU(2); and Crimes (Forensic Procedures) Act 2000 (NSW), ss 80(2) and 81F(2).

## Requirements for informed consent

### RECOMMENDATIONS

**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.

9.67 The requirements for informed consent recommended above largely reflect the requirements proposed in relation to suspect sampling in Chapter 8, with a few key differences, identified below.

### *Providing information*

9.68 All relevant information must be given to a person asked to provide informed consent before they agree to the collection of an elimination sample. This information should be given orally and in writing and should address the following matters:

- (a) The purpose for which the elimination sample is requested. This includes explaining the investigation for which the sample is requested and that the elimination sample is being requested in order to exclude that person from the investigation.
- (b) How the sample will be taken. Sampling procedures are discussed in Chapter 11.
- (c) How the sample will be used. This should include an explanation that the DNA sample will be used to generate a DNA profile that will be compared to the DNA profile(s) found at the crime scene(s) that are the subject of the investigation.
- (d) What will happen if the comparison described in (c) above results in an unexpected match that indicates the donor's potential involvement in the commission of the offence (see paragraphs 9.77–9.79 below).

- (e) How the DNA sample and any results of analysis, including a DNA profile, will be stored and when they will be destroyed. Storage, retention and destruction of elimination samples is discussed in Chapter 16.
  - (f) That the person is under no obligation to consent to the request.
  - (g) That the person may wish to consult a lawyer before deciding whether to consent to the request and, if the person giving consent is the donor, that they may nominate an adult to act as a support person.
  - (h) That, if the person consents to the request, they may withdraw their consent at any time.
  - (i) What will happen if a person withdraws their consent (see paragraph 9.80 below).
  - (j) If a person asked to give consent is the donor, that their refusal to consent or withdrawal of consent cannot be used as evidence in proceedings against them (see paragraphs 9.82–9.83 below).
- 9.69 This information should be explained in a manner and language that the person is likely to understand. Giving informed consent involves understanding a large amount of important information and applying that information to a person’s personal situation. Some people who are asked to give informed consent will have brain and behaviour issues that will affect their ability to quickly process and comprehend information.<sup>53</sup> We therefore recommend that, rather than simply “informing” the person giving consent of the required information, there is a duty to “explain” the required information in a manner and language that the person is likely to understand. This would require the requesting officer to check that the person has understood what they have been told. This is consistent with our recommendations in Chapter 8 in relation to suspect sampling and is similar to the existing duties on Police when questioning a child or young person under the Oranga Tamariki Act 1989.<sup>54</sup>
- 9.70 Procedures and practices for explaining the specified information should be developed in consultation with the DNA Oversight Committee. In order to ensure that information is explained in a manner and language that the person is likely to understand, the information provided in written form should be in simple and accessible language and versions should be available in English, te reo Māori and other languages commonly spoken in Aotearoa New Zealand. Procedures and practices should also include the use of visual aids, such as videos or short infographics that can be played to or shared with the person giving informed consent. This will promote understanding and comprehension among people who are deaf or who experience auditory processing or other brain and behaviour issues.

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<sup>53</sup> A recent report by the Chief Science Advisor for the Justice Sector identified that people with brain and behaviour issues are over-represented in the criminal justice system as both victims and offenders and that the processes of the justice system itself may compound negative outcomes for victims with brain and behaviour issues: Ian Lambie *What were they thinking? A discussion paper on brain and behaviour in relation to the justice system in New Zealand* (Office of the Prime Minister’s Chief Science Advisor, 29 January 2020) at 5. The term “brain and behaviour issues” is defined at 9 in that report to include traumatic brain injury, foetal alcohol spectrum disorder, cognitive impairment/intellectual disability, communication disorders, attention-deficit/hyperactivity disorder, learning difficulties, dyslexia and autism spectrum disorder. This report is explored in greater detail in Chapter 8.

<sup>54</sup> Oranga Tamariki Act 1989, ss 215–219.

### Opportunity to access legal advice

9.71 A person who is asked to give informed consent to the taking of an elimination sample should continue to have an opportunity to consult privately with a lawyer. This is consistent with our recommendation in relation to suspects in Chapter 8 and recognises that access to legal advice is a key safeguard in ensuring the provision of informed consent.

### Donors supported by a nominated adult

9.72 A person who is asked to give an elimination sample should be able to nominate an adult to support them during the consent process and when the sample is taken.<sup>55</sup> This is similar to our recommendations in relation to suspect sampling in Chapter 8. We consider that the availability of a nominated adult would improve the transparency of the process and would provide for the donor to be supported by a person of their choosing. This could be a friend or family member or a representative from their whānau, hapū or iwi. The presence of a nominated adult would also help to meet the needs of members of diverse communities including Pacific peoples, migrant and refugee and LGBTIQI+<sup>56</sup> communities and people with disabilities.<sup>57</sup>

### Recording the consent process

9.73 To be valid, the consent needs to be either in writing and signed by the person giving consent or given orally and recorded on video. Where reasonably practicable, the entire consent process, including the provision of information and the giving of consent, should be recorded on a video record. This would promote transparency and ensure that there is an accurate record of the consent process, should the person's ability to give informed consent or the consent process itself be challenged in future. The recording should not, however, be admissible for any other purpose as evidence in proceedings against the person providing consent.

### Using elimination samples

#### RECOMMENDATION

**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.

<sup>55</sup> Sampling procedures are discussed further in Chapter 11.

<sup>56</sup> This refers to people who identify as lesbian, gay, bisexual, transgender, queer or questioning or intersex+.

<sup>57</sup> Te Uepū Hāpai i te Ora | Safe and Effective Justice Advisory Group recently reported that many people from these diverse communities felt that the justice system did not meet their needs. Migrant and refugee communities of colour expressed their experience of cultural blindness and lack of cultural competency within the system. For many, proceedings were conducted in languages they did not understand and according to rules that are alien to them. Furthermore, there is little or no attempt to explain this system or provide any navigation through it: Te Uepū Hāpai i te Ora | Safe and Effective Justice Advisory Group *Turuki! Turuki! Move Together!* (December 2019) at 12.

- 9.74 Elimination samples should continue to be used only in connection with the investigation for which they are obtained. That is, a DNA profile generated from an elimination sample (elimination profile) should only be matched against DNA profiles found at the crime scene(s) that are the subject of the criminal investigation for which the sample was obtained. Elimination profiles should not be able to be matched against any other crime scene profile or any other index of the proposed DNA databank.
- 9.75 Limiting the use of elimination samples is important to encourage people to provide elimination samples to Police. Without elimination samples, many investigations would needlessly stall.<sup>58</sup> ESR estimates that approximately half of all crime scene samples collected contain a mixture of people's DNA, so being able to eliminate DNA from victims and third parties is very important. The importance of elimination sampling is also likely to increase as DNA profiling kits become more sensitive and crime scene profiles are able to be generated from items or surfaces that people have merely touched.
- 9.76 We do not prefer the approach in some comparable jurisdictions, which is to allow people providing elimination samples to choose to have their DNA profile used for unlimited purposes (see paragraph 9.49). In our view, there is a high risk that the consequences of doing so may not be fully appreciated by the person giving consent, given the context in which the sample is requested.<sup>59</sup> This was illustrated in the case of *R v W* discussed at paragraphs 9.20–9.21 above. In any event, we do not think it would be justifiable for Police to retain elimination profiles indefinitely and use them for a different purpose, given that the donor is not a suspect.<sup>60</sup> Such an approach also risks deterring people from providing elimination samples and may also deter victims from reporting crime through fear of implicating themselves or others in unrelated offending.<sup>61</sup>

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<sup>58</sup> Issues Paper at [8.113].

<sup>59</sup> A similar concern was identified in Australia. See Peter Ford and others *DNA Forensic Procedures: Further Independent Review of Part 1D of the Crimes Act 1914* (30 June 2010) at 11 and 48–49. In response to this concern, the legislation was amended to introduce a statutory presumption that volunteer profiles are to be used for the criminal investigation for which the volunteer sample was obtained, unless the volunteer expressly chooses otherwise: Crimes Act 1914 (Cth), s 23XWR(2)(b). See also NSW Ombudsman *DNA sampling and other forensic procedures conducted on suspects and volunteers under the Crimes (Forensic Procedures) Act 2000* (October 2006) at 75 where the NSW Ombudsman observed that police officers who indicate that a volunteer profile is to be used for unlimited purposes “often do not have a good understanding of what this means” and, when asked to confirm whether the volunteer did actually specify that their DNA sample could be used for other purposes, “usually advise that they cannot be sure of this and that the person’s profile should only be matched within the case for which it was provided”.

<sup>60</sup> Similarly, we recommend in Chapter 18 that Police should no longer be able to obtain DNA samples from volunteers for the purposes of storing the volunteer’s DNA profile on the DNA Profile Databank indefinitely and conducting speculative searches against the Crime Sample Databank (volunteer samples are currently obtained under Part 3 of the CIBS Act).

<sup>61</sup> This risk was identified in Standing Committee on Law and Justice *The use of victims’ DNA* (New South Wales Legislative Council, Report 41, December 2009) at [4.105]. The Standing Committee recommended a legislative ban on the use of a victim’s DNA for an unrelated crime unless it is a serious offence: at [4.111].



## Unexpected matches

### RECOMMENDATIONS

**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.

9.77 In rare cases, comparing an elimination profile against the relevant crime scene profiles may result in an unexpected match that tends to incriminate the donor in the commission of the offence. When an unexpected match occurs, this should not be able to be used as evidence against the donor without an order of a High Court, District Court or Youth Court Judge authorising the elimination sample to be treated as a suspect sample.<sup>62</sup> This would prevent the elimination sampling regime being used inappropriately to circumvent the procedural protections of the suspect sampling regime and obtain (and then rely on) an elimination sample from a person who should be considered a suspect. It will also preserve Police's ability to rely on DNA evidence that has been lawfully obtained.

9.78 Several requirements should be satisfied before a Judge makes an order:

- (a) The elimination sample was lawfully obtained. This would require Police to satisfy the Judge that the donor was not a suspect at the time the elimination sample was taken. As noted above, the definition of "suspect" is broad. An application to treat an elimination sample as a suspect sample could therefore be challenged by the donor if the circumstances suggest that Police did in fact suspect the donor when they asked them for an elimination sample. Police would also have to demonstrate that the procedural requirements for elimination samples described above were followed in all respects.
- (b) Analysis has produced evidence that tends to confirm the donor's involvement in the commission of the offence. This would ensure that elimination samples can only be treated as suspect samples where they produce relevant evidence.
- (c) If the donor is a child, their elimination sample can only be treated as a suspect sample in respect of offences for which that child can be prosecuted. This aligns

<sup>62</sup> A similar procedure exists in South Australia. See Criminal Law (Forensic Procedures) Act 2007 (SA), s 37.

with the requirements for obtaining a suspect sample from a child proposed in Chapter 8.

- (d) Finally, it must be reasonable in all the circumstances to make the order. This aligns with the current requirements for granting a suspect compulsion order<sup>63</sup> and with our recommended requirements for requesting suspect samples in Chapter 8.

9.79 If an application for an order to treat an elimination sample as a suspect sample is declined, that sample and the results of any analysis must be destroyed and cannot be relied on by Police when requesting a suspect sample or applying for a suspect compulsion order. Police would need other evidence to meet the requirements for obtaining a suspect sample outlined in Chapter 8.

## Withdrawing consent

### RECOMMENDATIONS

**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.

9.80 A person who consents to the obtaining of an elimination sample should be able to withdraw their consent at any time, orally or in writing. However, the ability to withdraw consent after an elimination sample has been obtained should be subject to a court order that could be issued in two scenarios:

- (a) First, if Police applies for an order that the sample be treated as a suspect sample. This would prevent the person who gave consent from frustrating an investigation

<sup>63</sup> Criminal Investigations (Bodily Samples) Act 1995, s 16(1)(e).

where there has been an unexpected match by withdrawing their consent. Police would be able to rely on that match provided a Judge is satisfied of the matters discussed at paragraph 9.78 above.

- (b) Second, if Police applies for an order that the sample be retained on the basis that analysis of the sample would tend to confirm or disprove a suspect's involvement in the commission of the offence — that is, if the elimination sample produces or is likely to produce evidence relevant to the investigation for which it was obtained. This would prevent a criminal investigation or prosecution being undermined by a withdrawal of consent, for example, where there is a mixed DNA crime scene sample and the donor's DNA needs to be excluded. In these situations, a Judge would need to be satisfied that the probative value of the evidence produced by the elimination sample makes retention reasonable in the face of the withdrawal of consent.

9.81 This recommendation is similar to the power of magistrates in several Australian regimes to order retention of an elimination sample when consent is withdrawn,<sup>64</sup> although it appears this power is rarely engaged.<sup>65</sup>

## Refusal or withdrawal of consent

### RECOMMENDATION

**R67**

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

9.82 If a donor refuses to consent or withdraws their consent, this should not be used as evidence against that person, either in the prosecution of the person for any offence or in support of an application by Police for a suspect compulsion order to require that person to provide a suspect sample.

9.83 This will ensure that the court cannot draw an adverse inference from a donor's refusal to provide an elimination sample or their withdrawal of consent. The ability to draw an adverse inference would, in our view, be inappropriate given that any person who is asked to provide an elimination sample was not considered a suspect at that time and that there are a number of reasons why a person may refuse or later withdraw their consent. Similar statutory protections are common in comparable jurisdictions.<sup>66</sup>

<sup>64</sup> See, for example, Crimes Act 1914 (Cth), s 23XWV; Crimes (Forensic Procedures) Act 2000 (NSW), s 81; Crimes Act 1958 (Vic), s 464ZGF; Crimes (Forensic Procedures) Act 2000 (ACT), s 84; and Forensic Procedures Act 2000 (Tas), s 34.

<sup>65</sup> See discussion in NSW Ombudsman *DNA sampling and other forensic procedures conducted on suspects and volunteers under the Crimes (Forensic Procedures) Act 2000* (October 2006) at 269.

<sup>66</sup> See Crimes Act 1914 (Cth), s 23XZ; Crimes (Forensic Procedures) Act 2000 (NSW), s 84; Crimes (Forensic Procedures) Act 2000 (ACT), s 87; Criminal Investigation (Identifying People) Act 2002 (WA), s 81; Forensic Procedures Act 2000 (Tas), s 47; Criminal Law (Forensic Procedures) Act 2007 (SA), s 48; and Criminal Justice (Forensic Evidence and DNA Database System) Act 2014 (Ireland), s 27(9).

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**CHAPTER 10**

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# Mass screening

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**INTRODUCTION**

- 10.1 In some criminal investigations where DNA believed to be from the offender has been found at a crime scene, Police may want to ask a group or class of people who share characteristics such as sex, age or geographic location to provide a DNA sample. These shared characteristics will be ones that Police believes the offender also shares. For example, police officers may ask all males between the ages of 20 and 30 years who live in a particular town to provide a DNA sample. This is referred to as mass screening (also known as intelligence-led screening or a DNA dragnet, sweep or canvas).
- 10.2 The purpose of mass screening is to identify a suspect. DNA profiles are generated from the DNA samples provided by mass screen participants and are compared to the DNA profile found at the crime scene (crime scene profile). A mass screen might identify a suspect if there is a match between a mass screen participant's DNA profile and the crime scene profile. Even if there is no direct match, a mass screen might indirectly identify a suspect by ruling out people whose DNA profiles do *not* match the crime scene profile and focusing lines of inquiry. For example, a mass screen might indirectly identify a suspect if a person refuses to participate in the mass screen or asks somebody else to provide a sample in their place.
- 10.3 One of the first mass screens ever conducted was in the "Pitchfork" case in England in the late 1980s.<sup>1</sup> In that case, DNA samples were obtained by consent from over 5,000 men born between 1953 and 1970 who had lived or worked close to where two 15-year-old girls had been raped and murdered.<sup>2</sup> While no direct match resulted, the mass screen has been credited with leading indirectly to the offender as it was eventually discovered that the offender had paid a co-worker to give a DNA sample on his behalf. It was this information that led to the offender being arrested and convicted.<sup>3</sup>
- 10.4 This chapter considers whether Police should be able to undertake a mass screen to identify a suspect in a criminal investigation.

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<sup>1</sup> Named after Colin Pitchfork, the person ultimately convicted of the crimes.

<sup>2</sup> For a summary of this case, see Ian Cobain "Killer breakthrough – the day DNA evidence first nailed a murderer" *The Guardian* (online ed, London, 7 June 2016).

<sup>3</sup> Ian Cobain "Killer breakthrough – the day DNA evidence first nailed a murderer" *The Guardian* (online ed, London, 7 June 2016).

## CURRENT LAW AND PRACTICE

- 10.5 Like elimination sampling, discussed in Chapter 9, the CIBS Act does not expressly provide for mass screening.
- 10.6 It is possible to conduct a voluntary mass screen using the suspect sampling regime under Part 2 of the CIBS Act. This is because “suspect” is broadly defined as “any person whom it is believed has *or may have*” committed an offence.<sup>4</sup> A police officer may request a suspect to provide a DNA sample if there are reasonable grounds to believe that analysis “would tend to confirm *or disprove* the suspect’s involvement in the commission of the offence”.<sup>5</sup>
- 10.7 There is no ability to conduct a compulsory mass screen under current law. This is because a suspect can only be required to provide a DNA sample if a High Court or District Court Judge is satisfied that “there is good cause to suspect” that the suspect has committed the offence.<sup>6</sup> This requires a high degree of individualised suspicion that is very unlikely to be present for all potential participants in a mass screen.<sup>7</sup>
- 10.8 While voluntary mass screening is possible under the CIBS Act, it is not clear whether this was deliberate or simply an incidental effect of the suspect sampling regime.

### Mass screening in practice

- 10.9 Police has no established policy or guidelines on mass screening and does not report on the number of mass screens conducted in Aotearoa New Zealand. We are, however, aware of at least five cases in which DNA samples were collected from a large group of people. Three of these cases predate the CIBS Act, two of which “provided the impetus for the establishment of the NZ National DNA Databank”.<sup>8</sup>
- 10.10 In 1992, a female tourist was stabbed to death in Hamilton. Police compiled an extensive list of men who matched the description of the suspect and requested each man to give a blood sample. Approximately 280 blood samples were obtained, one of which was found to match DNA from blood found at the crime scene that was believed to be from the offender. Police arrested Wayne Paekau who plead guilty to murder on 1 April 1992.<sup>9</sup>
- 10.11 In 1994, Police established that several serious sexual offences dating from 1983 had been committed by the same offender. Approximately 700 DNA samples were obtained voluntarily as part of a mass screen, and Joseph Thompson was successfully identified and convicted in 1995.<sup>10</sup>

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<sup>4</sup> Criminal Investigations (Bodily Samples) Act 1995, s 2 definition of “suspect” (emphasis added).

<sup>5</sup> Section 6(1) (emphasis added).

<sup>6</sup> Sections 16(1)(a) and 23(1)(a).

<sup>7</sup> The term “good cause to suspect” requires “a reasonable ground of suspicion upon which a reasonable [person] may act”: *Police v Anderson* [1972] NZLR 233 (CA) at 242. It is a question of fact to be decided objectively by reference to all the surrounding and relevant circumstances: *New Zealand Police v Penhale* HC Wellington CRI-2010-485-04, 25 February 2010 at [4].

<sup>8</sup> ESR A *Brief History of Forensic DNA 1990–2010: Marking 20 Years of DNA Analysis for the New Zealand Criminal Justice System* (February 2010) at 5. The NZ National DNA Databank refers to the DNA Profile Databank and the Crime Sample Databank. This statement relates to the mass screens conducted in 1994 and 1995.

<sup>9</sup> Discussed in John Lockyer *NZ Detectives* (Penguin Books, Auckland, 2010); and (25 July 1995) 549 NZPD 8082.

<sup>10</sup> ESR A *Brief History of Forensic DNA 1990–2010: Marking 20 Years of DNA Analysis for the New Zealand Criminal Justice System* (February 2010) at 5.

- 10.12 In 1995, DNA testing of crime scene samples linked seven rapes and one homicide in South Auckland. A mass screen of several thousand men was undertaken, but the key suspect, Malcom Rewa, could not be located at that time.<sup>11</sup> In 1996, Rewa was arrested following an attack on a 16-year-old girl, and his DNA profile was found to match the linked crimes.<sup>12</sup>
- 10.13 The fourth mass screen occurred in 2001 after significant developments in DNA technology meant that a crime scene profile could be generated from a DNA sample collected in the unsolved 1987 homicide of six-year-old Teresa Cormack.<sup>13</sup> Police obtained fresh DNA samples from approximately 900 people who had, over time, been identified as suspects in the investigation.<sup>14</sup> This included Jules Mikus, whose DNA profile was found to match the crime scene profile. Mikus was later convicted of Teresa Cormack's murder.
- 10.14 A fifth case concerned the homicide of sex worker Susan Sutherland in Christchurch in 2005. An unknown number of men who owned a specific type of vehicle connected to the crime scene were asked to provide samples.<sup>15</sup> As a result, a DNA sample was obtained from Jules Patrick Burns, and his DNA profile was found to match a crime scene profile. Burns was later convicted of Susan Sutherland's murder.

## ISSUES

- 10.15 Mass screening raises several issues:
- (a) First, people asked to participate in a mass screen can come under considerable social pressure to comply, particularly if the mass screen attracts significant publicity.<sup>16</sup> This can undermine the voluntary nature of consent, which raises questions about whether mass screening is inconsistent with the right to be secure against unreasonable search and seizure<sup>17</sup> and may impact on the mana of the person providing the sample.

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<sup>11</sup> At 5.

<sup>12</sup> At 5.

<sup>13</sup> At 7 and 13.

<sup>14</sup> *Mikus v R* [2011] NZCA 298 at [17]–[20].

<sup>15</sup> *R v Burns* [2007] NZCA 308 at [17].

<sup>16</sup> The social pressure to comply with a mass screen was demonstrated in the Pitchfork case, discussed at [10.3] above. In Ian Cobain "Killer breakthrough – the day DNA evidence first nailed a murderer" *The Guardian* (online ed, London, 7 June 2016), it was reported that, while a few men initially declined to participate in that mass screen (some saying they did not like needles and one or two saying they did not like police officers), most of these men soon changed their minds as:

The horror at the crimes – and the fear that the killer could strike again – resulted in those with reservations coming under considerable social pressure.

Social pressure to participate in order to avoid attracting suspicion was also a concern in a mass screen of 500 local men in Wee Waa, New South Wales, following the violent sexual assault of an elderly woman. See NSW Ombudsman *DNA sampling and other forensic procedures conducted on suspects and volunteers under the Crimes (Forensic Procedures) Act 2000* (October 2006) at 123. See also Australian Law Reform Commission *Essentially Yours: The Protection of Human Genetic Information in Australia* (ALRC R96, 2003) at [41.83]–[41.84] and [41.93]; Sheldon Krinsky and Tania Simoncelli *Genetic Justice: DNA Data Banks, Criminal Investigations, and Civil Liberties* (Columbia University Press, New York, 2011) at 50–52; and Jeremy Gans "Something to Hide: DNA, Surveillance and Self-Incrimination" (2001) 13 *CICJ* 168 at 170 and 172.

<sup>17</sup> The right to be secure against unreasonable search and seizure is affirmed in s 21 of the New Zealand Bill of Rights Act 1990. For a discussion of s 21, see Chapter 2.

- (b) Second, people who refuse to participate in a mass screen may attract unreasonable suspicion from Police and members of their community. There are many reasons why someone may not want to participate in a mass screen, including religious or cultural reasons, concern for the privacy of their genetic information or the protection of whakapapa information or distrust of Police or government. In Australia, concerns have been raised that mass screening of entire communities “promotes vigilantism” and “creates the environment for social alienation”.<sup>18</sup> The Australian Privacy Commissioner, commenting on a mass screen in New South Wales, observed that “community pressure and the consequences for people in that community who objected or refused to be part of the screening process, were unacceptable”.<sup>19</sup>
- (c) Third, how the class of people asked to participate in a mass screen is defined can raise issues of consistency with human rights law and te Tiriti o Waitangi | the Treaty of Waitangi (the Treaty). Defining a class of people by reference to certain characteristics such as “sex”, “colour”, “race”, “ethnic or national origins”, “disability”, “age” and “sexual orientation” risks being discriminatory and must be demonstrably justified in a free and democratic society.<sup>20</sup> Similarly, defining a class in a way that disproportionately affects Māori risks being inconsistent with the Treaty and the Treaty principles of equity and active protection.<sup>21</sup>
- (d) Fourth, mass screens involve intrusions on privacy, bodily integrity and tikanga Māori, including tikanga associated with personal tapu, mana and whakapapa. These intrusions are inherent in any form of DNA sampling but take on greater significance when mass screening a potentially large group of people, most (if not all) of whom were not involved in the offending.<sup>22</sup> Whether these intrusions are justified will depend on many factors, including the size of the class, the evidential basis for defining the class and whether other investigative methods are available.<sup>23</sup> In this context, it is important to recognise that the development of new DNA analysis techniques means that it is now possible to infer someone’s appearance or ancestry from their DNA.<sup>24</sup> It could be possible, therefore, to define a class based

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<sup>18</sup> Standing Committee on Law and Justice *Review of the Crimes (Forensic Procedures) Act 2000* (New South Wales Legislative Council, Report 18, February 2002) at [5.83] citing submission of the New South Wales Aboriginal Land Council. Similar concerns were also raised by the Aboriginal and Torres Strait Islander Commission: at [5.85]. See also David M Halbfinger “Police Dragnets For DNA Tests Draw Criticism” *The New York Times* (online ed, New York, 4 January 2003) as cited in NSW Ombudsman *DNA sampling and other forensic procedures conducted on suspects and volunteers under the Crimes (Forensic Procedures) Act 2000* (October 2006) at 123.

<sup>19</sup> Standing Committee on Law and Justice *Review of the Crimes (Forensic Procedures) Act 2000* (New South Wales Legislative Council, Report 18, February 2002) at [5.87] citing the Privacy Commissioner.

<sup>20</sup> Section 19(1) of the New Zealand Bill of Rights Act 1990 and s 21 of the Human Rights Act 1993 together affirm the right to be free from discrimination on a range of grounds including sex, colour, race, ethnic or national origins, disability, age and sexual orientation. This right may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society: New Zealand Bill of Rights Act 1990, s 5.

<sup>21</sup> Te Tiriti o Waitangi | the Treaty of Waitangi (the Treaty) and the principles of the Treaty are discussed in Chapter 2.

<sup>22</sup> For a discussion of how DNA sampling can infringe on bodily integrity, tikanga Māori and privacy rights, see Chapters 2 and 11.

<sup>23</sup> In Australia, the mass screen in Wee Waa discussed at above n 16 was criticised on the basis that more traditional and less intrusive policing methods were overlooked: Standing Committee on Law and Justice *Review of the Crimes (Forensic Procedures) Act 2000* (New South Wales Legislative Council, Report 18, February 2002) at [3.133]–[3.134].

<sup>24</sup> This is known as “forensic DNA phenotyping” and is discussed in Chapter 14. We understand that Police has used this technology to infer the ancestry of a potential offender from a crime scene sample on 11 occasions but not in connection with a mass screen.

solely on the information derived from a crime scene sample. This has occurred in other countries, but concerns have been raised that this constitutes a form of “genetic policing”:<sup>25</sup>

This type of “genetic policing” brings together issues of informational self-determination and bodily integrity of entire groups of people, and expectations about how these are managed in practice. Mass screens themselves are a very specific way of deploying [forensic DNA phenotyping], and the use of [evidentially visible characteristics] can easily render minority groups into suspect populations since the predominant group living in a particular area or country is often too large to investigate.

- (e) Fifth, in addition to the tikanga concerns raised by the sampling process, the risk of discrimination or genetic policing of Māori communities through mass screening engages tikanga responsibilities for Māori, including whanaungatanga, manaakitanga and kaitiakitanga described in Chapter 2. These responsibilities raise questions about transparency and accountability to Māori and monitoring and oversight by Māori.
- 10.16 The suspect sampling regime in the CIBS Act is focused on safeguarding the rights of suspects in circumstances where there is individualised suspicion. Consequently, there are no safeguards specific to mass screening, such as the need for judicial authorisation, to ensure that these are undertaken appropriately. The absence of Police policy on mass screening is also problematic as it means there is no clear guidance on when Police should consider conducting a mass screen and no consistent approach to conducting mass screens across Aotearoa New Zealand. This contrasts with Police’s policy on familial searching, for example, which specifies that familial searching may only be conducted in relation to serious offending and when Police has no other investigative leads. Familial searching is discussed in Chapter 23.
- 10.17 There is also a more general issue about lack of transparency and accountability. For example, there are no reporting requirements relating to mass screening, which makes it difficult to monitor how often mass screens occur, how many samples are obtained because of a mass screen and the rate of success of mass screens.
- 10.18 These issues raise a broader question: whether mass screening should be permitted at all. While mass screens have proved to be effective in identifying a suspect in some cases, they are resource intensive and expensive to run. The voluntary nature of mass screening means that there is a strong chance the offender will refuse to participate, and while a mass screen that fails to directly identify a suspect might still produce valuable investigative leads, research from the United States suggests that the “success” of mass screening is unpredictable.<sup>26</sup>
- 10.19 If mass screening is to be permitted in future, it must be expressly provided for in new DNA legislation. Under our recommendations in Chapter 8, it will no longer be possible

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<sup>25</sup> Victor Toom and others “Approaching ethical, legal and social issues of emerging forensic DNA phenotyping (FDP) technologies comprehensively: Reply to ‘Forensic DNA phenotyping: Predicting human appearance from crime scene material for investigative purposes’ by Manfred Kayser” (2016) 22 FSI Genetics e1 at e2 (citations omitted).

<sup>26</sup> Sheldon Krinsky and Tania Simoncelli *Genetic Justice: DNA Data Banks, Criminal Investigations, and Civil Liberties* (Columbia University Press, New York, 2011) at 62. See also Police Professionalism Initiative *Police DNA “Sweeps” Extremely Unproductive: A National Survey of Police DNA “Sweeps”* (September 2004).



to conduct mass screens using the suspect sampling regime.<sup>27</sup> Mass screening would not be possible under the proposed elimination sampling regime either, as elimination sampling is limited to people who are not suspects in the offending for the purpose of eliminating a person from the investigation.<sup>28</sup>

## MASS SCREENS IN COMPARABLE JURISDICTIONS

- 10.20 Mass screens are conducted in many other jurisdictions including in all the jurisdictions reviewed in the preparation of this Report, namely Australia, England and Wales, Scotland, Ireland and Canada. However, it is unclear how often mass screens are undertaken in these jurisdictions. In England and Wales, by 2006, close to 300 mass screens involving over 80,000 DNA samples had taken place.<sup>29</sup> Scotland appears to be the only jurisdiction that regularly reports on mass screens. With a similar population to Aotearoa New Zealand, Scotland conducts on average one mass screen each year and, as of February 2020, retained 5,010 DNA profiles connected to mass screens.<sup>30</sup>
- 10.21 In most of these jurisdictions, mass screens are conducted under statutory provisions that allow Police to obtain DNA samples from people with their consent.<sup>31</sup> Legislation in these jurisdictions does not refer expressly to mass screening or impose special requirements on mass screening. In Australia, there have been calls for mass screening to be more closely regulated, citing issues similar to those identified at paragraph 10.15 above.<sup>32</sup> This has included calls for legislation to require police to obtain a court order before conducting a mass screening<sup>33</sup> and for government guidelines for mass screenings to cover both the process for approving the screening and the manner in which it is to be conducted.<sup>34</sup> To date, these recommendations do not appear to have been adopted.

<sup>27</sup> In Chapter 8, we recommend that a police officer must have “reasonable grounds to suspect” a suspect of committing an offence before asking for a DNA sample. Simply belonging to a class of persons who are believed to share characteristics with the offender would likely fall well below this threshold.

<sup>28</sup> Two cases illustrate the distinction between elimination sampling and mass screening. In *R v Taufa* [2016] NZCA 639, Police collected DNA samples from males with a connection to the complainant. These samples were taken voluntarily and involved no suspicion they would match the DNA of the offender. In contrast, in *R v Burns* [2007] NZCA 308, Police sought voluntary samples from a number of men known to own a particular type of vehicle believed to be owned by the offender, with the express purpose of identifying a match with the crime scene profile. Elimination sampling is discussed in Chapter 9.

<sup>29</sup> See Jane Kaye “Police collection and access to DNA samples” (2006) 2 *Genomics, Society and Policy* 16 at 19; and NSW Ombudsman *DNA sampling and other forensic procedures conducted on suspects and volunteers under the Crimes (Forensic Procedures) Act 2000* (October 2006) at 122.

<sup>30</sup> Scottish Police Authority “Historic DNA Database” (April 2019) <[www.spa.police.uk](http://www.spa.police.uk)>; and Scottish Police Authority “Scottish DNA Database Statistics 2019/2020” <[www.spa.police.uk](http://www.spa.police.uk)>.

<sup>31</sup> This is the case in England and Wales, Scotland and Australia. Mass screens in Canada are on a purely voluntary basis under common law.

<sup>32</sup> For a discussion of concerns with mass screenings identified in Australia, see NSW Ombudsman *DNA sampling and other forensic procedures conducted on suspects and volunteers under the Crimes (Forensic Procedures) Act 2000* (October 2006) at 124–125; Standing Committee on Law and Justice *Review of the Crimes (Forensic Procedures) Act 2000* (New South Wales Legislative Council, Report 18, February 2002) at [3.133]–[3.134] and [5.82]–[5.96]; and Australian Law Reform Commission *Essentially Yours: The Protection of Human Genetic Information in Australia* (ALRC R96, 2003) at [41.78]–[41.96].

<sup>33</sup> Standing Committee on Law and Justice *Review of the Crimes (Forensic Procedures) Act 2000* (New South Wales Legislative Council, Report 18, February 2002) at Recommendation 23.

<sup>34</sup> Australian Law Reform Commission *Essentially Yours: The Protection of Human Genetic Information in Australia* (ALRC R96, 2003) at [41.93]–[41.96] and Recommendation 41-6; and NSW Ombudsman *DNA sampling and other*

- 10.22 We have identified just two jurisdictions where mass screening is expressly provided for in legislation. In Queensland, legislation clarifies that the statutory regime for obtaining DNA samples from suspects by consent also applies to mass screens<sup>35</sup> but does not make any further special provision for mass screening.
- 10.23 In Ireland, legislation introduced in 2014 establishes a specific regime for mass screens.<sup>36</sup> It requires any mass screen of a “class of persons” to be authorised by a member of the Garda Síochána (Ireland’s national police service) of or above the rank of chief superintendent.<sup>37</sup> A mass screen can be authorised if there are reasonable grounds to believe that the mass screening:<sup>38</sup>
- (a) is likely to further the investigation of the offence; and
  - (b) is a reasonable and proportionate measure to be taken in the investigation of the offence.
- 10.24 A class of persons for the purpose of mass screening may be determined by reference to one or more of the following:<sup>39</sup>
- (a) sex;
  - (b) age;
  - (c) kinship;
  - (d) a geographic area in which people reside or work;
  - (e) a period of time during which people did anything or were at any place; and
  - (f) any other matter considered appropriate.
- 10.25 Once authorisation is given, a police officer can ask anyone within the approved class of persons to consent to provide a DNA sample. If a person refuses to participate in a mass screen, that refusal “shall not of itself” justify arresting or detaining them in connection with the investigation.<sup>40</sup>

## OPTIONS FOR REFORM

- 10.26 We identified three options for regulating mass screening in the Issues Paper:<sup>41</sup>

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*forensic procedures conducted on suspects and volunteers under the Crimes (Forensic Procedures) Act 2000* (October 2006) at Recommendation 29.

<sup>35</sup> Police Powers and Responsibilities Act 2000 (Qld), s 448(1)(b)(i) provides that Part 2 of that Act applies when Police wants to obtain a DNA sample from a person “to help decide whether or not the person may be a suspect in relation to an offence”. A legislative example is included under that subsection of:

Members of the community may be asked to provide DNA samples for DNA analysis for comparison with the results of analysis of a DNA sample seized at a crime scene.

<sup>36</sup> The Criminal Justice (Forensic Evidence and DNA Database System) Act 2014 (Ireland) drew in large part on an earlier report of the Law Reform Commission of Ireland, which included a recommendation that mass screening be approved by a Chief Superintendent before it may be conducted: Law Reform Commission of Ireland *The Establishment of a DNA Database* (LRC 78, 2005) at [2.94]–[2.98].

<sup>37</sup> Criminal Justice (Forensic Evidence and DNA Database System) Act 2014 (Ireland), s 29.

<sup>38</sup> Section 29(2).

<sup>39</sup> Section 29(3).

<sup>40</sup> Section 29(10).

<sup>41</sup> Issues Paper at [8.130]–[8.132].

- (a) Provide for voluntary mass screening in new DNA legislation subject to a requirement to obtain authorisation for any mass screen from a senior police officer, a court or an independent oversight body, similar to the Irish model.
- (b) Introduce a compulsory mass screening regime whereby a court authorises Police to require individuals falling within the approved class to provide DNA samples and refusal to comply would constitute an offence.
- (c) Continue to permit mass screening under the suspect sampling regime and require Police to develop a publicly available protocol to address issues relating to the Treaty, tikanga Māori, privacy and the New Zealand Bill of Rights Act 1990.

## RESULTS OF CONSULTATION

- 10.27 We received nine submissions that addressed mass screening from seven organisations and two individuals. Most submissions supported Option 1 (regulating voluntary mass screening in legislation). No submissions expressed support for Option 2 (provision for compulsory mass screening) or Option 3 (permitting mass screening under the suspect sampling regime).
- 10.28 Police submitted that “mass screening” needs to be defined. It said that the kind of mass screening that first occurred in the Pitchfork case (discussed at paragraph 10.3) has not occurred in Aotearoa New Zealand. It cautioned against defining mass screening with reference to the number of DNA samples needed, as a historical case may require numerous suspects to be sampled over a period of years as an investigation progresses.
- 10.29 The New Zealand Law Society (NZLS) and the New Zealand Bar Association (endorsing NZLS’s submission in its entirety) submitted that the use of mass screens should be tightly prescribed, noting that such screens “involve an intrusive search of many people for (at best) speculative gain”. They supported restrictions similar to those for elimination sampling, namely legislative safeguards and assurances around collection, time-limited retention and specific use of samples; confirmation that the person has had an opportunity to obtain legal advice; a prohibition against using any mass screening power where a subject may be a suspect; the opportunity to withdraw consent at any time; and a prohibition on drawing an adverse inference (or suffering any other detriment) as a result of a refusal to submit to a mass screening.
- 10.30 Regulating mass screening in legislation was also supported by the Auckland District Law Society Criminal Law Committee (ADLS), the Public Defence Service (PDS), the Privacy Commissioner, Te Mana Raraunga | Māori Data Sovereignty Network and Sue Petricevic.
- 10.31 ADLS and Sue Petricevic considered that mass screens are effectively large-scale searches and submitted that the process, duration, target and location should be clearly stated and controlled by legislation.
- 10.32 PDS supported a model of regulation similar to the Irish model. However, it preferred that a court or independent body be responsible for authorising a mass screen rather than a senior police officer. PDS also supported an additional requirement that the investigation has stalled before a mass screen can be authorised.
- 10.33 Te Mana Raraunga similarly supported a statutory framework with independent oversight and cautioned that the legislation should prevent mass screening being used as a racial/ethnic profiling tool.

10.34 One submitter did not support allowing mass screening. Karaitiana Taiuru submitted that mass screening violates Māori customary rights and Treaty obligations by ignoring that DNA is a taonga and then mixing and matching the wairua of multiple samples to find a match. Karaitiana Taiuru submitted that this has the potential to discriminate against Māori, especially those who live in highly populated Māori communities.

## RECOMMENDATIONS

### Establishing a statutory regime for mass screening

#### RECOMMENDATION

**R68**

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

10.35 We recommend that new DNA legislation prescribes a separate regime for mass screens. We consider mass screening can be a helpful investigative tool in some cases and should be available to Police in the conduct of criminal investigations but subject to appropriate safeguards and oversight, which we discuss below. Prescribing a regime for mass screening will promote transparency and accountability and meets our broader objectives of ensuring the DNA regime is fit for purpose, constitutionally sound and accessible. A regime for mass screens was broadly supported in consultation.

10.36 Mass screens, like elimination sampling, should be based on informed consent. We do not prefer the option proposed in the Issues Paper of a compulsory mass screening regime. Compulsory mass screening is not justified in the absence of individualised suspicion and was not supported in consultation. The other option proposed in the Issues Paper, of permitting the continuation of mass screening under the suspect sampling regime, is no longer possible in light of our recommendations regarding suspect sampling in Chapter 8 (see paragraph 10.19 above).

### Requiring mass screens to have court authorisation

#### RECOMMENDATIONS

**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.

10.37 Police should only be able to conduct a mass screen with prior judicial approval in the form of a mass screen order granted by a High Court or District Court Judge.<sup>42</sup> While this departs from the approach in Ireland, which is to require the authorisation of a senior police officer,<sup>43</sup> we consider that independent judicial oversight is appropriate given the issues mass screening poses, discussed at paragraph 10.15 above. In particular, a court is best placed to consider, on a case-by-case basis, any human rights or Treaty issues raised by a proposed mass screen and to assess the degree of intrusion on privacy, bodily integrity and applicable tikanga, such as the mana of the person. The small number of mass screens that have occurred in Aotearoa New Zealand to date suggests that this will not significantly increase the administrative burden on the courts.

<sup>42</sup> This aligns with the existing concurrent jurisdiction of the District Court and High Court to hear applications for suspect compulsion orders and other matters under the CIBS Act.

<sup>43</sup> Criminal Justice (Forensic Evidence and DNA Database System) Act 2014 (Ireland), s 29(2).

- 10.38 We have not proposed defining a “mass screen” or requiring a mass screen order should Police wish to obtain samples from a specified number of people. We recognise Police’s concern, at paragraph 10.28 above, about defining a mass screen by reference to the number of DNA samples obtained. Some investigations may span years and over that time many people may become suspects. Nothing should prevent Police from obtaining DNA samples under the suspect sampling regime from multiple suspects, provided the criteria for suspect sampling is met in relation to each individual suspect. The purpose of mass screening is to provide Police with an additional investigative tool in situations where Police cannot use the suspect sampling regime because the suspect sampling criteria are not met. This will be the case where simply sharing characteristics with the likely offender would not alone constitute reasonable grounds to suspect a person of committing the offence but may be sufficient basis upon which to seek a mass screen (if the other criteria are also met).
- 10.39 Mass screens should only be carried out in relation to crime scene samples of a suitable quality, given the higher risk of false or “adventitious” matches when poor-quality partial crime scene profiles are used.<sup>44</sup> If a crime scene profile does not meet the quality threshold for databank searching (discussed in Chapter 17), a Judge cannot be satisfied of R70.a and a mass screen will not be an available option.

#### *Requirements for issuing a mass screen order*

- 10.40 Before authorising a mass screen, the Judge must be satisfied that there are reasonable grounds to believe that the mass screen is likely to further the investigation into the commission of an imprisonable offence. A mass screen is a significant measure and should only be authorised where it is expected to generate new investigative leads.
- 10.41 The Judge must also be satisfied that the mass screen is reasonable in all the circumstances, having regard to a specific list of matters. This requirement recognises that mass screens involve intrusions on individual privacy, bodily integrity and applicable tikanga Māori. They should only be conducted, therefore, where the intrusions are justified having regard to the seriousness of the offending and the strength of evidence indicating that someone with those characteristics committed the offence. Particular caution should be exercised when Police seeks to rely on the results of forensic DNA phenotyping to define the class of people who may be screened, given concerns regarding the use of this type of analysis, discussed in Chapter 14. Ultimately, the Judge must balance the public interest in investigating the offence against the public interest in minimising intrusions on individual privacy, bodily integrity and applicable tikanga. This should ensure that mass screens are targeted to the least amount of people, that other available investigative methods have been considered and that the proposed mass screen does not unfairly discriminate against particular members of a community and is consistent with rights and obligations arising from the Treaty and its principles.
- 10.42 The proposed offence threshold of “any imprisonable offence” aligns mass screening with suspect and elimination sampling. However, in practice, we expect that mass screening will only be authorised in relation to serious offending. We doubt mass screening for minor offending could ever meet the requirement to be reasonable in all

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<sup>44</sup> An adventitious match occurs where there is an apparent match between two DNA profiles (such as a crime scene profile and a profile from a known person) but the two profiles are not from the same person. The risk of an adventitious match increases when one of the profiles is incomplete or of poor quality.

the circumstances, having regard to the nature and seriousness of the offending among other considerations.

### ***Mass screen order to define class and any conditions imposed***

- 10.43 The mass screen order must set out the class of people who may be screened. We have not proposed prescribing the characteristics or features on which a class of people may be defined. We note that the Irish legislation prescribes an open-ended list of characteristics, including sex, age, kinship, geographic location of their home or work, a period of time during which a person did anything or was at any place and “such other matter” as the authorising officer considers appropriate.<sup>45</sup> Ultimately, we are not satisfied that prescribing such a list in new DNA legislation is necessary given the ultimate determining factors will be whether the basis on which the class is proposed is supported by the evidence. If a proposed mass screen discriminates on one of the prohibited grounds of discrimination in the Human Rights Act 1993 (such as sex, colour, race or ethnic or national origins),<sup>46</sup> it must be demonstrably justified in a free and democratic society.<sup>47</sup>
- 10.44 The Judge should be able to impose any conditions on the mass screen they think fit. This might include, for example, conditions on how the mass screen is to be conducted or a timeframe during which the mass screen must take place.

### ***Children and young people excluded from mass screens***

- 10.45 Mass screening should not be available in respect of children and young people. As we explain in relation to suspect sampling in Chapter 8, the inherent vulnerability of children and young people due to their age and maturity undermines their ability to provide free and informed consent. While we are satisfied that requiring consent from a parent or guardian is an adequate safeguard where a child or young person is asked to provide an elimination sample, we do not think this safeguard is adequate in the very different context of mass screening where the child or young person is or could be considered a suspect. In these circumstances, we consider that any collection of DNA samples from children and young people should take place under the suspect regime, which would require individualised suspicion and judicial approval in the form of a suspect compulsion order.

### ***Practice guidelines for mass screens***

- 10.46 Police should develop practice guidelines in consultation with the DNA Oversight Committee on when a mass screen should be considered and how the class of people should be defined. This would ensure consistent practices across Aotearoa New Zealand and that applications for mass screen orders are only made in appropriate circumstances. Guidance might include the types of offending where a mass screen could be useful, the quality and type of evidence that is needed to define a class of people who should be asked to participate in a mass screen and the need to consider the impact of a mass screen on Māori rights and interests.

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<sup>45</sup> Criminal Justice (Forensic Evidence and DNA Database System) Act 2014 (Ireland), s 29(3).

<sup>46</sup> Human Rights Act 1993, s 21.

<sup>47</sup> See above n 20.

## When Police may conduct a mass screen

### RECOMMENDATIONS

- 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.

- 10.47 If a mass screen is authorised, Police may request a DNA sample from any person who is one of the class of people to whom the mass screen order applies.
- 10.48 The requirements for obtaining informed consent that are detailed in Chapter 9 in relation to obtaining elimination samples should apply, with the necessary modifications, to mass screening. This includes all the requirements for informed consent such as providing relevant information to the person providing informed consent (the donor), providing an opportunity to access legal advice and recording the consent process where reasonably practicable.
- 10.49 Mass screening should not apply to adults who lack the ability to give informed consent. In Chapter 8, we explain that a person will lack the ability to consent if they:<sup>48</sup>
- (a) are unable to understand the information they are given and apply that information to personal situation; or
  - (b) are unable to communicate their consent to the requesting officer.
- 10.50 Where an adult is unable to give informed consent to the collection of a mass screen sample, the suspect sampling procedure should be relied on instead for the same reasons discussed at paragraph 10.45 in relation to children and young people.

## Using mass screen samples

### RECOMMENDATION

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

<sup>48</sup> This is broadly consistent with the presumption of competence in s 5 of the Protection of Personal and Property Rights Act 1988 and with the approach to incapacity to consent in comparable jurisdictions (see Chapter 8).



- 10.51 Mass screen samples, like suspect samples and elimination samples, should only be used in connection with the investigation for which they are obtained — that is, a DNA profile generated from a mass screen sample (mass screen profile) should only be matched against DNA profiles found at the crime scene that is the subject of the criminal investigation for which the sample was obtained.
- 10.52 If a mass screen profile matches the relevant crime scene profile, that mass screen profile should be able to be used as if it had been obtained as a suspect sample. The results of analysis should be able to be used as evidence against the donor in any criminal prosecution resulting from the investigation, subject to the normal rules of evidence in the Evidence Act 2006. This is because, unlike elimination sampling, the objective of a mass screen is to find a match between a mass screen profile and the relevant crime scene profile that implicates the donor in the offending. The mass screen will have already been authorised by a High Court or District Court Judge. Safeguards relating to withdrawing and refusing consent are discussed below. Police should not, therefore, be required to obtain a further DNA sample from the donor under the suspect sampling regime or to apply for a court order to treat the sample as a suspect sample, as is proposed in relation to elimination samples in Chapter 9.

### Withdrawing consent

#### RECOMMENDATION

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.

- 10.53 A person who consents to provide a mass screen sample (the donor) should be able to withdraw their consent before, during or immediately after the sample is taken (that is, while the person is still in the presence of the police officer supervising the sampling procedure). If a donor withdraws consent, they should be deemed to have refused to give consent, and any sample obtained should be destroyed immediately, consistent with the rights of suspects to withdraw consent recommended in Chapter 8. This slightly extends the existing rights of suspects to withdraw consent, which are currently limited to withdrawing consent before the sample is taken.<sup>49</sup> The ability to withdraw consent is more restrictive than with elimination samples (discussed in Chapter 9), but we consider this is appropriate given the different objective of mass screening discussed above.

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<sup>49</sup> Criminal Investigations (Bodily Samples) Act 1995, s 10.

## Consequences of refusing to provide a mass screen sample or withdrawing consent

### RECOMMENDATION

**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.

- 10.54 As with elimination sampling, a person's refusal to consent or withdrawal of consent to the collection of a mass screen sample should not be used as evidence in proceedings against that person. This will ensure that the court cannot draw an adverse inference from a person's refusal to provide a mass screen sample or their withdrawal of consent. The ability to draw an adverse inference would, in our view, be inappropriate given that there are a number of reasons why a person may refuse or later withdraw their consent.
- 10.55 In addition, refusal or withdrawal of consent should not be relied on to support reasonable grounds to suspect that person, either for the purpose of obtaining a DNA sample under the suspect sampling regime (discussed in Chapter 8) or for any other purpose such as obtaining an order or warrant for indirect sampling (discussed in Chapter 12), making an arrest or issuing a search or surveillance warrant.<sup>50</sup> Other evidence would be required in order to form reasonable grounds to suspect a person who refuses to participate or withdraws their consent.

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<sup>50</sup> A constable may arrest and take into custody without a warrant any person if the constable has good cause to suspect the person of having committed any offence punishable by imprisonment: Crimes Act 1961, s 315(2)(b). Similarly, a constable may only issue and serve a summons in relation to a charge if they have good cause to suspect that the person has committed an offence: Criminal Procedure Act 2011, s 28(1). Similarly, a search warrant may be issued under s 6 of the Search and Surveillance Act 2012 if there are reasonable grounds to suspect that an imprisonable offence has been or will be committed, while a surveillance device warrant may be issued under s 51 if there are reasonable grounds to suspect that an offence has been committed, is being committed or will be committed.

**CHAPTER 11**

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# Casework sampling procedures

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**INTRODUCTION**

- 11.1 In the previous chapters, we consider the criteria for obtaining casework samples directly from a known person, including from people who are suspects (suspect samples), people who are asked to provide a DNA sample for elimination purposes (elimination samples) and people who are asked to participate in a mass screen (mass screen samples).
- 11.2 In this chapter, we address the procedures used when collecting casework samples directly from a person. We consider what sampling methods should be available and in what circumstances reasonable force should be permitted. Chapter 12 considers the indirect collection of casework samples.<sup>1</sup>

**CURRENT LAW AND PRACTICE****Suspect sampling procedures**

- 11.3 The CIBS Act prescribes the procedures for obtaining suspect samples.
- 11.4 If a suspect agrees to provide a suspect sample by consent, they can elect to provide either a buccal sample (from inside of the mouth) or a blood sample (by way of a venous sample or fingerprick sample).<sup>2</sup> However, if a suspect sample is to be obtained by consent from a child who cannot be prosecuted for the offence, it must be taken by buccal sample.<sup>3</sup>

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<sup>1</sup> Indirect sampling includes the possibility of obtaining samples other than directly from a person, such as sampling an item discarded by a person or accessing a sample held by a third party.

<sup>2</sup> Criminal Investigations (Bodily Samples) Act 1995, s 48(2) and (3). If a person elects to provide a buccal sample, the inside of the mouth is swabbed to collect “epithelial” or skin cells, which contain DNA. A buccal swab is taken with a “lollipop”, which has the appearance of a long cotton bud. If a suspect is an adult and elects to provide a suspect sample by buccal sample, the sample must be taken by the suspect themselves: s 49A(2). If a suspect is a young person, they may elect to either take the buccal sample themselves or have the buccal sample taken by a suitably qualified person: s 49A(3). If a suspect is unable to take a buccal sample themselves due to disability or injury, it must be taken by a suitably qualified person: s 49A(5). Venous samples and fingerprick samples can only be taken by a suitably qualified person: s 49.

<sup>3</sup> Section 48(1). The child may elect to take the buccal sample themselves or to have the buccal sample taken by either a suitably qualified person, an independent adult or a parent: s 49A(4). If the child is unable to take a buccal sample themselves due to disability or injury, they may only elect to have the sample taken by a parent or a suitably qualified person, and a buccal sample must not be taken if the child does not make an election: s 49A(6) and (7). Parent is

- 11.5 If a suspect sample is to be taken pursuant to a compulsion order, the sampling method may be specified in the order.<sup>4</sup> If no method is specified, the suspect can elect to provide a venous, fingerprick or buccal sample.<sup>5</sup>
- 11.6 In practice, almost all suspect samples are taken by way of buccal sample (99.5 per cent since 2010).<sup>6</sup> Very few samples are taken by way of venous sample (0.15 per cent) or fingerprick sample (0.35 per cent).<sup>7</sup>
- 11.7 Suspects are entitled to reasonable privacy during the collection process<sup>8</sup> and can have a lawyer or another person of the suspect's choice present when the sample is taken.<sup>9</sup> Suspects under the age of 18 years are also able to have a parent "or other person who has the care of that person" present.<sup>10</sup>
- 11.8 If a suspect refuses to give a sample pursuant to a compulsion order, a police officer may use or cause to be used reasonable force to assist a suitably qualified person to take a suspect sample by way of fingerprick sample.<sup>11</sup> Any use of reasonable force must be reported to the Commissioner of Police in writing within three days and must also be reported annually by Police.<sup>12</sup> In practice, the use of reasonable force to obtain suspect samples is rare. Police has reported the use of reasonable force on only six occasions over the nine-year reporting period from 2010–2011 to 2018–2019 pursuant to either a compulsion order or a databank compulsion notice.<sup>13</sup> While Police is not required to report on whether the use of reasonable force is in relation to a child, young person or adult, Police has informed us that, to date, reasonable force has not been used to collect a suspect sample from a child or young person.<sup>14</sup>
- 11.9 If the suspect provides a buccal or fingerprick sample, they are given an opportunity to provide an additional buccal or fingerprick sample, which they can take away and have

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defined in s 2 of the Act to include a guardian, step-parent and, in certain circumstances, a person who is acting in the place of a parent.

<sup>4</sup> Sections 17A(1) and 24A(1).

<sup>5</sup> Section 48(4). The rules as to who may undertake the procedure are similar to those for samples taken by consent, discussed above in 2, except that a suspect of or over the age of 18 years may also elect to have the buccal sample taken by a suitably qualified person: s 49A(1)(b).

<sup>6</sup> New Zealand Police Submission to Law Commission at 6.

<sup>7</sup> At 6.

<sup>8</sup> Criminal Investigations (Bodily Samples) Act 1995, s 53.

<sup>9</sup> Section 50(1)(a).

<sup>10</sup> Section 50(1)(b).

<sup>11</sup> Sections 48(4)(b) and 54. This is subject to a requirement to take a sample by way of buccal sample if the Judge has specified this as the method by which the sample is to be taken because of the suspect's state of health: ss 48(5)(b)(i) and 54(2)(b).

<sup>12</sup> Sections 54(4) and 76(1)(e).

<sup>13</sup> Section 76(1)(e) requires Police to report on:

... the number of occasions on which any constable has used or caused to be used force to assist a suitably qualified person to take a fingerprick or buccal sample pursuant to a compulsion order or databank compulsion notice ...

Figures reported are not further broken down into samples taken pursuant to compulsion orders and databank compulsion notices.

<sup>14</sup> New Zealand Police Submission to Law Commission at 6.

analysed on their behalf.<sup>15</sup> If the suspect provides a venous sample, they may also elect to take away part of the sample to have it analysed on their behalf.<sup>16</sup>

- 11.10 A copy of any record of analysis of the suspect sample on behalf of Police and of any comparison made to a crime scene sample must be made available, as soon as practicable, to the suspect or to their lawyer.<sup>17</sup>

### Elimination sampling procedures

- 11.11 As we explain in Chapter 9, the CIBS Act does not provide for elimination sampling. In the absence of a statutory regime, elimination samples are obtained on a purely voluntary basis. Police has developed a standard form to be used when requesting an elimination sample, which records that elimination samples are only obtained by way of buccal sample.<sup>18</sup>

### Mass screening procedures

- 11.12 Mass screening, like elimination sampling, is not provided for in the CIBS Act. It is, however, possible to conduct a voluntary mass screen using the suspect sampling regime under the CIBS Act (see discussion in Chapter 10). This means that the sampling procedures explained above in relation to suspect samples obtained by consent also apply to mass screen samples.

## ISSUES WITH CURRENT SAMPLING PROCEDURES

- 11.13 In the Issues Paper, we raised two concerns regarding the existing casework sampling procedures:<sup>19</sup>
- (a) First, we were concerned about the physically intrusive nature of the current sampling methods. While buccal sampling is generally regarded as less physically intrusive than venous and fingerprick sampling, it still involves a search *within* the body of a person, so bodily integrity is still an issue in a way that it is not when police officers fingerprint or photograph a person. Buccal sampling also involves taking a sample from part of the body that, according to tikanga Māori, is considered tapu.<sup>20</sup>
  - (b) Second, we questioned whether it was appropriate to authorise the use of force against a suspect to obtain a suspect sample. We observed that the use of force, even reasonable force, is a grave physical intrusion on an individual's bodily integrity and on personal tapu and mana.

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<sup>15</sup> Criminal Investigations (Bodily Samples) Act 1995, ss 56 and 56A.

<sup>16</sup> Section 55.

<sup>17</sup> Section 59.

<sup>18</sup> Ngā Pirihimana o Aotearoa | New Zealand Police “DNA Elimination Sample Consent Form” (DNA300 – 08/17).

<sup>19</sup> Issues Paper at [8.45]–[8.61].

<sup>20</sup> Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (rev ed, Huia Publishers, Wellington, 2016) at 53–54. The intrusive nature of both venous and buccal samples was raised by the Minister of Justice in parliamentary debates on the Criminal Investigations (Bodily Samples) Amendment Bill 2002 (221-2). See (21 October 2003) 612 NZPD 9444.

## OPTIONS FOR REFORM

- 11.14 In the Issues Paper, we questioned whether collection options that were less physically intrusive should be available.<sup>21</sup> This might include the tape option (which involves applying tape to the back of a person’s hand and analysing the skin cells that attach to the tape) or the fingerprint option (which involves analysing the skin cells left behind on the fingerprint scanner following a police officer fingerprinting a person). We also questioned whether it was necessary to retain venous and fingerprick sampling as approved sampling methods, given that almost all suspect samples and all elimination samples are obtained using buccal sampling, or whether their use should be restricted to situations where buccal sampling is not appropriate.<sup>22</sup>
- 11.15 We also explored alternatives to the use of force such as:<sup>23</sup>
- (a) Making it an offence to refuse to comply with a compulsion order in the same way that refusal to provide breath or alcohol samples under drink-driving laws is dealt with.<sup>24</sup> It is already an offence to refuse to allow a DNA sample to be taken pursuant to a databank compulsion notice issued following a conviction for a qualifying offence or when a sample is required from a person arrested or intended to be charged if, as a result of that refusal, no sample is taken.<sup>25</sup>
  - (b) Permitting the court to draw an adverse inference from a suspect’s refusal to comply. This is already an option under the CIBS Act, although we are unaware of it having ever being used.<sup>26</sup>
  - (c) Permitting Police to collect a DNA sample from a suspect by indirect means. We discuss indirect sampling in Chapter 12.

## RESULTS OF CONSULTATION

- 11.16 In the Issues Paper, we asked for views on what sampling methods should be prescribed for suspect and elimination sampling and whether reasonable force should continue to be used to obtain a suspect sample pursuant to a compulsion order. Views on these matters are discussed below.
- 11.17 We received six submissions that generally supported the collection of samples in a way that recognises and respects tikanga Māori from the New Zealand Law Society (NZLS), the New Zealand Bar Association (endorsing NZLS’s submission in its entirety), Te Hunga Rōia Māori o Aotearoa | The Māori Law Society, Te Mana Raraunga | Māori

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<sup>21</sup> Issues Paper at [8.49] and [8.52].

<sup>22</sup> For example, in the Issues Paper, we observed that, in exceptionally rare cases a person may have different DNA profiles in different parts of their body due to blood transfusions, transplants or a natural mutation known as “genetic chimerism”. In such cases, a blood sample may be required to verify a DNA profile obtained by buccal sampling: at [8.53].

<sup>23</sup> At [8.55]–[8.59].

<sup>24</sup> Land Transport Act 1998, s 60(1).

<sup>25</sup> Criminal Investigations (Bodily Samples) Act 1995, s 77(1)(b).

<sup>26</sup> Section 70(1) permits the court or jury to draw an inference from the refusal to provide a sample “unless the prejudicial effect of the admission of the evidence [as to the refusal to consent] would outweigh its probative value”. In any proceedings where the jury might draw an inference, the Judge may tell the jury that there may be good reasons for the person’s refusal to allow the taking of the bodily sample: s 70(2).

Data Sovereignty Network, Karaitiana Taiuru and one other individual. Te Mana Raraunga, for example, submitted that:

Māori should have control over deciding the protocols and policies around Māori data. This includes control over deciding appropriate tikanga and kawa around bodily samples and derived data.

11.18 A submission from an individual stated that:

I want to be assured that there are systems in place that take into [account] tikanga Māori when dealing with my DNA ... As tangata whenua DNA samples should be taken in accordance with tikanga Māori.

### Submissions on sampling methods

11.19 We received 10 submissions that addressed sampling methods for suspect and elimination sampling from seven organisations and three individuals.

11.20 There was general support for suspects being able to elect a collection method and for a presumption that the least intrusive method should be used unless another method is necessary.

11.21 In relation to preferred sampling methods, Police and ESR supported the status quo. The Public Defence Service (PDS), the Auckland District Law Society Criminal Law Committee (ADLS), Sue Petricevic and one other individual favoured buccal sampling. PDS also supported the ongoing availability of fingerprick sampling. It recognised the tikanga Māori concerns relating to buccal sampling and also noted that, if DNA samples are to be taken by force, taking a fingerprick sample would not result in as much loss of dignity and would involve less force than a buccal sample. ADLS and Sue Petricevic also recognised that blood samples may occasionally be required. However, several submitters, including the NZLS, PDS and Associate Professor Nessa Lynch, suggested that venous sampling be removed.

11.22 NZLS and Nessa Lynch questioned whether it was appropriate to prescribe sampling methods in DNA legislation, given potential future developments in technology. They suggested that legislation should instead permit a person to nominate a method of DNA sampling. If no method is nominated, the least intrusive method should be used. NZLS suggested that, when deciding on a sampling method, consideration should be given to matters such as the available technology, a person's bodily integrity, a person's privacy rights and tikanga Māori.

11.23 Neither tape sampling nor fingerprint sampling was supported by any submitter. Police, ESR, PDS, ADLS and Sue Petricevic were concerned that these options posed an unacceptable risk of contamination. ESR explained:

There needs to be absolute confidence that a reference sample from an individual is exactly that and fundamentally, these suggested sampling methods which would be prone to having another person's DNA present would not provide that confidence.

11.24 ADLS and Sue Petricevic were also concerned that tape sampling would not provide standard quantities or quality of DNA. PDS was concerned that fingerprint sampling could lead to DNA sampling becoming standard practice, which would be inappropriate given the intrusion on informational privacy it presents.

## Submissions on use of reasonable force and alternative options

- 11.25 Eight submitters addressed the use of reasonable force to take suspect samples.<sup>27</sup> The majority of submitters, including Police, NZLS, PDS and Nessa Lynch, supported retaining Police’s power to use reasonable force when a suspect refuses to comply with a compulsion order provided the existing safeguards are retained. Submitters commented on the need to retain independent oversight of the use of reasonable force through the judicial approval of compulsion orders and public reporting requirements. The Privacy Commissioner also submitted that, if reasonable force is to be retained, the existing judicial safeguards should be retained.
- 11.26 Further safeguards were also suggested. NZLS suggested that consideration be given to limiting the use of reasonable force to serious offending only, noting that the use of force in relation to suspected minor offending could be disproportionate. PDS supported the additional protections of giving a suspect who refuses to comply the right to speak to a lawyer free of charge, giving the suspect 24 hours to reconsider and giving young people the right to support from parents or guardians. Nessa Lynch submitted that the use of reasonable force should be disallowed or seriously restricted in the cases of children, young people and vulnerable adults.
- 11.27 NZLS and PDS also supported the use of reasonable force given the lack of viable alternatives. PDS considered that simply making it an offence to refuse to comply with a compulsion order would be unlikely to be effective as, if the suspect is the offender, the penalty would be unlikely to outweigh the benefit of refusing to provide a DNA sample.
- 11.28 NZLS, PDS and the Independent Forensic Practitioners Institute (IFPI) were also strongly opposed to the alternative option of drawing an adverse inference. PDS submitted:
- People may refuse to supply samples for all sorts of reason[s] and allowing an adverse inference in such a situation is dangerous and analogous to allowing an adverse inference from refusing to make a statement, which is not allowed under New Zealand law.
- 11.29 NZLS made a similar submission. It did not support the ability for an adverse inference to be drawn from a refusal to allow a DNA sample as is currently the case under section 70 of the CIBS Act. It further observed that it is difficult to reconcile such an ability with the protection of “an equivalent right, such as the right to silence under section 32 of the Evidence Act 2006” where an adverse inference cannot be drawn. IFPI submitted that, as evidenced in other countries, the risk of wrongful conviction is five per cent (or even higher). This risk may cause some people to refuse to provide their informed consent “for their DNA to be handed over to a databank”.
- 11.30 Two submitters did not support the use of reasonable force. ADLS submitted that, given the high level of physical intrusion involved in forcibly taking a DNA sample, particularly in relation to children and young people, the alternatives of making refusal to comply an offence and allowing for adverse inferences should be adopted. Karaitiana Taiuru strongly opposed the use of reasonable force and submitted that tikanga-appropriate alternatives should be considered and, more generally, that the process of obtaining DNA samples should be made less physically intrusive and more compliant with tikanga Māori.

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<sup>27</sup> In addition to these eight submitters, the Independent Forensic Practitioners Institute commented on adverse inferences, and their views are discussed below.



## SUSPECT SAMPLING PROCEDURES IN COMPARABLE JURISDICTIONS

- 11.31 Many comparable jurisdictions, including Australia, England and Wales, Scotland and Ireland, prescribe detailed statutory rules for collection of DNA samples from suspects. Often, these rules vary depending on the degree of intrusion of the sampling method. For example, Australian legislation often differentiates between “intimate” and “non-intimate” samples, although there is some variation between Australian jurisdictions as to what constitutes intimate and non-intimate samples.<sup>28</sup> A similar distinction is also made in England and Wales, and Ireland.<sup>29</sup> Often, non-intimate samples including buccal swabs can be ordered by a senior police officer, while intimate samples including blood samples must be authorised by a judge or magistrate. In addition to buccal, fingerprick and venous sampling, the collection of hair samples (other than pubic hair) is also a commonly prescribed sampling method. It is unclear, however, how often hair sampling is undertaken in practice.
- 11.32 In all the jurisdictions we have analysed, the use of reasonable force is authorised to take a sample from a suspect or to prevent loss, destruction or contamination of any sample. Often, this is permitted without judicial oversight, provided a senior police officer has authorised the collection of the sample or the use of reasonable force.<sup>30</sup> This can usually only be done in circumstances where the suspect is in police custody and is an adult who does not lack the ability to consent and only in relation to certain methods such as buccal or fingerprick sampling.

## RECOMMENDATIONS

### Minimising intrusions on bodily integrity and providing for tikanga Māori

#### RECOMMENDATION

**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).

<sup>28</sup> For example, taking a blood sample is classified as an intimate procedure in New South Wales, Victoria, the Australian Capital Territory, Western Australia, South Australia and the Northern Territory. However, in Tasmania, taking a blood sample is classified as a non-intimate forensic procedure, and in the Australian Commonwealth, fingerprick sampling is classified as non-intimate while other forms of blood sampling are classified as intimate. Saliva or buccal samples are typically classified as non-intimate forensic procedures (except in Victoria), although New South Wales distinguishes between self-administered buccal swabs (non-intimate) and other-administered buccal swabs (intimate). See Crimes Act 1914 (Cth), s 23WA; Crimes (Forensic Procedures) Act 2000 (NSW), s 3; Crimes Act 1958 (Vic), s 464; Crimes (Forensic Procedures) Act 2000 (ACT), ss 6–7; Police Powers and Responsibilities Act 2000 (Qld), sch 6; Criminal Investigation (Identifying People) Act 2002 (WA), s 3; Forensic Procedures Act 2000 (Tas), s 3; Criminal Law (Forensic Procedures) Act 2007 (SA), s 3; and Police Administration Act 1978 (NT), s 4.

<sup>29</sup> See Police and Criminal Evidence Act 1984 (UK), ss 63–64; and Criminal Justice (Forensic Evidence and DNA Database System) Act 2014 (Ireland), s 2.

<sup>30</sup> See, for example, s 24(3) of the Criminal Justice (Forensic Evidence and DNA Database System) Act 2014 (Ireland), which requires the use of reasonable force to be authorised by a member of the Garda Síochána not below the rank of superintendent.

- 11.33 We recommend the development of policy in consultation with the DNA Oversight Committee to ensure that sampling procedures are carried out in a manner that is consistent with the proposed purpose of the new DNA legislation, which requires:
- (a) minimising interference with bodily integrity; and
  - (b) recognising and providing for tikanga Māori.
- 11.34 The participation of Māori in developing the policy, including through the DNA Oversight Committee, will be essential to properly determining how sampling may impact on applicable tikanga, such as personal tapu, and how to mitigate this through the sampling procedures, including by providing for tikanga in the development and implementation of such procedures. This policy should be publicly available to improve the transparency of the sampling process and to ensure that a person who provides a sample (a donor) is able to find out information about that procedure.
- 11.35 This recommendation and recommendations R82–R83 below are worded broadly to apply to all forms of direct sampling under the new DNA legislation, including both casework sampling and databank sampling (discussed in Part C of this Report). This recognises that the sampling process intrudes on bodily integrity and personal tapu regardless of its purpose. It is our view, therefore, that clear, simple and consistent sampling procedures and safeguards should be adopted to promote achievement of the proposed purpose of the new DNA legislation. Databank sampling procedures are discussed further in Chapter 19.

### Retaining current sampling options

#### RECOMMENDATION

**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.

- 11.36 We recommend that new DNA legislation continues to provide for buccal, fingerprick and venous sampling. While buccal sampling is the most common form of sampling and the least physically intrusive, we recognise the need for fingerprick samples in some circumstances, including when the use of reasonable force is required (discussed below) or when a buccal sample is not reliable for medical reasons. While very few blood samples are taken by venous sample, in rare cases, a venous sample will be required for medical reasons. Some donors may also prefer venous sampling over fingerprick sampling.
- 11.37 We do not recommend use of either tape sampling or fingerprint sampling. While these would represent less of an intrusion on bodily integrity and personal tapu (particularly in relation to buccal and venous samples given the tapu of the head and blood according to tikanga Māori), we accept ESR's advice that neither of these methods would provide the necessary degree of confidence given the risk of contamination. We also recognise PDS's concern that fingerprint sampling could standardise the collection of DNA from any person subjected to fingerprinting. We are firmly of the view that DNA sampling and fingerprinting should remain distinct processes.

- 11.38 Given the rapid pace of technological change, however, it is possible that new sampling methods may be developed that are less physically intrusive, thereby mitigating concerns about sampling arising from tikanga Māori, but still provide a reliable DNA sample. We therefore recommend that new DNA legislation permits new sampling methods to be authorised by regulations made under that Act. This would avoid the need to go through a primary legislative process to take advantage of developments in technology but would still ensure a robust process by engaging the requirement for the DNA Oversight Committee to advise the responsible Minister. The role of the DNA Oversight Committee is discussed in Chapter 5.

### Retaining current procedural safeguards

#### RECOMMENDATIONS

**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.

- 11.39 In order to minimise intrusions on bodily integrity and personal tapu and uphold the mana of the person, any person who provides a DNA sample under new DNA legislation should be able to choose their preferred sampling method. This enables the donor to retain a degree of autonomy, thereby minimising the intrusive nature of the sampling process. If a donor does not elect a method, the least intrusive method available should be used. As noted above, being able to choose the method may lessen the impact of the sampling process on a person's mana, particularly when someone is being required to provide a sample (such as pursuant to a court order).
- 11.40 We also recommend that any person providing a DNA sample should be able to nominate a lawyer or another person to be present when the sample is taken. This is consistent with the current entitlements in relation to suspect sampling<sup>31</sup> and reflects our recommendations in Chapters 8, 9 and 10 that a police officer should give the donor a reasonable opportunity to consult privately with a lawyer and to nominate an adult to act as a support person during the consent process and the taking of the sample. This would contribute to upholding the mana of people providing samples and those supporting them, consistent with the principle of manaakitanga, described in Chapter 2.
- 11.41 If a donor is under the age of 18, they should also be entitled to have a parent or guardian present during the procedure. Similarly, if a donor is over the age of 18 and

<sup>31</sup> Criminal Investigations (Bodily Samples) Act 1995, s 50.

lacks the ability to understand the general nature and effect of the sampling procedure, they should also be entitled to have a welfare guardian or principal caregiver present.<sup>32</sup> This is consistent with our recommendations in Chapters 8, 9 and 10, which recognise the need for special safeguards for people who lack the ability to consent to provide a casework sample.<sup>33</sup>

## Retaining authority to use reasonable force

### RECOMMENDATIONS

**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.

11.42 We consider that the use of reasonable force should continue to be available to Police where a suspect refuses to comply with a compulsion order. The power to use reasonable force is consistent with the approach in comparable jurisdictions, and Police's use of force over the past nine years demonstrates that it is only used rarely and as a last resort. We are satisfied that the existing protections, including the need for judicial authority in the form of a compulsion order, the suspect's entitlement to have a support person present during the sampling process and the requirement to report the use of reasonable force, are appropriate.

11.43 We also agree with NZLS and PDS that using reasonable force to obtain a suspect sample is preferable to the alternatives of making it an offence to refuse to comply with a compulsion order or enabling the fact finder to draw an adverse inference from a refusal to comply. These options risk incentivising a suspect to refuse to comply with a compulsion order in circumstances where they know their DNA sample will implicate them. While an offence provision might be a more proportionate response than the use

<sup>32</sup> The terms "welfare guardian" and "principal caregiver" are described in Chapter 9.

<sup>33</sup> In Chapter 8, we explain that a person will lack the ability to consent if they (a) are unable to understand the information they are given and apply that information to their personal situation; or (b) are unable to communicate their consent to the requesting officer. This is broadly consistent with the presumption of competence in s 5 of the Protection of Personal and Property Rights Act 1988 and with the approach to incapacity to consent in comparable jurisdictions (see discussion in Chapter 8).

of force in relation to low-level offending, it is unlikely that a compulsion order would be sought and issued in relation to low-level offending in the first place. We therefore consider it is unnecessary to have the alternative of an offence provision available.

- 11.44 We do not support the ability to draw an adverse inference from a refusal to comply with a compulsion order in any criminal proceedings for the offence or a related offence.<sup>34</sup> Therefore, section 70 of the CIBS Act should not be retained. We are not aware of this provision having ever been used, but we agree with NZLS and PDS that being able to draw such an inference is inconsistent with other protective rights, such as the right to silence, where adverse inferences are not permitted to be drawn. There may well be legitimate reasons why a suspect might refuse to comply with a compulsion order. In these circumstances, we do not think it is appropriate for the fact finder to be able to draw an adverse inference from a refusal to comply with a compulsion order.
- 11.45 Police should continue to report on the use of reasonable force. This reporting should identify whether the suspect was a child, young person or adult and the ethnicity of the suspect. This, along with the proposed oversight roles of the DNA Oversight Committee and the Independent Police Conduct Authority discussed in Chapter 5, should ensure appropriate oversight of the use of force to obtain suspect samples.
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<sup>34</sup> Here, we adopt the explanation in s 2(2) of the Criminal Investigations (Bodily Samples) Act 1995 that “[f]or the purposes of this Act, 2 offences are related to one another if the elements of the 2 offences comprise substantially the same act or omission”.

## CHAPTER 12

# Indirect sampling

## INTRODUCTION

- 12.1 The previous chapters explore the collection of DNA samples for criminal casework directly from the body of a known person. In this chapter, we explore the use of indirect sampling, which involves collecting a DNA sample in relation to a known person (the subject) from a secondary source.<sup>1</sup>
- 12.2 Indirect sampling is not governed by the CIBS Act. Instead, Police must rely on their general search powers under other sources of law, including the common law and the Search and Surveillance Act 2012.
- 12.3 The subject of indirect sampling will usually be a suspect in a criminal investigation, in circumstances where it has not been possible or practical to obtain a DNA sample directly from that suspect.<sup>2</sup> Indirect sampling might also provide a less intrusive means of obtaining a DNA sample for elimination purposes, particularly in circumstances where the subject is a child or a person who is unable to consent to the sampling process.<sup>3</sup>
- 12.4 This chapter considers three different types of indirect sampling:
- (a) Obtaining a DNA sample from a physical object that has the subject's biological material on or in it.
  - (b) Obtaining a DNA sample from a stored sample of the subject's biological material that was collected by a third party for a different purpose (stored samples). Stored samples will usually have been collected for health purposes and include blood

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<sup>1</sup> Indirect sampling is different to the collection of DNA samples from crime scenes (crime scene samples). Crime scene samples are "unknown" in the sense that, at the time of collection from the crime scene, it is not known whose DNA is being collected. Indirect samples are collected in circumstances where there is a degree of certainty that the sample relates to a known person, usually for the purposes of casework comparison against a DNA profile derived from a crime scene sample. The collection of crime scene samples is discussed in Chapter 13.

<sup>2</sup> As we explain below, indirect sampling is used rarely in New Zealand, but examples include *R v T* (1999) 17 CRNZ 63 (HC), discussed below at n 24, where it was not possible to obtain a suspect compulsion order under s 16 of the Criminal Investigations (Bodily Samples) Act 1995. In *Simpson v R* [2016] NZCA 95, discussed below at n 12, the subject of indirect sampling was a suspect who had refused to give a sample by consent under the CIBS Act. Indirect sampling has been used much more extensively in other jurisdictions. For instance, in the Australian case of *R v White* [2005] NSWSC 60, indirect sampling was used to obtain DNA from six subjects in circumstances where the evidence against those subjects was not sufficient to treat them as suspects (and require a sample under the statutory sampling regime). Sampling was to narrow down the list of people of interest and identify a single suspect in the offending.

<sup>3</sup> Elimination sampling is discussed in Chapter 9. In that chapter, we recommend that informed consent from a responsible adult (such as a parent or guardian) should be required in circumstances where the donor is under the age of 14 or is a person who lacks the ability to give informed consent. However, even if informed consent is obtained, an elimination sample should not be taken if the donor objects to or resists the taking of the sample.

spot cards collected for the Ministry of Health’s Newborn Metabolic Screening Programme.<sup>4</sup>

- (c) Obtaining a DNA sample directly from a close genetic relative of the subject. Because close genetic relatives share DNA, a degree of correlation between a relative’s DNA profile and the crime scene profile (a “near match”) might indicate that the DNA at the crime scene was left by the subject.
- 12.5 Once an indirect sample is obtained, it can be analysed to generate a DNA profile, and that profile can be compared against a crime scene profile to determine if there is a match (or a near match if the indirect sample is from the subject’s relative).
- 12.6 In this chapter, we consider whether indirect sampling should be available in criminal investigations and, if so, in what circumstances. The use of indirect sampling to identify deceased people, human remains, and people who are unable to identify themselves due to incapacity is discussed in Chapter 22.

## CURRENT LAW AND PRACTICE

- 12.7 As noted above, indirect sampling is not governed by the CIBS Act. In *R v C*, the Court of Appeal held that the CIBS Act is not a code when it comes to obtaining DNA samples in criminal investigations:<sup>5</sup>

... the [CIBS] Act provides for the obtaining of invasive intimate samples, if necessary by force. It does not purport to provide a code for the obtaining of all such samples by other non-invasive means.

- 12.8 This means that whether indirect sampling is permitted under current law and, if so, in what circumstances depends on the extent of police powers under the common law and the Search and Surveillance Act. Consideration must also be given to how section 21 of the New Zealand Bill of Rights Act 1990 (Bill of Rights Act) and the Privacy Act 1993 (and its successor, the Privacy Act 2020) might apply to indirect sampling.<sup>6</sup>

### Common law

- 12.9 Under the common law, a police officer investigating an offence can do what any member of the public may lawfully do.<sup>7</sup> They do not need specific statutory authority to do so. This has two applications for indirect sampling, which we discuss below.

#### *Indirect sampling with consent*

- 12.10 A police officer may collect and use an indirect sample with informed consent.<sup>8</sup> However, the ability to obtain indirect samples with consent is limited in two respects.

<sup>4</sup> The Newborn Metabolic Screening Programme was established in 1969 as a national programme to screen babies for certain serious metabolic disorders. Testing is conducted with parental consent and involves collecting a blood sample from the baby’s heel and transferring that sample onto a blood spot card. The card is sent to the laboratory for testing and is then stored indefinitely unless the family requests its return.

<sup>5</sup> *R v C* CA381/00, 19 February 2001 at [8].

<sup>6</sup> The Privacy Act 1993 will be replaced by the Privacy Act 2020 on 1 December 2020. In this Report, we refer to both statutes for completeness.

<sup>7</sup> See, for example, *Lorigan v R* [2012] NZCA 264, (2012) 25 CRNZ 729 at [26]–[36]; *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305 at [217] per Tipping J; *R v Ngan* [2007] NZSC 105, [2008] 2 NZLR 48 at [46] per Tipping J; and *R v Gardiner* (1997) 15 CRNZ 131 (CA) at 134.

First, the collection of indirect samples is governed by the information privacy principles under the Privacy Act, discussed below.<sup>9</sup> Second, the collection and use of blood spot cards is governed by a Memorandum of Understanding between Police and the Ministry of Health (MOU).<sup>10</sup> Under that MOU, a police officer can only access a suspect's blood spot card if they obtain a search warrant.<sup>11</sup> We discuss search warrants below.

### *Collecting discarded objects for indirect sampling*

- 12.11 A police officer may be able to collect a discarded object provided that collection does not involve trespass on private premises (in which case, a search warrant would be required — see discussion below). This would include objects discarded by a subject that contain their biological material, such as a used disposable cup or cigarette butt.<sup>12</sup>
- 12.12 However, it is uncertain whether the common law also provides a power for a police officer to arrange for a discarded object to be swabbed for biological material, for that material to be analysed for DNA and for a DNA profile to be created and compared against a crime scene profile.<sup>13</sup> Unlike the simple act of collecting a discarded object, it is difficult to say that these subsequent steps are actions that “any member of the public can lawfully do in the same circumstances”.<sup>14</sup>
- 12.13 Furthermore, arranging for the analysis and a casework comparison of a person's DNA without valid consent might also breach the common law tort of privacy. This requires the existence of facts in which there is a reasonable expectation of privacy and publicity given to those private facts that would be considered highly offensive to an objective reasonable person.<sup>15</sup>

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<sup>8</sup> Consistent with s 19 of the Human Tissue Act 2008, which establishes a regime for the collection and use of human tissue based on informed consent. The Human Tissue Act 2008 defines “collect”, in relation to human tissue, to mean “to remove or take that tissue from a living individual”: s 6. Therefore it does not appear to apply to the indirect collection of human tissue or the use of indirect samples. A police officer's power to obtain information from a third party on a voluntary basis (without a search warrant or production order), provided they do so lawfully, was also confirmed by the Supreme Court in *R v Alford* [2017] NZSC 42, [2017] 1 NZLR 710 at [29].

<sup>9</sup> In *R v Alford* [2017] NZSC 42, [2017] 1 NZLR 710 at [64], the Supreme Court observed that the information privacy principles do not create any search powers, but they do allow police officers to seek personal information other than directly from the individual involved and allow an agency to release information to police officers provided the statutory pre-conditions are met.

<sup>10</sup> Ngā Pirihi Mana o Aotearoa | New Zealand Police and Ministry of Health *Memorandum of Understanding: The Disclosure of Newborn Blood Spot Samples and Related Information* (May 2014). Rules regarding the use and disclosure of information derived from blood spot cards as agreed in the Memorandum of Understanding are also codified in sch 3 of the Health and Information Privacy Code 1994 discussed at n 36 below.

<sup>11</sup> At [2.2].

<sup>12</sup> This has occurred at least once, in *Simpson v R* [2016] NZCA 95. The appellant was questioned by police officers at a police station in relation to an alleged rape. He was asked to provide a DNA sample but refused. When he left the police station, a used cup and wristband he had discarded were obtained and sent to ESR for analysis. Ultimately, the Court of Appeal did not have to determine whether the sample had been improperly obtained, as the other evidence against the appellant was sufficient for police to apply for and obtain a suspect compulsion order under the CIBS Act. See *Simpson v R* [2016] NZCA 95 at [43]–[53]. See also *R v Reuben* [1995] 3 NZLR 165 (CA) in relation to the general question of reasonable expectations of privacy in abandoned items.

<sup>13</sup> This is the process of casework comparison, discussed in Chapter 17.

<sup>14</sup> *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305 at [217] per Tipping J.

<sup>15</sup> *Hosking v Runting* [2005] 1 NZLR 1 (CA) at [117]. The “facts” in the context of indirect sampling would likely be the results of analysis. If these results revealed personal genetic information about an individual, this might reach the threshold of being highly offensive to an objective reasonable person. While the methods traditionally used to analyse DNA in criminal investigations are intended not to reveal this type of information, analysis methods used in the future may do so, as we discuss in Chapter 6.



- 12.14 For these reasons, it is uncertain whether a police officer can lawfully arrange for a person's DNA to be analysed under the common law without valid consent.

### The Search and Surveillance Act

- 12.15 Rather than relying on the common law, a police officer might apply for a search warrant under the Search and Surveillance Act. Section 6 provides the authority for issuing search warrants in relation to places, vehicles and other things. It states:

An issuing officer may issue a search warrant, in relation to a place, vehicle, or other thing, on application by a constable if the issuing officer is satisfied that there are reasonable grounds—

- (a) to suspect that an offence specified in the application and punishable by imprisonment has been committed, or is being committed, or will be committed; and
- (b) to believe that the search will find evidential material in respect of the offence in or on the place, vehicle, or other thing specified in the application.

- 12.16 Any person lawfully executing a search warrant can enter and search the place, vehicle or other thing that is the subject of the search warrant (including any item or items found in that place, vehicle or thing) and seize anything that is the subject of the search or anything else that may be lawfully seized.<sup>16</sup>

### Can a search warrant authorise indirect sampling?

- 12.17 Relying on general search powers to obtain indirect samples can be problematic. Authorising a search for physical objects such as personal items, discarded objects or stored samples containing a person's biological material is more complex than authorising a search for other types of evidence. As the Commission explained in its 2007 report on search and surveillance powers:<sup>17</sup>

A search for forensic material is somewhat different from a search for ordinary items, given that scientific analysis is necessary to determine whether evidential material is present. A search for forensic material involves:

- identifying where the material probably is;
- searching for and seizing items that may contain the material sought;
- subjecting seized items to scientific examination.

It is the scientific examination that establishes the presence of evidential material relating to the commission of the offence, rather than the search and visual identification by an enforcement officer.

- 12.18 With these complexities in mind, there seem to be two possible applications of section 6 of the Search and Surveillance Act. First, a search warrant may authorise the seizure of physical objects, such as personal items, discarded objects or stored samples (the "evidential material") from a specified place, vehicle or thing. In *T v R*, the High Court observed that this "is a relatively uncontroversial avenue by which s 6 of the SSA could apply".<sup>18</sup> Section 112 of the Search and Surveillance Act clarifies that items that are the

<sup>16</sup> Search and Surveillance Act 2012, s 110(a) and (d).

<sup>17</sup> Te Aka Matua o te Ture | Law Commission *Search and Surveillance Powers* (NZLC R97, 2007) at [3.44]–[3.45]. The term "forensic material" is used to describe an item that requires scientific analysis or testing to determine whether it contains or is evidential material. See also *R v T* (1999) 17 CRNZ 63 (HC) at 70.

<sup>18</sup> *T v R* [2015] NZHC 1588 at [82]. These comments were made in the context of the possibility of obtaining a search warrant in relation to a spleen sample taken for the purpose of a post-mortem. The Court observed at [82] that:

subject of the search can be seized for the purpose of examination or analysis to determine that item's relevance.

12.19 However, the problem with this interpretation is that the focus of the test for seizure is framed around the physical object itself rather than the biological material for which it is being seized. It may be a stretch to argue that the physical object is “evidential material” in its own right. The Search and Surveillance Act defines evidential material as “evidence of the offence, or any other item, tangible or intangible, of relevance to the investigation of the offence”.<sup>19</sup> It might be argued that it is not the object itself that is of relevance to the investigation but the biological material it holds.

12.20 Another possible application of section 6 is to authorise a search warrant to seize biological material (the “evidential material”) from a specified physical object (the “thing”). This possibility was identified, but not resolved, in the High Court in *T v R*, which considered whether blood could be a “thing” that is searched:<sup>20</sup>

This is a reasonably complex issue. In the [Search and Surveillance Act] both “evidential material” and “thing” are framed in very broad terms. This was deliberate. Plainly evidential material can encompass DNA, which is often used as evidence in criminal proceedings. The more difficult issue is whether an appropriate interpretation of “thing” here can encompass a human body, or the blood of a human. This raises two main questions. First, whether Parliament intended “thing” to extend to such matters in light of the words immediately preceding “thing”, being “place or vehicle” (the statutory interpretation issue). Second, whether the [Search and Surveillance Act] ought to apply to human tissue (be it a deceased human body or blood) in light of the tightly prescribed regime dealing with such matters (the policy issue).

12.21 This case was considered in the Court of Appeal in 2016. The appellant argued that biological material could not be a “thing” for the purposes of section 6, but the Court similarly found that it did not have to resolve the issue for the purpose of that appeal.<sup>21</sup>

12.22 This leaves the question of whether and in what circumstances a police officer can obtain a search warrant to conduct indirect sampling uncertain. Practical issues also arise with discarded items, because it may be difficult to predict in advance where a suspect may discard an item or what that item will be.<sup>22</sup>

12.23 In 2007, the Commission identified similar problems with the predecessor to section 6 of the Search and Surveillance Act: section 198(1)(b) of the Summary Proceedings Act 1957.<sup>23</sup> The Commission noted that two Court of Appeal cases had confirmed the lawfulness of search warrants authorising the seizure of physical objects containing biological material.<sup>24</sup> Nonetheless, the Commission concluded that:<sup>25</sup>

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In this case, the warrant (if one had been sought) could have specified the relevant area in which the spleen sample was stored as the “thing” and the spleen sample as the “evidential material”.

<sup>19</sup> Search and Surveillance Act 2012, s 3 definition of “evidential material”.

<sup>20</sup> *T v R* [2015] NZHC 1588 at [81].

<sup>21</sup> *T (CA438/2015) v R* [2016] NZCA 148 at [62].

<sup>22</sup> This makes it difficult to satisfy the requirements for making an application for a search warrant, which includes specifying the address or other description of the place, vehicle or other thing proposed to be entered and searched: Search and Surveillance Act 2012, s 98(1)(d).

<sup>23</sup> *Te Aka Matua o te Ture | Law Commission Search and Surveillance Powers* (NZLC R97, 2007) at [3.44]–[3.52]. Section 198(1)(b) of the Summary Proceedings Act 1957 provided for search warrants in respect of “any thing which there is reasonable ground to believe will be evidence as to the commission of any such offence”.

<sup>24</sup> In *R v T* (1999) 17 CRNZ 63 (HC); *R v T* [1999] BCL 759 (CA), a sample had been obtained from T with consent but was later ruled inadmissible, and there was no jurisdiction to issue a suspect compulsion order under the CIBS Act. T

... allowing samples to be seized under section 198 of the Summary Proceedings Act 1957 is a considerable stretch ... A sample that provides a genetic profile may provide circumstantial evidence of identity, but to produce evidence of the commission of an offence, the genetic profile must be compared with other forensic material. Given the relevant human rights values, particularly privacy, we doubt that section 198 is adequate to authorise the seizure of samples for genetic analysis ... Judicial authority can be relied on, but we think that an express legislative authorisation is preferable.

## Right to be secure against unreasonable search and seizure

- 12.24 Any exercise of search and seizure powers must be consistent with section 21 of the Bill of Rights Act, which guarantees the right of everyone to be secure from unreasonable search and seizure. As we explain in Chapter 2, section 21 is engaged where there is an intrusion upon a “reasonable expectation of privacy”.<sup>26</sup> In *R v Alford*, the Supreme Court described this concept as follows:<sup>27</sup>

The reasonable expectation of privacy is directed at protecting “a biographical core of personal information which individuals in a free and democratic society would wish to maintain and control from dissemination by the state” and includes information “which tends to reveal intimate details of the lifestyle and personal choices of the individual”.

- 12.25 The collection and use of DNA in criminal investigations clearly engages reasonable expectations of privacy. In *R v Toki*, the Court of Appeal considered this issue in relation to the collection of a DNA sample under the CIBS Act and observed that:<sup>28</sup>

... it is trite that DNA is not a mere fingerprint: it contains a wealth of genetic information about a person with unlimited future utility. The one-off intrusion of the procedure thus permanently erodes Mr Toki’s privacy and freedom, which would usually remain beyond the reach of the state apparatus. Without Mr Toki’s informed consent, the bodily sample now stored on the DNA profile databank was obtained in serious, permanent and ongoing breach of his rights.

- 12.26 While *Toki* concerned the direct collection of a sample for the DNA Profile Databank, similar consequences apply to indirect sampling, given the “wealth of genetic

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refused to provide a second sample by consent, so police officers obtained a warrant, searched T’s home and seized a razor and toothbrush from which DNA samples were obtained and analysed. In *R v C* CA381/00, 19 February 2001, a sample had been obtained from C but was ruled inadmissible for technical reasons. C refused to provide a second sample by consent. A police officer applied for and obtained a search warrant and seized a number of items, including a pair of underpants being worn by C from which a DNA profile was obtained. The Courts in both *R v T* and *R v C* relied on a statement made in *R v Sanders* [1994] 3 NZLR 450 (CA) at 461 where Fisher J stated in relation to s 198(1)(b) of the Summary Proceedings Act 1957 that:

[A] thing will constitute evidence of the commission of an offence if its form or existence would directly or indirectly make one or more of the factual elements of the offence itself more likely.

On this basis, the Courts found that the items seized were within the scope of the warrant, the search and seizure was reasonable and the DNA evidence was admissible.

<sup>25</sup> Te Aka Matua o te Ture | Law Commission *Search and Surveillance Powers* (NZLC R97, 2007) at [3.52]. The Law Commission and Ministry of Justice jointly conducted a review of the Search and Surveillance Act in 2016–2017. Because the Commission’s review of the use of DNA in criminal investigations project had also just commenced, that joint review declined to analyse whether the Search and Surveillance Act’s warrant regime is the appropriate mechanism for seizing bodily samples. See Te Aka Matua o te Ture | Law Commission *Review of the Search and Surveillance Act 2012 | Ko te Arotake i te Search and Surveillance Act 2012* (NZLC R141, 2017) at 7.

<sup>26</sup> *R v Alford* [2017] NZSC 42, [2017] 1 NZLR 710 at [63]–[64]; and *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305 at [160] and [163].

<sup>27</sup> At [63].

<sup>28</sup> *R v Toki* [2017] NZCA 513, [2018] 2 NZLR 362 at [24].

information” contained in DNA and that the effect of indirect sampling is to “permanently erode” the subject’s privacy without their informed consent.

- 12.27 The question then becomes whether the search and seizure is unreasonable.<sup>29</sup> The courts have considered this question in relation to direct sampling and have held that non-compliance with the “comprehensive and prescriptive” regime under the CIBS Act can amount to an unreasonable search and seizure under section 21.<sup>30</sup>
- 12.28 Whether indirect sampling is reasonable will depend on the circumstances of the case. In two early cases, the Court of Appeal upheld the reasonableness of a search warrant issued under the Summary Proceedings Act for physical objects containing a suspect’s biological material for analysis and comparison against crime scene profiles.<sup>31</sup> However, those cases were determined long before the Supreme Court decision in *Alsford*. The significant developments in DNA technologies and methods of DNA analysis since those cases were decided means that the scope and nature of private information that can be derived from a person’s DNA has increased considerably, as observed in *Toki*. We expect that scientific advances will continue to expand the amount of information that can be generated from DNA in future. It is, therefore, unclear how a court would approach indirect sampling now or in the future. As we explain at paragraphs 12.83–12.94 below, the courts in comparable jurisdictions have taken different approaches.

### The Privacy Act

- 12.29 The Privacy Act also plays a role in indirect sampling. While the Privacy Act does not create search powers, it does prescribe rules (the information privacy principles) about how personal information should be collected, stored and disclosed.<sup>32</sup>

### *Is biological material “personal information”?*

- 12.30 As explained in Chapter 5, currently it is uncertain whether a DNA sample, which is a sample of a person’s biological material, constitutes “personal information” under the Privacy Act. Personal information is defined in the Privacy Act as “information about an identifiable individual”.<sup>33</sup> While a DNA sample would clearly *contain* personal information (in the form of a person’s DNA information), it is unclear whether the sample itself is personal information. In Chapter 5, we recommend that new DNA legislation clarifies that a DNA sample is “personal information” for the purposes of that Act. This clarification was supported by the Office of the Privacy Commissioner. Our discussion below therefore assumes that the information privacy principles apply to DNA samples.

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<sup>29</sup> *R v Alsford* [2017] NZSC 42, [2017] 1 NZLR 710 at [17] and [64].

<sup>30</sup> *R v Toki* [2017] NZCA 513, [2018] 2 NZLR 362 at [15] and [23]–[24]. See also *R v Shaheed* [2002] 2 NZLR 377 (CA) at [6], [166]–[167] and [194]; *R v T* [1999] 2 NZLR 602 (CA) at 613–614; and *R v Hoare* CA310/04, 21 April 2005 at [34]–[42]. Although as *R v Shaheed* also held, non-compliance may not necessarily lead to exclusion of the evidence under s 30 of the Evidence Act 2006.

<sup>31</sup> *R v T* [1999] BCL 759 (CA); and *R v C* CA381/00, 19 February 2001 discussed above n 24.

<sup>32</sup> Privacy Act 1993, s 6; and Privacy Act 2020, s 22.

<sup>33</sup> Privacy Act 1993, s 2 definition of “personal information”; and Privacy Act 2020, s 7 definition of “personal information”.

### *The information privacy principles*

- 12.31 Principle 2 states that an agency must collect personal information directly from the individual concerned. However, it is not necessary to comply with this requirement if the agency believes, on reasonable grounds, that:
- (a) the information is publicly available;
  - (b) the individual concerned authorises collection of the information from someone else;
  - (c) non-compliance is necessary “to avoid prejudice to the maintenance of the law”, including “the prevention, detection, investigation, prosecution, and punishment of offences”; or
  - (d) compliance is not reasonably practicable in the circumstances of the particular case.
- 12.32 To comply with principle 2, the decision to undertake indirect sampling would need to be justified. For example, direct sampling may prejudice an ongoing covert operation, pose an undue risk of the suspect absconding or not be possible if the suspect cannot be found or has died.
- 12.33 Principle 4 is also relevant. This provides that an agency can only collect personal information by lawful means and by a means that, in the circumstances of the case, is fair and does not intrude to an unreasonable extent upon the personal affairs of the individual concerned.<sup>34</sup> Compliance with this principle would be questionable given the uncertainties regarding the current law, discussed above.
- 12.34 Principle 8 provides that an agency that holds personal information must not use or disclose that information without taking reasonable steps to ensure that the information is accurate, up to date, complete, relevant and not misleading.<sup>35</sup> Depending on how Police obtains an indirect sample, it may be difficult to comply with this principle. For example, a sample obtained from a discarded object may be contaminated, and a profile generated from that sample may therefore be inaccurate or misleading.
- 12.35 Principle 11 enables an agency to disclose personal information to another agency in certain situations, including when disclosure is necessary “to avoid prejudice to the maintenance of the law by any public sector agency”, including prejudice to “the prevention, detection, investigation, prosecution and punishment of offences”. This might apply, for example, if a police officer seeks a stored sample from a third party.<sup>36</sup> The Supreme Court has established that the third-party must be given sufficient information by police officers to enable them to form a view about whether there are reasonable grounds to believe that disclosing the information is necessary to avoid

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<sup>34</sup> This reflects the language of information privacy principle 4 as expressed in the Privacy Act 2020, which differs from the Privacy Act 1993 in design but not substance. Note that principle 4 in the Privacy Act 2020 also makes explicit reference to the importance of ensuring collection is fair and does not intrude on personal affairs where personal information is being collected from children and young people.

<sup>35</sup> This reflects the language of information privacy principle 8 as expressed in the Privacy Act 2020, which differs slightly from the Privacy Act 1993 in that it includes “or disclose” after the words “use”.

<sup>36</sup> The Health Information Privacy Code 1994, issued under s 46 of the Privacy Act 1993, is also relevant. It takes the place of the information privacy principles in the health sector and sets specific rules for health sector agencies relating to the collection, use, storage and disclosure of health information. Rule 11 is similar to information privacy principle 11 and includes the same exception to the prohibition on disclosure for avoiding prejudice to the maintenance of the law: *Te Mana Mātāpono Matatapu* | Office of the Privacy Commissioner *Health Information Privacy Code 1994* (28 June 1994), r 11(2)(i)(i).

prejudicing an investigation.<sup>37</sup> In terms of the scope of the “prejudice to the maintenance of the law” exception, the Office of the Privacy Commissioner has explained that:<sup>38</sup>

This exception does not give Police the right to see any information they would like in order to maintain the law. Rather, it only applies to situations where not seeing the information would prejudice, or do some harm to, maintaining the law.

- 12.36 Therefore, indirect sampling by obtaining a physical object from a third party agency would need to be justified, and police would need to provide the third party with sufficient information to enable the agency to make its own decision on whether the disclosure is necessary.
- 12.37 Other information privacy principles are relevant to the use, storage and retention of personal information.<sup>39</sup> Regardless of whether a biological sample constitutes personal information, these principles would apply to any DNA information derived from that sample.

### **Effect of the information privacy principles**

- 12.38 Information privacy principles do not create rights that are enforceable through the courts.<sup>40</sup> However, the Supreme Court has confirmed that the privacy principles may affect the interpretation of the Search and Surveillance Act and that a breach of a privacy principle may be relevant to an assessment of whether evidence has been obtained unfairly and should be ruled inadmissible under section 30 of the Evidence Act 2006.<sup>41</sup>

### **Indirect sampling in practice**

- 12.39 In Aotearoa New Zealand, indirect sampling is uncommon in practice. It is less reliable than direct sampling given the risk of contamination. This was noted by the Court of Appeal in *T v R*, where the possibility of obtaining a search warrant to seize physical objects such as bedding or clothing for DNA analysis was not considered “realistic or practical” as it was “far from clear whether this would have produced any relevant evidential material” and that “issues of proof of whose bedding and whose clothing items could have arisen”.<sup>42</sup>
- 12.40 Police has advised that indirect sampling in relation to suspects is not the preferred method, given the risk of contamination, but that there are rare circumstances when it is deemed necessary, such as when sampling has been authorised as part of a covert operation for intelligence purposes. Police has advised us that indirect suspect samples have been obtained covertly on rare occasions pursuant to a court order under the Search and Surveillance Act.<sup>43</sup>

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<sup>37</sup> *R v Alsford* [2017] NZSC 42, [2017] 1 NZLR 710 at [42].

<sup>38</sup> Sam Grover “Hager and Westpac – A bit more context, information and clarification” (22 March 2017) Office of the Privacy Commissioner: Blog <<https://privacy.org.nz/blog>>.

<sup>39</sup> Privacy Act 2020, s 22 (information privacy principles 5, 9 and 10); and Privacy Act 1993, s 6 (information privacy principles 5, 9 and 10).

<sup>40</sup> Privacy Act 2020, s 31; and Privacy Act 1993, s 11. This is subject to an exception in relation to sub-cl (1) of information privacy principle 6, which concerns the right to access personal information from a public sector agency.

<sup>41</sup> *R v Alsford* [2017] NZSC 42, [2017] 1 NZLR 710 at [38].

<sup>42</sup> *T (CA438/2015) v R* [2016] NZCA 148 at [60].

<sup>43</sup> However, this was not the case in *Simpson v R* [2016] NZCA 95, discussed above n 12.

- 12.41 We understand blood spot cards are accessed for criminal investigation purposes only rarely.<sup>44</sup> We are not aware of the use of stored samples from other biobanks. However, as genetic research becomes more common, this may become an increasingly useful potential source of intelligence for law enforcement purposes.<sup>45</sup>
- 12.42 We are not aware of close genetic relative sampling occurring in criminal investigations in Aotearoa New Zealand (although it is used in missing and unidentified person investigations, as we discuss in Chapter 22). Police considers this technique would be problematic and of limited value.

## ISSUES WITH INDIRECT SAMPLING

- 12.43 There are two broad issues with indirect sampling:
- (a) The lawfulness of indirect sampling is uncertain.
  - (b) There is a lack of safeguards that reflect the intrusive nature of indirect sampling.

### Uncertain legal authority

- 12.44 As explained above, the extent of police officers' powers to collect and analyse indirect samples is uncertain. In the absence of statutory rules authorising indirect sampling, it is unclear:
- (a) what the relationship is between indirect sampling and Part 2 of the CIBS Act (governing the collection of DNA samples directly from suspects);
  - (b) whether a police officer can arrange for DNA analysis of a physical object without informed consent;
  - (c) whether a search warrant can lawfully authorise a search for physical objects that contain biological material or for biological material itself;
  - (d) in what circumstances indirect sampling will be unreasonable and therefore in breach of section 21 of the Bill of Rights Act; and
  - (e) whether biological material is "personal information" under the Privacy Act and is subject to the information privacy principles regarding collection of personal information.
- 12.45 Legal uncertainty is a significant concern both for law enforcement and for the individuals whose privacy may be affected by indirect sampling. Police officers may be unaware of or reluctant to utilise what may be legitimate investigative techniques in appropriate circumstances. Meanwhile, individuals are at a clear disadvantage given the lack of procedural safeguards (discussed below). They may not find out about indirect sampling until later in the investigation, and it would be incumbent on them to challenge the lawfulness of the indirect sampling, which could result in resource-consuming litigation.

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<sup>44</sup> In Bevan Hurley, Sam Sherwood and Michael Hayward "Parents upset at police access to blood samples taken from babies" *Sunday Star Times* (online ed, Auckland, 15 October 2017), it was reported that blood spot cards have been used in the investigation of at least two homicides.

<sup>45</sup> Biobanks are collections of human tissue samples stored for potential use in research beyond the life of a specific study: Kāhui Matatika o te Motu | National Ethics Advisory Committee "Biobanks" (26 May 2020) <[www.neac.health.govt.nz](http://www.neac.health.govt.nz)>.

12.46 As the Commission noted in 2007 in relation to the right to be secure against unreasonable search and seizure:<sup>46</sup>

For the protection of individual rights to be maximised, breaches of these rights must be prevented rather than being vindicated only after they have been violated. This is inherent in the notion of being *secure* against unreasonable searches and seizures. An ex-post facto assessment of the lawfulness of law enforcement action, conducted outside any statutory regulatory framework, means that the prophylactic purposes of section 21 of the Bill of Rights act are not met.

### Lack of adequate safeguards

12.47 A further issue with indirect sampling is the lack of safeguards that recognise the intrusive nature of indirect sampling.

12.48 While indirect sampling does not involve intrusions on bodily integrity, it does constitute a significant intrusion on privacy and engages tikanga Māori.<sup>47</sup> This is because indirect sampling enables a person's biological material to be obtained without their consent (and in some circumstances without their knowledge), which may impact on the mana of the person, and analysed to produce a wealth of information about that person as well as their wider family, whānau and whakapapa.

12.49 Despite the intrusive nature of indirect sampling, it is inadequately regulated, which raises the following issues:

- (a) Indirect sampling can circumvent the procedural safeguards of the CIBS Act regarding the collection, use, storage, retention and destruction of DNA samples and related information. Notably, while suspect samples obtained under Part 2 of the CIBS Act cannot be used for another purpose (such as being compared against crime scene profiles on the Crime Sample Databank), there is no such statutory restriction on indirect samples.
- (b) The onus is on the subject of indirect sampling to challenge its lawfulness. However, unlike direct sampling, the subject may not know about the indirect sampling until later in the investigation or once charges are filed. Even if indirect sampling is found to be unlawful, this will not necessarily give rise to a remedy. In *R v Simpson*, for example, an indirect sample was obtained from a cup and wristband discarded by the suspect during a police interview.<sup>48</sup> A suspect compulsion order was then obtained under the CIBS Act after analysis of the indirect sample identified a link to the crime scene. However, the Court of Appeal did not need to decide on the lawfulness of the police officers' actions in taking the indirect samples, because the subsequent suspect sample obtained under the CIBS Act was lawfully obtained.<sup>49</sup> Another problem with the onus being on the subject of indirect sampling is that they may never become aware that it has occurred or raise it as an issue. As the

<sup>46</sup> Te Aka Matua o te Ture | Law Commission *Search and Surveillance Powers* (NZLC R97, 2007) at [2.45].

<sup>47</sup> Including the values of tapu, mana, and whakapapa, as well as the associated tikanga of whanaungatanga, manaakitanga, and kaitiakitanga, as discussed in Chapter 2.

<sup>48</sup> *Simpson v R* [2016] NZCA 95.

<sup>49</sup> At [50].



Australian Law Reform Commission observed in its consideration of the issue in 2003:<sup>50</sup>

In practice, the police could obtain a suspect's cigarette butt and have the sample analysed and compared with a crime scene sample. If the person is excluded as a suspect, or if the person is implicated but a formal sample is subsequently taken pursuant to the Crimes Act provisions, the admissibility of the covertly obtained sample would not arise as an issue in court proceedings.

- (c) There is a lack of transparency and accountability. There are no reporting requirements in relation to the use of indirect sampling and no independent oversight or auditing to ensure that indirect sampling is reasonable.

### Concerns about use of blood spot cards and other stored samples

- 12.50 As we identified in the Issues Paper, additional concerns arise in relation to the use of biological samples that have been collected for a purpose other than for a criminal investigation.<sup>51</sup> Typically, these stored samples will have been obtained in connection with a health purpose, such as medical testing or health research. Permitting access to stored samples in order to obtain a suspect's DNA may undermine public trust and confidence in the collection of stored samples for health purposes. This is a significant concern.
- 12.51 A significant source of stored samples obtained for health purposes in Aotearoa New Zealand are the blood spot cards that are stored by the Ministry of Health as part of its Newborn Metabolic Screening Programme.<sup>52</sup> As noted above, pursuant to a MOU, Police may only seek to access to a suspect's blood spot card if they obtain a search warrant and only as a last resort.<sup>53</sup>
- 12.52 However, in the Issues Paper we noted that the National Screening Unit, which administers the Newborn Metabolic Screening Programme, still has a number of concerns relating to the prospect of a police officer obtaining a search warrant for a suspect's blood spot card.<sup>54</sup> The Screening Unit is of the view that, if the public were aware that there is a mechanism by which Police could access blood spot cards for this purpose, fewer people would consent to their babies participating in the Screening

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<sup>50</sup> Australian Law Reform Commission *Essentially Yours: The Protection of Human Genetic Information in Australia* (ALRC R96, 2003) at [41.211].

<sup>51</sup> Issues Paper at [9.77].

<sup>52</sup> For background on the use of newborn blood spot cards, see discussion in the Issues Paper at [9.78]–[9.83].

<sup>53</sup> Ngā Pirihi Mana o Aotearoa | New Zealand Police and Ministry of Health *Memorandum of Understanding: The Disclosure of Newborn Blood Spot Samples and Related Information* (May 2014). Appendix 5 of the Memorandum of Understanding includes a statement that must accompany any application for a search warrant in respect of a newborn blood spot card, which alerts the issuing officer to the sensitivity of the application. That statement includes the following passage:

Given the sensitive nature of health information generally, and of human biological material such as blood samples in particular and the risks to the Newborn Metabolic Screening Programme if there is widespread use of Guthrie Cards for non-health related purposes, the Ministry of Health and the New Zealand Police have agreed that recourse should be had to the cards only as a matter of last resort and in accordance with the principles and procedures set out in the Agreement Schedule. These include that these matters be brought to the attention of any Judge or authorised issuing officer from whom a warrant to obtain a sample is sought.

<sup>54</sup> Issues Paper at [9.88]–[9.90].

Programme, thus jeopardising the societal utility that it brings.<sup>55</sup> Former Privacy Commissioners have also identified similar concerns.<sup>56</sup>

12.53 We share these concerns. We also have several other concerns about the use of blood spot cards:

- (a) First, in terms of tikanga Māori, newborn blood spot cards may attract a higher level of tapu than other samples. As we explain in Chapter 2, blood is considered particularly tapu. In addition, the purpose for and circumstances in which a medical sample is taken may also impact on tapu, and birth, in particular, is a time of heightened tapu. Recognition of the cultural and spiritual implications of obtaining human tissue is also central to the philosophy behind the Human Tissue Act 2008.<sup>57</sup>
- (b) Second, blood spot cards are obtained when the subject is only days old, with the informed consent of a parent, for the purposes of establishing their baby's wellbeing. We question whether it would ever be appropriate to use a person's stored sample in criminal proceedings against them in circumstances where that sample was obtained without their direct consent and when they were only days old. In many cases, the parents will not have been aware that the blood spot card could be used in future criminal investigations or indeed that it would still exist many years later.
- (c) Third, the Newborn Metabolic Screening Programme is a significant and unique source of DNA information. It has been running since 1969, and as at 2012, there were around 2 million blood spot cards in storage.<sup>58</sup> In theory, these blood spot cards could serve as the foundation for a near universal databank of DNA samples, at least of those born in Aotearoa New Zealand since 1969. Any increase in access to these samples for use in criminal investigations is highly undesirable, as the use of any form of universal DNA databank should not occur without the informed consent of the public and without authorisation from Parliament. We discuss our concerns with universal DNA databanks in Chapter 18.

### Concerns about use of close genetic relative sampling

12.54 Additional concerns arise in relation to sampling a suspect's close genetic relative. This method uses shared DNA information, which raises questions around the collective interests in DNA and whakapapa information. It also raises questions about whether a relative can give valid consent to the use of their DNA for the purposes of inculpating or exculpating another person.

12.55 We also question the reliability of close genetic relative sampling. Depending on the relative sampled, up to 50 per cent of their DNA might be shared (for example, if the relative is a parent or child of the suspect), but it could be less than this (for example, if

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<sup>55</sup> At [9.88].

<sup>56</sup> Marie Shroff "NZ Doctor Series – Privacy Matters (#32)" (25 April 2013) Office of the Privacy Commissioner <[www.privacy.org.nz](http://www.privacy.org.nz)>; and Te Mana Mātāpono Matatapu | Office of the Privacy Commissioner *Guthrie Tests* (Report by the Privacy Commissioner following inquiry into the collection, retention, use and release of newborn metabolic screening test samples, pursuant to section 13(1)(m) of the Privacy Act 1993, September 2003).

<sup>57</sup> Human Tissue Bill 2006 (82-1) (explanatory note) at 2.

<sup>58</sup> Te Mana Mātāpono Matatapu | Office of the Privacy Commissioner *Proposed Amendment No 7 to the Health Information Privacy Code 1994: Information Paper* (29 February 2012) at 4.

the relative is a sibling or a half sibling).<sup>59</sup> In addition, it may be that, unknown to police officers and to the relative concerned, there is no genetic relationship between the relative and the suspect. If that is the case, the results of close genetic relative sampling would be misleading and potentially distressing for the suspect and their family.

## OPTIONS FOR REFORM

- 12.56 In the Issues Paper, we observed that there may be situations where it is appropriate to obtain an indirect sample from a suspect. We identified several options for reform designed to improve certainty, transparency and accountability:<sup>60</sup>
- (a) Amend the Search and Surveillance Act to clarify that biological material may be the subject of a search warrant.
  - (b) Create a search power to enable DNA analysis of discarded items or require a police officer to obtain a court order to arrange for analysis of a discarded item.
  - (c) Require Police to issue a policy statement governing indirect sampling.
  - (d) Impose auditing requirements or reporting obligations on the use of indirect sampling.
- 12.57 We also identified options for reform to address the potential use of blood spot cards in criminal investigations. We noted that the MOU could be enshrined in legislation or the use of blood spot cards to identify suspects could be prohibited.<sup>61</sup>
- 12.58 Finally, in relation to the sampling of close genetic relatives, we identified three options for reform:<sup>62</sup>
- (a) Prohibit the sampling of close genetic relatives.
  - (b) Permit close genetic relative sampling only as a last resort.
  - (c) Require Police to issue a policy statement governing the use of close genetic relative sampling.

## RESULTS OF CONSULTATION

- 12.59 We received 48 submissions that addressed indirect sampling from eight organisations and 40 individuals. Of these:
- (a) thirty-three submissions from seven organisations and 26 individuals considered indirect sampling should only be used in limited circumstances;
  - (b) twelve submissions from one organisation and 11 individuals considered that indirect sampling should never be allowed; and
  - (c) three submissions, all from individuals, had no concerns with Police being able to collect or use indirect samples.

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<sup>59</sup> See Nicole Wetsman "Siblings Can Have Surprisingly Different DNA Ancestry. Here's Why" *National Geographic* (online ed, Washington DC, 23 March 2018); and Chelsea Weidman "Are You Genetically Closer to Your Parents or Siblings?" *Genetics Digest* <[www.geneticsdigest.com](http://www.geneticsdigest.com)>.

<sup>60</sup> Issues Paper at [9.66]–[9.76].

<sup>61</sup> At [9.92]–[9.97].

<sup>62</sup> At [9.108].

## Submissions supporting use of indirect sampling in limited circumstances

- 12.60 As noted above, the majority of submissions considered that indirect sampling should only be used in limited circumstances.<sup>63</sup> These submissions often made one or more of the following points:
- (a) Indirect sampling should be reserved for serious offending including violent and sexual offending.
  - (b) Indirect sampling should be considered only where direct sampling is not available or is not appropriate and where it is necessary to progress the case.
  - (c) Indirect sampling should be subject to independent oversight, with many submitters supporting the need for a court order authorising the collection and use of indirect samples and some supporting the need for auditing to ensure indirect sampling is undertaken appropriately.
- 12.61 The Privacy Commissioner submitted that indirect sampling raises important privacy considerations, as a person has a privacy interest in their biological material, no matter where it is found. The Privacy Commissioner noted that information privacy principle 2 requires that personal information be collected directly from the individual concerned, subject to an exception where this would prejudice the maintenance of the law. The Commissioner noted that accountability for indirect sampling is important, including to verify that this meets the necessary threshold for the relevant privacy principle exception. The decision to undertake indirect sampling and the reasons for it should be recorded for audit purposes.
- 12.62 Te Mana Raraunga | Māori Data Sovereignty Network submitted that, in line with its data sovereignty principles, free, prior and informed consent should be the underlying principle for obtaining samples, directly or indirectly, and that any indirect sampling should be governed by independent judicial oversight, should be used as a last resort only and should be subject to clear statutory guidelines. Te Mana Raraunga also highlighted the collective interests in DNA and derived data for indigenous peoples and submitted that this needs to be taken into account in the indirect collection of samples.
- 12.63 The New Zealand Law Society (NZLS) and the New Zealand Bar Association (endorsing NZLS's submission in its entirety) supported statutory regulation of indirect sampling, submitting this would provide more certainty than the common law approach outlined above, which is common in other jurisdictions (discussed below). In relation to discarded or abandoned objects, NZLS submitted that statutory guidance should address matters such as the nature of the item abandoned, the context and location of the abandonment, whether coercion was used and the purpose for which the sample is sought. NZLS supported the establishment of a statutory search power because indirect sampling involves "a complex interplay of principles, policy, privacy and property issues" that have not been clearly resolved by case law to date. The search power should enable a police officer to arrange for analysis of a discarded object provided certain criteria are met. NZLS submitted that the search power should be

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<sup>63</sup> Including Police, the Privacy Commissioner, Te Mana Raraunga | Māori Data Sovereignty Network, the New Zealand Law Society (NZLS), the New Zealand Bar Association (endorsing NZLS's submission in its entirety), the Auckland District Law Society Criminal Law Committee, the Sensible Sentencing Trust, Sue Petricevic, Gavin English, Associate Professor Nessa Lynch, Professor Carole McCartney, Dr Aaron Amankwaa, Professor Dennis McNeven and 21 other individuals.

contingent on a court order “because indirect searches sidestep the protections built into the direct suspect sampling procedures”. Associate Professor Nessa Lynch made a similar submission, agreeing that the common law position is unclear and supporting a statutory search power to balance the relevant interests involved.

- 12.64 The Auckland District Law Society Criminal Law Committee (ADLS) made a similar submission, noting that indirect sampling is “quite a breach of personal privacy and should be a last resort”. ADLS considered that, in principle, indirect sampling would be justified in certain circumstances, but a court order should be required to authorise an item to be lawfully obtained by Police to be analysed by ESR. ADLS submitted that such a power should be in new DNA legislation with a cross-reference to the Search and Surveillance Act (similar to section 334 of the Resource Management Act 1991). An order should only be obtained where it is established that the item in Police’s possession is directly linked to the suspect and either that Police has requested a consent sample from a suspect and that has been refused or where an individual is a suspect in an ongoing covert operation.
- 12.65 Professor Carole McCartney and Dr Aaron Amankwaa submitted that indirect sampling should be generally prohibited, noting that data protection principles across Europe forbid the collection and retention of personal data without the knowledge and informed consent of the subject. However, they recognised that there may be circumstances where it may be “absolutely necessary” to progress a case. They submitted that any use of indirect sampling should be subject to stringent conditions such as limiting the use of the results of any indirect sampling to intelligence leads only, not allowing profiles to be loaded on a databank and subjected to speculative searching and destroying samples and related information once they have fulfilled their purpose.
- 12.66 Police submitted that indirect sampling is not the preferred method due to the risk of contamination but that there are rare circumstances when it is deemed necessary.

### Submissions opposing indirect sampling

- 12.67 The Public Defence Service (PDS) and 11 individuals opposed any use of indirect sampling. PDS considered that indirect sampling is improper and should not be permitted. Discarding an item should not be viewed as abandoning any reasonable expectation of privacy that a person has in respect of their DNA profile and genetic makeup, given the inherent link between a person’s DNA and their identity. PDS drew a broad analogy with the privilege against self-incrimination, which is designed to protect people whose will may be overborne by intrusive investigatory practices. PDS submitted that “[d]iscarding an item cannot be said to be a freely-willed decision to pass on a DNA profile to the world”. PDS also noted that indirect sampling may offend against the best evidence rule, particularly given the contamination risk. PDS did not believe that a quasi-search warrant process will solve these concerns. It submitted that:
- ... there is a real possibility that indirect sampling and obtaining a search warrant for that purpose will become the first option as opposed to requesting consent from the suspect or applying for a compulsion order, due to the ability to do so covertly.
- 12.68 If indirect sampling were to be permitted, PDS considered it imperative that a quasi-search warrant process is required prior to collection.

12.69 Some individual submitters who opposed indirect sampling objected on due process grounds. These submitters thought that the use of clandestine methods to obtain a DNA sample is unfair and that people should know if they are being investigated. Some also objected to indirect sampling on the basis that it violated a person's privacy and their right to be treated as innocent until proven guilty. A further reason was the unreliability of indirect sampling and the risk that it might be deliberately manipulated.

### Newborn blood spot cards

12.70 We sought submissions on whether a police officer should be able to obtain a suspect's newborn blood spot card rather than obtaining a sample directly from the suspect. We received 10 submissions on this issue.

12.71 Several submitters expressed concerns about Police accessing a suspect's blood spot card. NZLS, PDS, ADLS, Te Mana Raraunga and Nessa Lynch were concerned about the risk of undermining public confidence and participation in the Newborn Metabolic Screening Programme. Members of the Independent Forensic Practitioners Institute (IFPI) also expressed "grave concern at the whole concept" of blood spot cards being stored and possibly made available for purposes beyond the purpose for which they were given. They considered this to be contrary to all ethical principles.

12.72 In addition, ADLS and Te Mana Raraunga also raised the issue of relying on parental consent to the collection of the blood spot card. ADLS noted that, at the point at which a blood spot card might be utilised for investigative purposes, the subject has not given their consent to the collection or storage of that sample and indeed are, for the most part, unlikely to know such records exist. Te Mana Raraunga submitted there should be an even stricter regime around future access and use.

12.73 Several submitters considered that Police should be prohibited from accessing suspects' blood spot cards, including PDS, ADLS and Te Mana Raraunga. ADLS noted that an alternative option could be to notify all individuals whose blood spot cards are retained when they turn 17 and give them an opportunity to request return of that sample. If return is not requested, a police officer could in future be able to apply for access to that sample. However, both ADLS and Sue Petricevic noted that blood spot cards are not collected under the same stringency as DNA samples under the CIBS Act, so they should only be used as a last resort and only for intelligence purposes. Members of IFPI went even further, supporting the destruction of blood spot cards to prevent them being used beyond the purpose for which they were given.

12.74 NZLS, however, supported limited access to suspects' blood spot cards in exceptional circumstances. NZLS considered there may be rare cases where a blood spot card is the only available means of obtaining a suspect's biological material in a case involving serious offending. NZLS supported giving the MOU legislative effect, as this would clarify the circumstances when the use of blood spot cards is permissible. A stringent legislative framework should apply to give a judge the ability to question Police about the justification for using a blood spot card and whether other investigative avenues have been exhausted.

12.75 Nessa Lynch suggested that the current safeguards are acceptable, namely the controls in the MOU, including the requirement for a court order.

- 12.76 The Privacy Commissioner supported consideration of whether the controls in the MOU should become part of a statutory regime. He identified two options. If there is a demonstrable law enforcement need to access blood spot cards in rare circumstances by search warrant, one option would be to create conditions or limits of the issue of these warrants to reflect the intent that they are to be used as a last resort in necessary circumstances. However, the potential use of warrants should be carefully balanced against the potential impact on the screening programme. If there is no adequate policy rationale for accessing blood spot cards by search warrant, an alternative option is to restrict their use for law enforcement purposes.
- 12.77 Police submitted that it did not consider blood spot cards to be an appropriate source to obtain a suspect sample. It noted, however, that there have been two occasions where court orders have been granted to use blood spot cards to compare with DNA profiles generated from homicide victims, subject to the requirements of the MOU.

### **Samples from close genetic relatives**

- 12.78 We received 11 submissions from six organisations and five individuals that commented on whether police officers should be able to obtain DNA samples from a suspect's close genetic relative. Several submitters questioned the scientific reliability of close genetic relative sampling and noted the significant intrusions on individual and collective privacy.
- 12.79 Four submitters did not support close genetic relative sampling. Police noted that this has not been done in Aotearoa New Zealand and that it would be problematic and of limited value. PDS considered that sampling close genetic relatives would give police a "back-door to obtain a close comparison for a suspect's DNA" and that many of the same concerns that arise with familial searching (discussed in Chapter 23) also arise with this kind of sampling.
- 12.80 Te Mana Raraunga and Karaitiana Taiuru also opposed close genetic relative sampling, citing concerns relating to the collective nature of interests in DNA. Karaitiana Taiuru submitted that a proper understanding of DNA from a Māori perspective means it should be treated as collectively owned, not just controlled by an individual. All genetic data contains whakapapa of all tūpuna and is taonga. On that basis, Police should not be able to secure a sample from a family member related to the suspect, as doing so would undermine the rights of Māori to control their own genetic data as well as the status of DNA as taonga. Te Mana Raraunga also noted that the use of DNA from close genetic relatives will have a disproportionate impact on Māori due to their over-representation in the DNA databanks and the differential application of police officers' powers. Te Mana Raraunga further commented that any consent process in relation to samples from relatives would need to have strict, comprehensive processes for collective consent due to the significant collective impacts beyond either the suspect or the donor.
- 12.81 Five submitters supported the use of close genetic relative sampling in some situations. NZLS and ADLS submitted that close genetic relative sampling should only be permitted as a last resort and only in respect of serious offending. Both submitters supported independent approval on a case-by-case basis in the form of a judicial warrant (preferred by NZLS) or a court/oversight body application (preferred by ADLS). Sue Petricevic and Nessa Lynch made similar submissions.

12.82 Two individuals supported close genetic relative sampling with the relative's consent.

## INDIRECT SAMPLING IN COMPARABLE JURISDICTIONS

12.83 We have not identified any comparable jurisdiction that has introduced legislation to regulate or prohibit indirect sampling. However, this has been identified as a regulatory gap in Australia, and the courts in several jurisdictions have had to consider whether police can lawfully obtain and analyse objects discarded by suspects for their DNA.

### Australia

12.84 In Australia, both the Australian Law Reform Commission and the New South Wales Ombudsman have expressed concerns about the unregulated use of “covert DNA sampling” to obtain a suspect's DNA.

12.85 In a 2003 report, the Australian Law Reform Commission considered the “informal collection” of DNA samples in criminal investigations, including the collection of discarded samples, the use of non-forensic investigative powers such as search warrants and requests for stored genetic samples and sampling close genetic relatives.<sup>64</sup> The Commission was concerned that allowing police to obtain a sample outside the specific legislative framework for the direct collection of samples in criminal casework “could significantly undermine not only adherence to the framework but also the procedural and other safeguards existing within it”.<sup>65</sup> The Commission concluded:<sup>66</sup>

The Inquiry considers there is a public interest in ensuring that Part 1D of the Crimes Act is not undermined by the use of informal means to collect genetic samples for law enforcement purposes. The Australian community has a right to expect that the private and sensitive information contained within their genetic samples is used only as specifically permitted by legislation or other court authority.

12.86 The Commission recommended that legislation be amended to provide that, with the exception of crime scene samples, law enforcement officers may collect genetic samples only from the individual concerned, pursuant to the legislative direct sampling regime, or from a stored sample with the consent of the individual concerned (or someone authorised to consent on their behalf) or pursuant to a court order.<sup>67</sup>

12.87 In a 2006 report, the New South Wales Ombudsman observed that obtaining covert DNA samples by retrieving an item discarded by a suspect or by some other investigative procedure (such as a random breath test) was “essentially unregulated”.<sup>68</sup> While a court might find that evidence obtained covertly was improperly obtained and therefore inadmissible, a review of the case law identified several cases where the

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<sup>64</sup> Australian Law Reform Commission *Essentially Yours: The Protection of Human Genetic Information in Australia* (ALRC R96, 2003) at [41.197]–[41.213].

<sup>65</sup> At [41.210].

<sup>66</sup> At [41.212].

<sup>67</sup> Recommendation 41-13 at 1053. The Victorian Parliament Law Reform Committee considered the ALRC's view on ‘informal’ collection but declined to make a similar recommendation on the basis that admissibility rules in criminal proceedings were sufficient to deal with the matter: Victorian Parliament Law Reform Committee *Forensic Sampling and DNA Databases in Criminal Investigations* (2004) at 320.

<sup>68</sup> NSW Ombudsman *DNA sampling and other forensic procedures conducted on suspects and volunteers under the Crimes (Forensic Procedures) Act 2000* (October 2006) at 171–174.



evidence resulting from covert sampling was ruled admissible.<sup>69</sup> The Ombudsman noted that, unless an accused objects to the evidence being admitted, it is unlikely the reasons for taking a covert sample will be reviewed.<sup>70</sup> The Ombudsman recommended that Police keeps and publishes records of the number of covert DNA samples submitted for analysis, the reason why the sample was taken covertly and the results of the analysis.<sup>71</sup> In addition, the Ombudsman recommended that:<sup>72</sup>

Parliament consider regulating the collection of covert samples to include under what circumstances covert samples can be collected, whether a court order should be required, and how profiles obtained from covert samples should be managed on the New South Wales DNA database.

12.88 To date, it appears the recommendations from these reports have not been adopted.

## United Kingdom

12.89 In the United Kingdom, a police officer may apply for a warrant to enter and search premises on similar grounds to those that apply under New Zealand's Search and Surveillance Act.<sup>73</sup> However, a warrant may not be granted for "excluded material", which embraces "human tissue or tissue fluid which has been taken for the purposes of diagnosis or medical treatment and which a person holds in confidence".<sup>74</sup> Therefore, it would not be possible to seize a stored biological sample under a warrant.

12.90 Obtaining DNA material in other circumstances depends on whether there is an unlawful property interference. If no interference with property is required to obtain the sample, its collection is lawful. However, if collection does involve interference with property, the authorisation of a chief constable or police commissioner is required.<sup>75</sup>

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<sup>69</sup> At 171–172, discussing the decisions to admit evidence in *R v White* [2005] NSWSC 60 (where covert DNA samples were taken from six people of interest in a murder investigation in the hope of obtaining a match); *R v Kane* [2004] NSWCCA 78, (2004) 144 A Crim R 496 (where a police officer obtained a cigarette butt discarded on the footpath); *R v Nicola* [2002] NSWCCA 63 (where police retrieved a used cup from a bin in a police station after the suspect had refused to provide a DNA sample); and *R v Daley* [2001] NSWSC 1211 (where police used a supposedly random breath test as a pretext for obtaining a DNA sample from a man suspected of multiple robbery and sexual assault offences).

<sup>70</sup> At 173.

<sup>71</sup> Recommendation 53 at 173.

<sup>72</sup> Recommendation 54 at 173.

<sup>73</sup> Police and Criminal Evidence Act 1984 (UK), s 8.

<sup>74</sup> Section 11(1)(b).

<sup>75</sup> Police Act 1997 (UK), pt 3. The effect of an authorisation is to enable entry and/or interference with property: s 92. An authorisation to interfere with property may be granted pursuant to s 93(2) where the authorising officer believes:

- (a) that it is necessary for the action specified to be taken for the purpose of preventing or detecting serious crime, and
- (b) that the taking of the action is proportionate to what the action seeks to achieve.

An authorising officer means the chief constable or Commissioner of Police of one of the various police forces operating in the UK. It also includes the most senior officers in charge of branches of military police and other law enforcement agencies: s 93(5). Samples acquired in this way are not subject to the further requirements of the Regulation of Investigatory Powers Act 2000 (UK). See Home Office *Covert Surveillance and Property Interference: Revised Code of Practice* (August 2018) at [7.48]. The section of the equivalent Scottish Code is identical in its material respects. See Scottish Government *Covert Surveillance & Property Interference: Code of Practice* (SG/2017/282, December 2017) at [7.32].

## Canada

12.91 In Canada, police powers are constrained by constitutional protections against unreasonable search and seizure by the State.<sup>76</sup> As in Aotearoa New Zealand, this protection is only engaged if the state action intrudes upon the individual's reasonable expectations of privacy. Several cases have considered indirect sampling and have held that there is no reasonable expectation of privacy in relation to discarded objects unless the person was in police custody when the object was discarded.<sup>77</sup> Therefore, police officers are not prevented from obtaining and analysing discarded objects for DNA and may even act to encourage suspects to discard objects so that they can then be collected for DNA analysis.<sup>78</sup>

## Ireland

12.92 In Ireland, a more restrictive approach has been adopted. In *Director of Public Prosecutions v Wilson*, cigarette butts discarded by a suspect in custody were obtained and used to generate a DNA profile.<sup>79</sup> The Supreme Court of Ireland held that, whether a person is in police custody or not, they have the same substantive right to privacy, which encompasses "intimate information about an individual contained in DNA".<sup>80</sup> The Court distinguished between the item discarded and the DNA information on the item, stating that:<sup>81</sup>

We would accept that, while he had relinquished all interest in the physical cigarette butts, Mr. Wilson continued to retain a privacy interest in the information contained in the DNA deposited on them.

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<sup>76</sup> Section 8 of the Canadian Charter of Rights and Freedoms, pt 1 of the Constitution Act 1982, being sch B to the Canada Act 1982 (UK) provides that: "Everyone has the right to be secure against unreasonable search or seizure".

<sup>77</sup> In *R v Stillman* [1997] 1 SCR 607 at [61]–[62], the Supreme Court of Canada held that, while a person will have "a lower expectation of privacy following his or her arrest and subsequent custody", whether a person has "abandoned [an] item and relinquished any privacy interest in [it] will have to be determined on the particular facts presented in each case". In that case, the suspect was being detained at a police station and had refused to provide a DNA sample by consent. His expectation of privacy "was not so low as to permit" a police officer to seize his used facial tissue from the police station rubbish bin and to use that to obtain a DNA profile: at [61]–[62]. A person in police detention "cannot prevent those samples ... being taken", and that was a violation of the suspect's right to be free from unreasonable search and seizure: at [60]. However, subsequent cases have applied *R v Stillman* restrictively. The courts have held that there was no reasonable expectation of privacy in cigarette butts discarded during a police interview (*R v F (DM)* 1999 ABCA 267, (1999) 244 AR 146); in a cigar butt discarded in an ashtray at the entry to a courthouse (*R v Grywacheski* 2004 MBQB 64, (2004) 182 Man R (2d) 278); or in a drink can discarded by the accused outside the courthouse (*R v Marini* [2005] OJ No 6197 (ONSC)).

<sup>78</sup> In *R v Nguyen* (2002) 57 OR (3d) 589 (ONCA), police officers devised a scheme to obtain DNA from the accused by arranging for him to be offered chewing gum while being transported to and from a detention centre for a court appearance. When he disposed of the gum in a rubbish bin, it was retrieved for DNA analysis. While the Ontario Court of Appeal held that there was a breach of s 7 of the Charter of Rights and Freedoms, the Court nonetheless upheld the trial court's finding that the police officers' conduct was "passive" and "not objectionable" and that the choice to discard the gum or not remained in the accused's hands: at [19]–[20]. See also *R v Delaa* 2009 ABCA 179, (2009) 457 AR 118, where police officers staged a fake chewing gum survey to obtain the accused's DNA. The Alberta Court of Appeal upheld the trial Judge's assessment that discarding the gum without coercion in a public place meant that no privacy interest was implicated: at [18]–[22].

<sup>79</sup> *Director of Public Prosecutions v Wilson* [2017] IESC 54.

<sup>80</sup> At [4.22] and [4.31].

<sup>81</sup> At [4.32].

12.93 However, the Court held that this privacy interest is not absolute. It is subject to the “compelling public interest that exists in relation to the investigation of serious crimes”.<sup>82</sup> The Court observed that police officers could have instead opted to take a sample directly from the suspect by force under the statutory suspect sampling regime but that:<sup>83</sup>

It would clearly be contrary to public policy to hold that the Garda were in the circumstances constrained to use force, thereby risking injury to both the suspect and themselves, and that a failure to use force rendered the picking up of the discarded items unlawful.

12.94 In that case, therefore, it was considered a justifiable intrusion into the suspect’s privacy to carry out an analysis of the DNA sample in order to generate a DNA profile for the purpose of discovering whether it matched the profile associated with the crime.<sup>84</sup>

## RECOMMENDATIONS

### Regulating indirect sampling

#### RECOMMENDATION

**R87**

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

12.95 We consider that indirect sampling should be available as an investigative tool but that its use should be regulated in new DNA legislation. This would resolve the current legal uncertainties described above and enable the creation of a clear framework for indirect sampling that aligns with the direct sampling regime.

12.96 We prefer to regulate rather than prohibit indirect sampling as we recognise that there may be situations where it is in the public interest to use indirect sampling methods to obtain a DNA sample and further a criminal investigation. Our concerns identified above regarding the lack of safeguards can be addressed by regulating the practice rather than prohibiting it altogether.

12.97 We also prefer statutory regulation over leaving the legal uncertainties to the courts to resolve over time. In our view, there are clear benefits in clarifying in legislation the extent of police powers to obtain and use a person’s DNA, given the significant privacy interests and tikanga Māori engaged and given the impact on a person’s mana in taking a DNA sample without consent and analysing whakapapa information. We also note the risk that the courts may opt to follow the Canadian approach and determine that there is no reasonable expectation of privacy in relation to objects containing biological material that are discarded in public places (see paragraph 12.91). We have concerns about the Canadian approach and the level of protection it provides.

12.98 We agree with the Privacy Commissioner that a person has a privacy interest in their biological material no matter where it is found. Protecting that interest will become

<sup>82</sup> At [4.23].

<sup>83</sup> At [4.35].

<sup>84</sup> At [4.32].

increasingly important in future as DNA analysis is able to reveal more personal genetic information. Given the nature of biological material, discarding DNA passively and involuntarily while going about ordinary business is unavoidable.<sup>85</sup> We do not agree with some of the suggestions made in the Canadian cases that a suspect should take active steps to protect their privacy, for example, by rinsing a used drink can before disposing of it, retaining cigarette butts rather than disposing of them or refraining from smoking altogether.<sup>86</sup>

## Indirect suspect sampling

### RECOMMENDATIONS

#### 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.

<sup>85</sup> For example, humans constantly shed skin cells which contain DNA, and it is not possible to avoid doing so. Some people also shed skin cells and therefore DNA more than others: Sense About Science and EUROFORGEN *Making Sense of Forensic Genetics: What can DNA tell you about a crime?* (2017) at 18.

<sup>86</sup> See generally *R v Marini* [2005] OJ No 6197 (ONSC); and *R v F (DM)* 1999 ABCA 267, (1999) 244 AR 146.

**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.

- 12.99 We recommend that new DNA legislation includes two new powers:
- (a) The power to search for and seize physical objects or stored samples that are believed to contain or consist of a suspect's biological material for DNA analysis, pursuant to a new DNA search warrant.
  - (b) The power to analyse a DNA sample that has already been obtained from a physical object or stored sample by means other than with a DNA search warrant.
- 12.100 These powers should only be exercised with the prior approval of a High Court or District Court Judge in the form of a DNA search warrant or DNA analysis order. We consider a Judge is best placed to consider, on a case-by-case basis, the different privacy, tikanga and law enforcement considerations that may arise. This should not significantly increase the administrative burden on the courts, given that indirect sampling is a rare practice.
- 12.101 The use of indirect samples and the results of any analysis of those samples should be restricted to the investigation for which the sample was obtained. We do not propose any power to compare DNA profiles from indirect samples to profiles from other crime scenes, with or without a court order. Restricting the use of indirect samples would avoid further unnecessary intrusions on privacy and inconsistency with applicable tikanga Māori and is also appropriate given the increased contamination risk posed by indirect sampling. Because indirect samples are not collected under the same controlled conditions as samples obtained directly from a person, they should not be used for a broader purpose or kept long term. We discuss the storage and retention of casework samples further in Chapter 16.
- 12.102 In Chapter 5, we recommend that new DNA legislation should include comprehensive reporting requirements. This should include reporting on the number of DNA search warrants and DNA analysis orders applied for and granted. This would enable the DNA Oversight Committee to monitor the trends in the use of the new power, including its impact on Māori.
- 12.103 In addition, because indirect samples are less reliable than samples obtained directly, an indirect sample and the results of any analysis of an indirect sample should only be considered an "intelligence lead" and should not be used as evidence in any proceedings against that person. However, if the results of a casework comparison suggest that the suspect may be the source of the crime scene profile, those results should be able to be used to support an application for a suspect compulsion order.

### ***DNA search warrants***

- 12.104 We recommend creating a new, specific search power for the search and seizure of biological material for DNA analysis pursuant to a DNA search warrant. This will clarify police powers in relation to indirect sampling without the need to amend the general search powers under the Search and Surveillance Act, avoiding the risk of unintended consequences for other types of evidential material.

- 12.105 The new powers should be contained within the new DNA legislation rather than the Search and Surveillance Act. While the Search and Surveillance Act consolidates Police powers of search and seizure, it is common for tailored search and seizure powers related to a specific statutory regime to sit within that regime itself.<sup>87</sup> The benefit of this approach is that it would ensure that any applications for a DNA search warrant are considered within the relevant statutory context and with the purpose of the new DNA legislation (recommended in Chapter 3) in mind.
- 12.106 We recommend that a DNA search warrant should only be granted if the Judge is satisfied of three key matters:
- (a) First, 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 at the place or vehicle where the search takes place. This is similar to the current requirement for search warrants under section 6 of the Search and Surveillance Act but is modified so that its application in relation to biological material seized for DNA analysis is clarified.
  - (b) Second, the grounds for obtaining a suspect sample directly from a suspect under the suspect sampling regime (discussed in Chapter 8) are met. These grounds are reflected in R89.b, R89.c and R89.e. Indirect sampling should not be available in order to circumvent these requirements, for example, where there is insufficient evidence against a suspect to satisfy the criteria for obtaining a suspect sample directly.
  - (c) Third, 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. This reflects the test under the information privacy principles of the Privacy Act. This requires a police officer to satisfy the Judge that indirect sampling is justified in the circumstances.<sup>88</sup> This might be the case if indirect sampling is necessary to further the investigation, for example, because the suspect cannot be found, has fled overseas or has died. It might also be satisfied if police officers are conducting a covert operation and requesting a sample from the suspect would prejudice that investigation. This requirement would not be satisfied simply because following the suspect sampling procedure is considered too onerous or because the suspect has refused to provide a suspect sample by consent.
- 12.107 If a warrant is granted and a search produces the object or stored sample sought, it should be able to be submitted by Police to ESR for analysis in the usual way. Police would need to advise ESR, however, that the sample had been obtained indirectly as this will affect how it is to be used once analysed (see paragraph 12.101).

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<sup>87</sup> See, for example, the Human Tissue Act 2008, s 69(2); Animal Welfare Act 1999, s 131; Anti-Money Laundering and Countering Financing of Terrorism Act 2009, s 117; Coroners Act 2006, s 122; Criminal Proceeds (Recovery) Act 2009, ss 101(1) and 102(1); Hazardous Substances and New Organisms Act 1996, s 119; Human Assisted Reproductive Technology Act 2004, s 69(2); Psychoactive Substances Act 2013, s 79; and Resource Management Act 1991, s 334(1).

<sup>88</sup> We note in this regard that, in a recent opinion of the Privacy Commissioner, as discussed in Sam Grover "Hager and Westpac – A bit more context, information and clarification" (22 March 2017) Office of the Privacy Commissioner: Blog <[www.privacy.org.nz](http://www.privacy.org.nz)>, the Privacy Commissioner formed the view that the maintenance of law exception only applies where not seeing the information would prejudice or do some harm to the maintenance of the law. We would envisage a similar interpretation of this test in these circumstances.

### DNA analysis orders

- 12.108 A DNA analysis order would authorise a police officer to arrange for an indirect sample to be analysed. This would be necessary if a police officer has already obtained an indirect sample other than pursuant to a DNA search warrant and wants to arrange for the analysis of that sample. This might include a discarded object collected from a public place or a biological sample or object provided voluntarily by a third party. We do not think it is necessary to interfere with these common law powers. Such action would continue to be governed by section 21 of the Bill of Rights Act and the information privacy principles under the Privacy Act and subject to ongoing development in the courts.
- 12.109 However, judicial authority would be required before such objects or stored samples are analysed. This clarifies the uncertainty regarding the extent of police officers' powers to arrange for DNA analysis under the common law and reflects our view that a person retains a privacy interest in their biological material and the information it contains, no matter where or how it is found. It is an appropriate safeguard, therefore, to require a Judge to authorise the analysis of an indirect sample.
- 12.110 The effect of this recommendation in relation to stored samples is that a court would need to approve the use of a suspect's stored sample, even if the third party has voluntarily provided access to that sample. We consider this is appropriate given that stored samples will usually have been obtained for health purposes, and there are strong policy reasons for ensuring the use of such samples to inculcate a suspect in a criminal investigation is subject to strict safeguards (see paragraphs 12.50–12.53 above).
- 12.111 The grounds for granting a DNA analysis order should mirror the relevant grounds for issuing a DNA search order where appropriate. However, rather than being satisfied that biological material will be found at the place or vehicle searched, the Judge should be satisfied that there are reasonable grounds to believe that the DNA sample already obtained consists of or contains the suspect's biological material. This is important given the risk of contamination inherent in indirect sampling. If indirect sampling is to be authorised, there needs to be a reasonable degree of confidence that the DNA derived from the object or sample will be from the suspect.

### Access to and use of a suspect's blood spot card should be prohibited

#### RECOMMENDATION

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.

12.112 Our recommendations above would enable access to biological samples collected for a different purpose, subject to strict safeguards. However, given the strong social utility of the Newborn Metabolic Screening Programme and the concerns identified above about the potential use of blood spot cards in criminal investigations, we consider that these samples should not be accessed by Police for the purpose of obtaining and using a suspect's blood spot card.

12.113 We therefore make a specific recommendation that the current Memorandum of Understanding between Ministry of Health and Police should prohibit Police access to blood spot cards as they relate to a suspect. There is, however, utility in allowing blood spot card use for other purposes, including for the identification of missing persons or for coronial inquiry, and therefore capacity to request a card for these purposes should be retained.

### Prohibiting close genetic relative sampling

#### RECOMMENDATION

**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.

12.114 We do not consider that DNA samples should ever be obtained from a suspect's close genetic relative for the purpose of inculpating or exculpating that suspect. We do not think this method of sampling is necessary for law enforcement purposes given its unreliability (see paragraph 12.54), and nor is it justified, given the significant intrusion on individual and collective interests in DNA. New DNA legislation should make it clear that this method of sampling is prohibited.

### Indirect elimination sampling

#### RECOMMENDATION

**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.



- 12.115 We recommend that indirect sampling should be available in relation to elimination sampling in limited situations. The elimination sampling regime we recommend in Chapter 9 is based on informed consent. Therefore, elimination samples are ordinarily obtained directly from the donor with their consent. However, if the donor is unable, due to their age or their lack of ability to give informed consent, we recommend that informed consent be given on their behalf by a responsible adult. In these situations, it is possible that the donor might object to or resist the taking of the sample. For example, a very young child or an adult who suffers from dementia might refuse to comply with the sampling procedure.
- 12.116 In these circumstances, we do not consider that the sample should be taken directly from the donor (see R56.b in Chapter 9). The donor is not a suspect in the offending, and the use of force to obtain a sample would be a significant and unjustified intrusion on their bodily integrity. However, we also recognise that obtaining their DNA may be important to the investigation. In these circumstances, therefore, we recommend that police be given a power to obtain an indirect sample with the responsible adult's consent. For example, a used cup might be collected and analysed. Because indirect sampling is based on informed consent and because the donor is not a suspect in the offending, we do not consider court authorisation is necessary.
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## CHAPTER 13

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# Crime scene examinations

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## INTRODUCTION

- 13.1 Crime scene examination is a step in a criminal investigation that assists to establish what occurred and whether an offence has been committed.<sup>1</sup> This chapter considers the authority to collect and analyse DNA samples as part of crime scene examination. For the purposes of this Report, we refer to these DNA samples as crime scene samples.
- 13.2 Crime scene samples are central to the operation of the DNA regime. Without a crime scene sample, a DNA profile cannot be generated for comparison against a suspect's DNA profile or against the DNA databanks.
- 13.3 The CIBS Act does not provide authority for the collection or analysis of crime scene samples. Instead, Police rely on general search powers under the Search and Surveillance Act 2012 and the common law. In this chapter, we consider whether these powers are adequate or whether specific powers to collect and analyse crime scene samples are needed.

## CURRENT LAW AND PRACTICE

### Collecting and analysing crime scene samples

- 13.4 Crime scene samples can comprise any form of human biological material. Blood, semen, hair, saliva and skin cells may all contain DNA. Therefore, as part of a crime scene examination, Police or ESR forensic specialists will swab surfaces or collect objects that may have biological material on them. Once collected, swabs and any objects are sent to ESR for analysis.
- 13.5 At the time of collection, the source of the crime scene sample is unknown. The purpose of collecting a crime scene sample is to identify the source of the sample through DNA analysis (described in Chapter 6). If the crime scene sample is of suitable quality, a DNA profile is generated for casework comparison and databank searching (crime scene profile).
- 13.6 There is no statutory definition of "crime scene" in either the Search and Surveillance Act or the CIBS Act. The CIBS Act does, however, provide a broad description of what could constitute a crime scene sample, for the limited purpose of obtaining a suspect compulsion order (discussed in Chapter 8). The CIBS Act provides that a suspect compulsion order can only be granted if, among other things:<sup>2</sup>

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<sup>1</sup> Ngā Pirihimana o Aotearoa | New Zealand Police "Crime scene examination" in *Police Manual* at 4.

<sup>2</sup> Criminal Investigations (Bodily Samples) Act 1995, ss 16(1)(b) and 23(1)(d).

material reasonably believed to be from, or genetically traceable to, the body of a person who committed the offence has been found or is available—

- (i) at the scene of the offence; or
- (ii) on the victim of the offence; or
- (iii) from within the body or from any thing coming from within the body of the victim of the offence that is reasonably believed to be associated with, or having resulted from, the commission of the offence; or
- (iv) on any thing reasonably believed to have been worn or carried by the victim when the offence was committed; or
- (v) on any person or thing reasonably believed to have been associated with the commission of the offence ...

13.7 This description is understandably limited to crime scene samples believed to be from the offender, because only that would justify obtaining a suspect sample from the suspect for the purposes of casework comparison.<sup>3</sup> However, crime scene samples that are believed to be from the victim or a third party might be of equal significance depending on where they are found (for example, if the victim's DNA is found in the suspect's car or on the suspect's body or clothing).

13.8 The *Police Manual* contains a broad description of "crime scene":<sup>4</sup>

A crime scene is any place an offender has been in relation to the crime. Scenes are likely to include:

- the place where the offence occurred or where the body, property or associated evidence was found
- the body itself in cases of homicide
- all people who are associated with the crime, whether living or dead, may be considered as crime scenes
- any vehicles used by the suspects
- suspects themselves
- the victim's and suspect's home and workplace.

13.9 Based on this description, crime scene samples may be collected from a physical location associated with the crime, including but not limited to the "scene of the crime", or from the body of a person associated with the crime, including suspects, victims and third parties.

### Legal authority to collect crime scene samples

13.10 As noted above, the CIBS Act does not provide authority for collecting crime scene samples. Instead, police officers rely on their general search powers. This includes powers under the Search and Surveillance Act and the common law.<sup>5</sup> The Coroners Act 2006 also includes powers that can be used to collect crime scene samples from deceased bodies.<sup>6</sup>

<sup>3</sup> The process of casework comparison is described in Chapter 17.

<sup>4</sup> Ngā Pirihimana o Aotearoa | New Zealand Police "Crime scene examination" in *Police Manual* at 3.

<sup>5</sup> Police may also have specific statutory powers in other enactments, such as the power to close any road or part of a road if they have reasonable grounds to believe that an offence punishable by 10 or more years' imprisonment has been committed or discovered: Policing Act 2008, s 35.

<sup>6</sup> Coroners Act 2006, s 47.

- 13.11 Below we explore the current law in relation to collection of crime scene samples from physical locations and from people and deceased bodies.

### Collecting crime scene samples from physical locations

- 13.12 The Search and Surveillance Act contains a range of search powers that can be exercised for the collection of “evidential material”, whether that material is collected from a crime scene or somewhere else.<sup>7</sup> The term “evidential material” is defined as follows:<sup>8</sup>

**evidential material**, in relation to an offence or a suspected offence, means evidence of the offence, or any other item, tangible or intangible, of relevance to the investigation of the offence

- 13.13 A search warrant may be issued under the Search and Surveillance Act “in relation to a place, vehicle, or other thing” so long as the issuing officer is satisfied that there are reasonable grounds:<sup>9</sup>

(a) to suspect that an offence specified in the application and punishable by imprisonment has been committed, or is being committed, or will be committed; and

(b) to believe that the search will find evidential material in respect of the offence in or on the place, vehicle, or other thing specified in the application.

- 13.14 The Search and Surveillance Act also contains warrantless powers of entry and search, some of which are relevant to the seizure of evidential material, such as the power of entry to find and avoid loss of evidential material relating to offences punishable by 14 or more years’ imprisonment,<sup>10</sup> entry and search of a vehicle for evidential material relating to offences punishable by 14 or more years’ imprisonment<sup>11</sup> and entry without warrant after arrest when it is believed on reasonable grounds that evidential material will be destroyed.<sup>12</sup>

- 13.15 When exercising a search power under the Search and Surveillance Act, a police officer can seize anything that is the subject of the search or anything else that may be lawfully seized.<sup>13</sup> Section 112 clarifies that this can include items of uncertain status and provides that:

If a person exercising a search power is uncertain whether any item found may lawfully be seized, and it is not reasonably practicable to determine whether that item can be seized at the place or vehicle where the search takes place, the person exercising the search power may remove the item for the purpose of examination or analysis to determine whether it may be lawfully seized.

- 13.16 In addition to exercising search powers, the Search and Surveillance Act also recognises that police officers can undertake a search by consent in circumstances where a search power could be exercised, whether or not a police officer holds the necessary belief or

<sup>7</sup> The Search and Surveillance Act 2012 also contains a range of powers that can be exercised by other enforcement officers, but for the purposes of our review, we focus on the powers under the Search and Surveillance Act 2012 that apply to police officers when investigating criminal offending.

<sup>8</sup> Search and Surveillance Act 2012, s 3 definition of “evidential material”.

<sup>9</sup> Section 6.

<sup>10</sup> Section 15.

<sup>11</sup> Section 17.

<sup>12</sup> Section 83.

<sup>13</sup> Section 110(d).

suspicion.<sup>14</sup> A consent search will be unlawful if it is not for a prescribed purpose (which includes to investigate whether an offence has been committed), if certain advice is not given to the person from whom consent is sought or if consent is given by a person who does not have the authority to give that consent.<sup>15</sup> A person under the age of 14 is unable to consent to a search.<sup>16</sup>

### *Is a crime scene sample “evidential material”?*

13.17 As we identify in Chapter 12, relying on general search powers to collect DNA samples can be problematic. Crime scene samples consist of biological material that contains DNA, and this fits awkwardly into the definition of “evidential material” used in the Search and Surveillance Act and set out at paragraph 13.12 above. This is for two reasons:

- (a) First, biological material is not an “item” in the ordinary sense of the word. While the definition of evidential material includes “intangible items”, the types of intangible items referred to in the Search and Surveillance Act are limited to information on a computer system or data storage device.<sup>17</sup>
- (b) Second, whether biological material is “of relevance” to an investigation cannot be known until *after* DNA analysis has occurred. This issue was identified in the Commission’s 2007 report on search and surveillance powers, where it noted that:<sup>18</sup>

It is the scientific examination that establishes the presence of evidential material relating to the commission of the offence, rather than the search and visual identification by an enforcement officer.

13.18 In its 2007 report, the Commission recommended a specific power both to seize items that may contain forensic material of significant investigative relevance and to undertake subsequent forensic testing of those items.<sup>19</sup> That recommendation was not adopted.

13.19 One possible interpretation of the Search and Surveillance Act is that no specific power to collect and analyse crime scene samples is required because section 112 (set out at paragraph 13.15 above) clarifies that a police officer may remove items for analysis, and this includes samples for DNA analysis.<sup>20</sup> The Commission had recommended a provision similar to section 112 in its 2007 Report, but intended that this would apply in circumstances where there was too much material to be sorted through at the place of the search to identify what material was evidential material that could be seized.<sup>21</sup>

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<sup>14</sup> Section 91.

<sup>15</sup> Sections 92–94.

<sup>16</sup> Section 95.

<sup>17</sup> Sections 110(h), 125(1)(l) and 146. See also s 97, which describes an intangible “thing” that can be searched as an email address or Internet data storage facility.

<sup>18</sup> Te Aka Matua o te Ture | Law Commission *Search and Surveillance Powers* (NZLC R97, 2007) at [3.44].

<sup>19</sup> At [3.58]–[3.61]. The term “forensic material” is used to describe an item that requires scientific analysis or testing to determine whether it contains or is evidential material.

<sup>20</sup> Simon France (ed) *Adams on Criminal Law – Rights and Powers* (online ed, Thomson Reuters) at [SS112.01]. Compare Stephanie Bishop and others *Garrow and Turkington’s Criminal Law in New Zealand* (online ed, LexisNexis) at [SSA112.3].

<sup>21</sup> Te Aka Matua o te Ture | Law Commission *Search and Surveillance Powers* (NZLC R97, 2007) at [6.86]–[6.95]. The Commission identified two instances of where such a power was necessary: at [6.87]. Namely, where the volume or nature of material is such that items relevant to the investigation cannot be identified and seized at the place

- 13.20 One difficulty in relying on section 112 to collect and analyse crime scene samples is that, strictly speaking, “examination or analysis” of a crime scene sample in isolation will not usually determine its relevance to the investigation (unlike, for example, drug testing or forensic analysis of computers). In most cases, a crime scene sample will need to be analysed for DNA and a crime scene profile generated for comparison with DNA profiles from known people, either through the process of casework comparison or databank searching. This comparison exercise is not expressly envisaged in section 112. In addition, section 112 also refers to “items” and so suffers from the same problem identified in 13.17(a) above.
- 13.21 Despite these interpretative issues, the courts have given “evidential material” a wide meaning and have recognised that it can include DNA samples. In *T v R*, the High Court stated that “[p]lainly evidential material can encompass DNA, which is often used as evidence in criminal proceedings”.<sup>22</sup> In *M v R*, the Court of Appeal also considered that search powers under the Search and Surveillance Act would appear to “permit seizure of DNA material”.<sup>23</sup>
- 13.22 This issue was also touched on by the Court of Appeal in *T v R*.<sup>24</sup> One of the appellant’s arguments was that, where the evidence that is the subject of a search warrant requires further testing before it could assist the prosecution case, it cannot qualify as “evidential material” for the purposes of the Search and Surveillance Act.<sup>25</sup> While the Court did not consider that this issue needed to be “conclusively resolved” for the purposes of the appeal, it did make the following observations:<sup>26</sup>

In essence, [the appellant] argues that there is a gap in the law; the [Search and Surveillance Act] allows for the seizure of an item containing relevant DNA material if the item is of relevance to the investigation of the offence, but does not cover the ability to test for or obtain that DNA material.

Without deciding the point, we doubt the correctness of this submission. Evidential material “in relation to an offence or a suspected offence, means evidence of the offence, or any other item, tangible or intangible, of relevance to the investigation of the offence”. We see this as a wide definition. The Supreme Court has held that, in the context of the Evidence Act, relevance is set at a low threshold and is “not an exacting test”.

We therefore have real reservations about an approach that says a search warrant can only be obtained if the item that is the subject of the search warrant must itself be proof of guilt or of relevance to the investigation without any further investigational analysis. It is unlikely Parliament intended such a narrow and artificial interpretation of the

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searched or where an item that may be lawfully seized in terms of the warrant may be connected to or part of other items and cannot practicably be separated at the place being searched. Examples given included removing substantial quantities of documents for sifting to identify those of relevance, removing a computer or other electronic device to facilitate the examination of its contents, taking computer discs so that material of evidential value may be identified and retained and removing a number of items where legitimate articles are intermingled with illicit items to allow for the separation of the two: at [6.90].

<sup>22</sup> *T v R* [2015] NZHC 1588 at [81]. The Court went on to observe that a warrant could have been issued to specify a spleen sample that had been taken during a post-mortem as the “evidential material” to be seized for the purposes of DNA analysis and that this “is a relatively uncontroversial avenue by which s 6 of the [Search and Surveillance Act 2012] could apply”: at [82].

<sup>23</sup> *M (CA84/2019) v R* [2019] NZCA 203 at [29].

<sup>24</sup> *T (CA438/2015) v R* [2016] NZCA 148.

<sup>25</sup> At [62].

<sup>26</sup> At [63]–[65] (citations omitted) citing *Wi v R* [2009] NZSC 121, [2010] 2 NZLR 11 at [8].

deliberately wide definition of evidential material. We also see little merit in [the appellant's] argument that seeks to differentiate, say, the sample of human tissue (such as the spleen) from a DNA profile derived from it.

- 13.23 These cases suggest that the Search and Surveillance Act can accommodate the collection and analysis of crime scene samples regardless of the interpretative difficulties identified above.

### **Collecting crime scene samples from public places**

- 13.24 Police officers may collect crime scene samples from a public place. These situations are not covered by the Search and Surveillance Act because there is no competing property interest at stake. Instead, police officers rely on the common law principle that they can do what any member of the public may lawfully do.<sup>27</sup> However, as we explore in Chapter 12, it is unclear whether the common law also provides a power for a police officer to arrange for a crime scene sample to be analysed for DNA and for a crime scene profile to be generated and compared against a DNA profile from a known person. It is difficult to say that these subsequent steps are actions that “any member of the public can lawfully do in the same circumstances”.<sup>28</sup>

### **Collecting crime scene samples from people**

- 13.25 In some cases, a police officer may want to collect a crime scene sample from the body of a person. However, the law has long recognised that people cannot be searched in the same way as property.<sup>29</sup> Below we address search powers that exist in relation to people under the Search and Surveillance Act. If the Search and Surveillance Act does not apply, the collection of crime scene samples from the body of a person can only occur with the informed consent of the person involved.
- 13.26 The Search and Surveillance Act provides a range of warrantless search powers that relate to searches of a person:
- (a) Section 16 provides the power to search a person in a public place if a police officer has reasonable grounds to believe that person is “in possession of evidential material” relating to an offence punishable by imprisonment for a term of 14 years or more.
  - (b) Section 88 applies on arrest or detention and permits a search if there are reasonable grounds to believe that “there is any thing on or carried by a person” that “is evidential material relating to the offence in respect of which the arrest is made or the person is detained”.
  - (c) Section 119 applies when a person who may exercise a power of arrest is searching a place or vehicle. When doing so, they may search any person found at the place or in the vehicle or who arrives at the place or stops at or enters or tries to enter or get onto the vehicle, if the person conducting the search “has reasonable grounds

<sup>27</sup> See, for example, *Lorigan v R* [2012] NZCA 264, (2012) 25 CRNZ 729 at [26]–[36]; *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305 at [217] per Tipping J; *R v Ngan* [2007] NZSC 105, [2008] 2 NZLR 48 at [46] per Tipping J; and *R v Gardiner* (1997) 15 CRNZ 131 (CA) at 134.

<sup>28</sup> *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305 at [217] per Tipping J.

<sup>29</sup> *T v R* [2015] NZHC 1588 at [99].

to believe that evidential material that is the object of the search is on that person”.<sup>30</sup>

13.27 Section 125 prescribes special rules for searching people and provides that a police officer:<sup>31</sup>

(f) may, in conducting the search, use any equipment or aid to facilitate the search, if it is used in a way that—

(i) involves no or minimal contact; and

(ii) is reasonable in the circumstances; and

...

(j) may seize any thing carried by the person or in the physical possession or immediate control of the person being searched if that thing is the subject of the search or may otherwise be lawfully seized; ...

13.28 Searches must be conducted “with decency and sensitivity” and “in a manner that affords to the person being searched the degree of privacy and dignity that is consistent with achieving the purpose of the search”.<sup>32</sup> The Search and Surveillance Act also requires Police to issue guidelines for conducting strip searches, in recognition of the intrusive nature of such searches.<sup>33</sup> Those guidelines state that a strip search may be justified when a police officer has reasonable grounds to believe that evidential material “may be concealed on the person” and a less intrusive search may not be sufficient to locate the evidential material.<sup>34</sup> The guidelines require authority from a supervisor with the position of sergeant or above to conduct a strip search.

### **Can search powers under the Search and Surveillance Act be used to collect crime scene samples?**

13.29 The Court of Appeal considered the use of these search powers under the Search and Surveillance Act to obtain crime scene samples from a suspect in *M v R*.<sup>35</sup> In that case, a police officer told the appellant he was invoking the Search and Surveillance Act in order to take DNA swabs from the appellant’s fingers and fingernail clippings following an interview in relation to an allegation of sexual violation.<sup>36</sup> However, M was not under arrest at the time, so section 88 did not apply, and the search occurred at a police station, so section 16 did not apply.<sup>37</sup>

13.30 The Court of Appeal observed that, if the appellant had been lawfully detained or arrested, section 125(1)(j) “would appear to permit seizure of DNA material *on* the person of the person detained (e.g. by swab or scraping)”.<sup>38</sup> However, the Search and

<sup>30</sup> Search and Surveillance Act 2012, s 119(1).

<sup>31</sup> Section 125(1).

<sup>32</sup> Section 125(3).

<sup>33</sup> Section 126. A strip search is defined in s 3 of the Act as a search where the person may be required to undress or remove, raise, lower or open any items of clothing so that genitals, buttocks or, in the case of a female, breasts are uncovered or covered only by underclothing.

<sup>34</sup> Ngā Pirihimana o Aotearoa | New Zealand Police *NZ Police guidelines for conducting strip searches* (March 2018) at 1.

<sup>35</sup> *M (CA84/2019) v R* [2019] NZCA 203.

<sup>36</sup> At [10].

<sup>37</sup> At [22] and [28].

<sup>38</sup> At [29] (emphasis in original).



Surveillance Act “does not provide a basis to compel production of a body part such as a fingernail”.<sup>39</sup> The Court explained, in relation to searches of a person:<sup>40</sup>

Materially, s 125(1)(f) requires that the use of any equipment to facilitate the search must involve no or minimal physical contact. That rather suggests fingernails (or parts thereof) are not “things” that can be seized during the search of a person. Bearing in mind both s 21 of the Bill of Rights Act 1990, and the specific regime laid down in the Criminal Investigations (Bodily Samples) Act, we consider explicit language necessary to authorise seizure of samples or parts from the human body itself.

- 13.31 In relation to search warrants, the Court did not construe the Search and Surveillance Act as permitting the search and seizure of samples from a human body where a warrant has been obtained, because a person cannot be a “thing” within the meaning of section 6 of the Search and Surveillance Act:<sup>41</sup>

The permitted search is of a “place, vehicle or other thing”, rather than of a person. The power to seize in s 110(d) is “to seize anything that is the subject of the search or anything else that may be lawfully seized”. That is, it relates to the same trio of inanimate objects the subject of the warrant — or anything else that may be searched by reason of a power vested elsewhere. What that power might be, in relation to seizure of a human body part such as a fingernail, is unclear. The definition of a “search power” includes “every power, conferred under this Act or an enactment set out in column 2 of the Schedule to which that provision is applied, to enter and search, or enter and inspect or examine (without warrant) any place, vehicle or other thing, *or to search a person*”. This rather suggests the ability to search a person is distinct from the ability to issue a search warrant in relation to any place, vehicle or other thing.

- 13.32 The Court’s findings echoed concerns identified by the High Court in *T v R*, where the Judge noted that:<sup>42</sup>

I am not convinced it is open to interpret s 6 of the [Search and Surveillance Act] to include human tissue as a “thing” in light of this tightly regulated regime and the fact that it does not seem to have ever been in the contemplation of Parliament that a human corpse could be searched in the same way as a building, room, ship, box, container or other such item.

- 13.33 In summary, the Court of Appeal confirmed that a police officer can take DNA swabs from a person when exercising a search power under section 88 of the Search and Surveillance Act but that there is no power to require a bodily sample from a person such as fingernail clippings.

- 13.34 The other search powers described at paragraph 13.26 could potentially be interpreted as permitting the collection of a crime scene sample from a person, such as a swab of biological material on a person’s skin or a scraping from under a person’s fingernails. The language of section 16, however, only refers to evidential material “in possession” of a person, which might not be interpreted to include evidential material “on” a person, which is the language used in sections 88 and 119(1). It is also significant that sections 16 and 119(1) are not limited in their application to suspects, unlike section 88, which is limited to people who are arrested or detained under a statutory power of detention. In the absence of case law on sections 16 and 119 in the context of collecting crime scene samples from the body of a person, the law remains unclear.

<sup>39</sup> At [28]. See also [26].

<sup>40</sup> At [29] (citations omitted).

<sup>41</sup> At [30] (emphasis in original and citations omitted).

<sup>42</sup> *T v R* [2015] NZHC 1588 at [96].

## Collecting crime scene samples from the body of a deceased person

- 13.35 Sometimes, a police officer will want to collect crime scene samples from the body of a deceased person, such as a homicide victim. The Coroners Act governs the collection of samples from a deceased in the event of sudden or unexplained death and deaths in special circumstances.<sup>43</sup> Under that Act, a pathologist must carry out a full internal and external examination of the body unless a lesser examination is directed by the coroner<sup>44</sup> and may take a bodily sample if they believe it is necessary for the purposes of a post-mortem that has been directed by the coroner.<sup>45</sup> Before requiring a lesser examination, the coroner must consult with Police about “any evidential matters that may make a full internal and external examination of the body necessary or desirable”.<sup>46</sup>
- 13.36 The courts have confirmed that the Coroners Act “creates a regime for the investigation of death, not the investigation of other crimes”.<sup>47</sup> Therefore, DNA samples cannot be obtained from a deceased body under the Coroners Act except for the purpose of the post-mortem.<sup>48</sup> This meant that, in the case of *T v R*, a blood sample taken from a deceased child to establish that the child was the result of incest was not lawfully taken under the Coroners Act because that purpose was disconnected from the purpose of the post-mortem.<sup>49</sup>

## ISSUES

- 13.37 The collection of crime scene samples is essential to Police being able to use DNA in criminal investigations. Our review of the general search powers available to Police under the Search and Surveillance Act, the Coroners Act and common law suggests the law is developing appropriately despite the interpretative difficulties that arise in trying to apply general powers to biological material.
- 13.38 The lack of specific authorisation for the collection and analysis of crime scene samples does, however, raise issues:
- (a) First, some aspects of the law remain uncertain. The courts have readily accepted that DNA samples can be “evidential material” that can be seized pursuant to the exercise of a search power under the Search and Surveillance Act. However, the ability to conduct further analysis of DNA samples was not “conclusively resolved” by the Court of Appeal in *T v R* (see paragraph 13.22). In addition, there remains uncertainty as to the ability to conduct analysis on crime scene samples that are collected pursuant to Police’s common law powers (see paragraph 13.24). Given the importance of Police being able to conduct DNA analysis of crime scene samples, it

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<sup>43</sup> Coroners Act 2006, s 3.

<sup>44</sup> Section 36(1).

<sup>45</sup> Section 47(1). The term “bodily sample” is defined in s 9 of the Act to mean “a sample or specimen (whether of a body part, or of any other thing that is in or on the body, or of both) taken from the body by a pathologist after the death of the person concerned”. It expressly includes a sample or specimen that is or is part of any thing that is in or on an item of clothing on the body or a weapon or other foreign item or substance that is in or on the body.

<sup>46</sup> Section 36(2)(a).

<sup>47</sup> *T v R* [2015] NZHC 1588 at [39]. See also [45].

<sup>48</sup> At [45]–[54].

<sup>49</sup> At [54]. The High Court’s findings were not disputed on appeal, and that concession was accepted by the Court of Appeal: *T (CA438/2015) v R* [2016] NZCA 148 at [24].

would be desirable to clarify this in legislation rather than await clarification through the courts.

- (b) Second, the current law is inaccessible to the public. The extent to which Police's general search powers extend to the collection of crime scene samples is governed by case law (which is continuing to develop) rather than in legislation. Neither the CIBS Act nor the Search and Surveillance Act provide clear guidance on the authority to collect and analyse DNA samples.
- (c) Third, when a crime scene sample is taken from a person, significant questions of privacy, bodily integrity and tikanga Māori arise, as we explored in the earlier chapters in this part of the Report.<sup>50</sup> There is, however, a lack of clarity around how police officers exercise their powers under the Search and Surveillance Act when collecting crime scene samples from a person. In addition, independent reporting and monitoring of these powers is out of step with our recommendations in Chapter 5 relating to the collection of a suspect's own DNA. The regime for collecting crime scene samples using general search powers is also out of step with the approach in Australia and England and Wales, discussed below.

## CRIME SCENE EXAMINATIONS IN COMPARABLE JURISDICTIONS

13.39 While approaches taken in comparable jurisdictions vary, several jurisdictions have clarified the operation of general search powers as they relate to the collection of crime scene samples.

13.40 In England and Wales, legislation provides for the issuing of search warrants provided there are:<sup>51</sup>

... reasonable grounds for believing ... that there is material on premises ... which is likely to be of substantial value (whether by itself or together with other material) to the investigation of the offence ...

13.41 Implicit in this description is the ability for comparison between material seized and other material.

13.42 Australian Commonwealth legislation provides that a search warrant in relation to premises authorises the person executing the warrant "to take samples of things found at the premises for forensic purposes".<sup>52</sup>

13.43 In Canada, there is a wide range of search powers, but all must be exercised within the confines of section 8 of the Canadian Charter of Rights and Freedoms, which, like section 21 of the New Zealand Bill of Rights Act 1990, affirms the right to be secure against unreasonable search and seizure. The Canadian Criminal Code provides a general power to grant a warrant authorising a peace officer to "use any device or investigative technique or procedure or do anything described in the warrant that would, if not authorized, constitute an unreasonable search or seizure in respect of a

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<sup>50</sup> We consider these considerations are appropriately recognised and provided for in the context of deceased bodies, given the restrictive interpretation of the power to take samples from bodies discussed above. The purpose of the Coroners Act 2006 also recognises the cultural and spiritual needs of family of, and of others who were in a close relationship to, a person who has died: s 3(2)(b). It also provides processes that provide for tikanga Māori, including a process for the return of bodily samples taken from a deceased body: s 50.

<sup>51</sup> Police and Criminal Evidence Act 1984 (UK), s 8(1)(b).

<sup>52</sup> Crimes Act 1914 (Cth), s 3F(1)(b).

person or a person's property".<sup>53</sup> A warrant can be issued if the judge is satisfied that there are reasonable grounds to believe that an offence has been or will be committed and that information concerning the offence will be obtained through the use of the technique, procedure or device. That power does not, however, "permit interference with the bodily integrity of any person".<sup>54</sup>

### Collecting crime scene samples from people

- 13.44 Some comparable jurisdictions provide a prescriptive regime for collecting crime scene samples from the body of a person, recognising the invasive nature of such procedures and the need for transparency and enhanced safeguards.
- 13.45 In England and Wales, legislation draws a distinction between "intimate samples", which include a swab taken from any part of a person's genitals or from a bodily orifice other than the mouth, and "non-intimate samples", which include samples taken from a nail or from under a nail and a swab taken from any part of a person's body other than a part from which a swab taken would be an intimate sample.<sup>55</sup> Intimate samples can only be taken from a person in police detention with their consent,<sup>56</sup> whereas non-intimate samples can be taken without the person's consent if a police officer of or above the rank of inspector authorises it to be taken, having reasonable grounds for suspecting the person of involvement in an imprisonable offence and for believing that the sample will tend to confirm or disprove their involvement.<sup>57</sup>
- 13.46 In Australia, most jurisdictions prescribe a separate regime for the collection of forensic material from a person. This is based on the Commonwealth model. Commonwealth legislation provides for any person to undergo a forensic procedure if informed consent is given.<sup>58</sup> Intimate forensic procedures are defined as including the taking of a sample by swab, washing, vacuum suction, scraping or lifting by tape from the external genital or anal area, the buttocks or, in the case of a female or a transgender person who identifies as a female, the breasts.<sup>59</sup> Non-intimate forensic procedures include the taking of a sample by swab, washing, vacuum suction, scraping or lifting by tape from any other body area.<sup>60</sup> Intimate forensic procedures can only be ordered by a magistrate and only in relation to a suspect.<sup>61</sup> Special procedures provide for interim orders if the magistrate is satisfied that the probative value of evidence obtained as a result of the forensic procedure "is likely to be lost or destroyed if there is delay in carrying out the procedure".<sup>62</sup> Non-intimate forensic procedures can be carried out on an adult in custody by order of a senior police officer.<sup>63</sup>

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<sup>53</sup> Criminal Code RSC 1985 c C-46, s 487.01(1).

<sup>54</sup> Section 487.01(2).

<sup>55</sup> Police and Criminal Evidence Act 1984 (UK), s 65.

<sup>56</sup> Section 62(1).

<sup>57</sup> Section 63(3).

<sup>58</sup> Crimes Act 1914 (Cth), pt 1D.

<sup>59</sup> Section 23WA definition of "intimate forensic procedure".

<sup>60</sup> Section 23WA definition of "intimate forensic procedure".

<sup>61</sup> Section 23WR.

<sup>62</sup> Section 23XA(1)(b). See also s 23XB, which addresses making applications for an interim order.

<sup>63</sup> Section 23WM. This excludes people who lack the ability to consent.

13.47 In contrast to the regimes in England and Wales and Australia, the approach in Canada relies on the common law power of search incidental to arrest. Several cases have considered the extent of this power in relation to DNA samples. In *R v Stillman*, the Supreme Court held that this power did not extend to taking hair samples, buccal swabs or dental impressions from a person while in custody.<sup>64</sup> However, in *R v Saeed*, the Supreme Court held that the power did permit Police to obtain DNA samples by conducting a penile swab.<sup>65</sup> The Court observed that there needed to be reasonable grounds to believe that the procedure would provide evidence of the offence and reasonable steps taken to protect the suspect's privacy.<sup>66</sup> However, this decision has been criticised on the basis that it overlooks the privacy interest inherent in such a search and that such a swab is likely to collect the accused's DNA incidentally.<sup>67</sup>

## OPTIONS FOR REFORM

- 13.48 In the Issues Paper, we identified several options for reform to clarify the law regarding the collection and analysis of crime scene samples, including:<sup>68</sup>
- (a) amending section 112 of the Search and Surveillance Act to clarify that it enables analysis of evidential material “whether by itself or together with other material” to determine its relevance;
  - (b) amending section 112 of the Search and Surveillance Act to widen its scope and clarify that it applies whenever a police officer is exercising common law powers; or
  - (c) enacting a tailored power to arrange for the analysis of crime scene samples, which could be included in new DNA legislation.
- 13.49 We did not seek submissions on the collection of crime scene samples in the Issues Paper. Submissions on the use and retention of crime scene samples are summarised in Chapters 6 and 16.

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<sup>64</sup> *R v Stillman* [1997] 1 SCR 607 at [42]–[43].

<sup>65</sup> *R v Saeed* 2016 SCC 24, [2016] 1 SCR 518.

<sup>66</sup> At [75]–[78].

<sup>67</sup> Megan Ward “*R v Saeed: Bodily Integrity and the Power to Search Incident to Arrest*” (2018) 81 Sask L Rev 87 at 89 as cited in *M (CA84/2019) v R* [2019] NZCA 203 at [36], n 37.

<sup>68</sup> Issues Paper at [5.33] and [5.37]–[5.38].

## RECOMMENDATIONS

### Clarifying existing powers to collect crime scene samples from physical locations

#### RECOMMENDATION

**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).

- 13.50 We recommend clarifying in legislation that, when exercising search powers under the Search and Surveillance Act or collecting evidential material from a public place, police officers have the authority to seize items or material for the purpose of analysis pursuant to new DNA legislation. This should be sufficiently broad to include items that may have biological material on them, such as cigarette butts or clothing, as well as samples or swabs of what appears to be biological material such as blood, semen and other bodily fluids. Crime scene samples and the ability to analyse them are central to the operation of an effective DNA regime. Rather than relying on case law to establish the application of general search powers to crime scene samples, we consider that clarifying the scope of these powers in legislation is more accessible and transparent.
- 13.51 Rather than attempting to redraft the general provisions of the Search and Surveillance Act, including section 112 – which may have unintended consequences for other types of evidential material – our preference is for a stand-alone power, similar to the Commission's recommendation in its 2007 report on search and surveillance powers.<sup>69</sup> This provision could either sit in the Search and Surveillance Act or in new DNA legislation. As we identified in the Issues Paper, one of the drivers of the Search and Surveillance Act was to consolidate and simplify search powers available to Police.<sup>70</sup> However, as we noted above, new DNA legislation may be the more natural fit for authority that governs the collection of crime scene samples. This is particularly true given that, in Chapters 6 and 17, we make recommendations that will govern how crime scene samples can be used in criminal investigations. This is an aspect of the DNA regime that is not currently regulated by the CIBS Act.
- 13.52 This power would be incidental to a police officer exercising a search power under the Search and Surveillance Act in relation to a place, vehicle or thing or when collecting items from a public place. It would not apply to searches of a person, which we address below.<sup>71</sup> In relation to search powers, this means that the conditions for conducting a search (either by way of search warrant or warrantless search) must be satisfied.

<sup>69</sup> Te Aka Matua o te Ture | Law Commission *Search and Surveillance Powers* (NZLC R97, 2007) at [3.58]–[3.61].

<sup>70</sup> Issues Paper at [5.40].

<sup>71</sup> As explained above, in *M (CA84/2019) v R*, the Court of Appeal confirmed that a person cannot be a “thing” that is searched pursuant to a search warrant: *M (CA84/2019) v R* [2019] NZCA 203 at [30].

## Clarifying policy and practice for collection of crime scene samples and other forensic material from people

### RECOMMENDATIONS

**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.

- 13.53 We recommend the development of practice guidelines on the collection of crime scene samples from a person to ensure that collection is consistent with the purpose of the new DNA legislation. As explained above, collecting evidential material from the body of a person involves different considerations to searches of places, vehicles and things.
- 13.54 Currently, police officers have a range of powers that can be used to search a person for any manner of evidential material. There is, however, no clear guidance on how these general search powers should be used to collect forensic evidential material including, but not limited to, biological material for DNA analysis. Collecting this type of material can often be very intrusive, such as taking swabs from intimate parts of a person's body. While the strip search guidelines would apply in those circumstances, those guidelines are not drafted with the express purpose of obtaining biological samples. As noted at paragraph 13.28, they are focused on evidential material that may be concealed on a person, which is not the same as evidential material that may be in an intimate part of a suspect's body by reason of the nature of the offending. This contrasts with the prescriptive regimes in England and Wales and Australia that define the different types of forensic procedures or samples that can be taken from a suspect and in what circumstances.
- 13.55 In Chapter 5, we recommend that comprehensive reporting requirements be included in new DNA legislation. These requirements should include reporting on the collection of crime scene samples. Police already reports on the exercise of its powers under the Search and Surveillance Act, but this is not broken down in terms of the reason for the search or the type of evidential material obtained. For the DNA Oversight Committee to perform its oversight role, Police should keep and make available information in relation to the number of occasions on which a crime scene sample is collected from the body of a person under the Search and Surveillance Act. We would expect Police records to include the person's age and ethnicity and the circumstances in which the sample was taken from them. If the DNA Oversight Committee identified a concern as part of its monitoring of the DNA regime, this could then provide the basis for advising Police or, if need be, the Minister on the need for statutory reform.

13.56 Finally, we also recommend further consideration be given to developing a harmonised regime for the collection of all forms of forensic material from suspects, not just biological material for DNA analysis. We note the regimes in place in Australia and England and Wales provide for a wide range of different forensic procedures and provide different rules depending on the invasive nature of the procedure. We see merit in such an approach. However, we are reluctant to address this broader issue in the context of DNA only.

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## CHAPTER 14

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# Forensic DNA phenotyping

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## INTRODUCTION

- 14.1 Forensic DNA phenotyping (phenotyping) is a technique for ‘mining’ a DNA sample of unknown origin for personal genetic information.<sup>1</sup> It is used to analyse certain genetic markers to predict a person’s physical appearance, such as their hair colour, eye colour or likely ancestry. In the context of criminal investigations, phenotyping can provide Police with intelligence leads when searching for a suspect.
- 14.2 This type of analysis was not available when the CIBS Act came into force and its use is a fundamental departure from the intent of that legislation. As we explain in Chapter 4, the CIBS Act is premised on using DNA technology to identify suspects by generating a DNA profile from a sample of DNA found at a crime scene. That profile can then be compared with other DNA profiles from known people, either through the process of casework comparison or databank searching. When the CIBS Act was enacted, the only available method of DNA profiling was thought to target areas of the human genome that do not reveal information about an individual’s genetic characteristics.<sup>2</sup> As we explain in Chapter 6, this provided the underlying justification for the State obtaining and analysing an individual’s DNA.<sup>3</sup>
- 14.3 In this chapter we consider the issues that arise with phenotyping, particularly when it is used to infer a person’s likely ancestry. This type of phenotyping is known as ancestry inferencing. We then consider whether phenotyping should be used in criminal investigations.

## CURRENT LAW AND PRACTICE

### The CIBS Act

- 14.4 As we explain in Chapter 6, there is little regulation of DNA analysis in the CIBS Act. There is no definition of what constitutes “analysis” and no reference to the DNA analysis techniques that may be used.
- 14.5 Further, as we explain in Chapter 13, the CIBS Act does not provide authority for collecting or analysing crime scene samples. Instead, police officers rely on their general

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<sup>1</sup> “Phenotype” is defined in the Merriam-Webster online dictionary as “the observable characteristics or traits of an organism that are produced by the interaction of the genotype and the environment: the physical expression of one or more genes”: Merriam-Webster “phenotype” <[www.merriam-webster.com](http://www.merriam-webster.com)>.

<sup>2</sup> This method of profiling is short tandem repeat (STR) profiling. It is discussed in Chapter 6.

<sup>3</sup> Victor Toom and others “Approaching ethical, legal and social issues of emerging forensic DNA phenotyping (FDP) technologies comprehensively: Reply to ‘Forensic DNA phenotyping: Predicting human appearance from crime scene material for investigative purposes’ by Manfred Kayser” (2016) 22 FSI Genetics e1 at e3.

search powers. This includes powers under the Search and Surveillance Act and the common law.<sup>4</sup> In that chapter we recommend clarifying in legislation that, when exercising search powers under the Search and Surveillance Act or collecting evidential material from a public place, police officers have the authority to seize items or material for the purpose of analysis pursuant to new DNA legislation.

### Other legal limitations on phenotyping

- 14.6 For the same reasons set out in Chapter 6, to avoid inconsistency with the right to be free from unreasonable search and seizure under section 21 of the New Zealand Bill of Rights Act 1990 (Bill of Rights Act), any analysis of crime scene samples must be reasonable and proportionate to the law enforcement value and public interest in the investigation and prosecution of criminal offending.
- 14.7 In addition, the information privacy principles in the Privacy Act 1993 (and its successor, the Privacy Act 2020) might also have implications for phenotyping. As we explain in Chapter 5, these principles should apply to all DNA samples obtained in the investigation and prosecution of offences and the investigation of missing and unidentified people. One of these principles is that an agency that holds personal information must take steps to ensure personal information it uses or discloses is accurate, up to date, complete, relevant and not misleading.<sup>5</sup>

### Phenotyping in practice

- 14.8 As we discuss in Chapter 6, massively parallel sequencing (MPS) technology has developed rapidly over the last decade and enables the use of a significant number of DNA or genome analysis techniques.<sup>6</sup> One of these techniques is phenotyping.<sup>7</sup>
- 14.9 If investigators have no leads or suspects in a case and a crime scene profile has not matched any profiles on a DNA databank, using phenotyping to predict someone's physical appearance may provide useful intelligence. Currently, phenotyping can be used to predict:

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<sup>4</sup> Police may also have specific statutory powers in other enactments, such as the power to close any road, or part of a road, if they have reasonable grounds to believe that an offence punishable by 10 or more years' imprisonment has been committed or discovered: Policing Act 2008, s 35.

<sup>5</sup> Privacy Act 2020, s 22 (information privacy principle 8). This reflects the language of information privacy principle 8 as expressed in the Privacy Act 2020, which differs slightly from the Privacy Act 1993 in that it includes "or disclose" after the word "use".

<sup>6</sup> Massively parallel sequencing (MPS) technology refers to high-throughput sequencing of multiple pieces of DNA in parallel, rather than sequencing technology used with standard STR profiling which is much slower. It can be used to analyse small amounts of DNA and degraded DNA (which is often the case with crime scene samples), and due to the additional information generated through analysis, it may be useful in enhancing STR profiling. However, most significantly, MPS technology enables a broader range of analysis techniques to be used. See generally National DNA Database Ethics Group (United Kingdom) *Ethical Dimensions of the Application of Next Generation Sequencing Technologies to Criminal Investigations* (March 2017) and discussion of MPS technology in Chapter 6.

<sup>7</sup> Whilst massively parallel sequencing technology can also be used to conduct ancestry inferencing, it is also possible to use Y-STR analysis kits for this purpose, as ancestry inferencing can be conducted on genetic markers for ancestry found on the Y chromosome.

- (a) a person's physical traits, by analysing the genetic markers (single nucleotide polymorphisms or SNPs) thought to be responsible for particular physical traits, known as 'evidentially visible characteristics' (EVCs);<sup>8</sup> and
  - (b) a person's ancestry, by analysing ancestry informative markers.
- 14.10 We discuss EVCs and ancestry inferencing below. It is also possible to analyse DNA to infer health and behavioural information about a person, although this technology is not currently being used in criminal investigations. We discuss this further below.

### *Evidentially visible characteristics*

- 14.11 Currently, hair and eye colour are the two main EVCs targeted for analysis, as there is still limited knowledge about the genetics of other human EVCs.<sup>9</sup> These EVCs are relatively straightforward to determine.<sup>10</sup> However, the intermediate eye colour tones, including grey, green and light brown, are still not able to be determined with the same degree of accuracy as darker or lighter tones.<sup>11</sup>
- 14.12 Some phenotyping analysis kits are also able estimate a person's likely age, by assessing the minor changes and mutations that genes undergo as people age.<sup>12</sup> Analysis kits currently under development target the genetic markers for height, build, facial structure, skin tone and baldness. Some suggest kits that target these EVCs will soon be commercially available,<sup>13</sup> while others consider that certainty regarding these features is still a long way off.<sup>14</sup>
- 14.13 Proponents of phenotyping targeting EVCs argue that it serves as a "biological witness" and has the potential to be more accurate than a human eyewitness,<sup>15</sup> whose erroneous identifications have "sometimes proceeded all the way to the witness box".<sup>16</sup> Yet there is still a high degree of uncertainty as to how genotype (genetic markers) might express

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<sup>8</sup> Occurring at the level of the nucleotides, SNPs are the simplest and most common form of genetic variation, accounting for about 90 per cent of the variations in humans: The Forensics Library "DNA Analysis" (22 August 2017) About Forensics UK <[www.aboutforensics.co.uk](http://www.aboutforensics.co.uk)>. For instance, at certain points on the genome, one person may have a G and another may have a C. Large numbers of SNP panels or SNP arrays can be analysed and variations recorded.

<sup>9</sup> Manfred Kayser "Forensic DNA Phenotyping: Predicting human appearance from crime scene material for investigative purposes" (2015) 18 FSI Genetics 33 at 34.

<sup>10</sup> At 34.

<sup>11</sup> Open letter from Veronika Lipphardt (Professor at University of Freiburg) and others on critical approaches to Forensic DNA Phenotyping and Bio-Geographical Ancestry (8 December 2016).

<sup>12</sup> It has been found, however, that disease can contribute to the genes changing, which makes it harder to correctly estimate age: Manfred Kayser "Forensic DNA Phenotyping: Predicting human appearance from crime scene material for investigative purposes" (2015) 18 FSI Genetics 33 at 44–45.

<sup>13</sup> Peter Gunn, Simon Walsh and Claude Roux "The nucleic acid revolution continues – will forensic biology become forensic molecular biology?" (2014) 5(44) *Frontiers in Genetics* 1 at 3; and "Genes for face shape identified" *The BBC* (online ed, London, 13 September 2012).

<sup>14</sup> Sense About Science and EUROFORGEN *Making Sense of Forensic Genetics: What can DNA tell you about a crime?* (2017) at 32.

<sup>15</sup> Manfred Kayser "Forensic DNA Phenotyping: Predicting human appearance from crime scene material for investigative purposes" (2015) 18 FSI Genetics 33 at 34. Several academics have also said that phenotyping provides "de-contextualized statistical information about a person's most likely appearance": Victor Toom and others "Approaching ethical, legal and social issues of emerging forensic DNA phenotyping (FDP) technologies comprehensively: Reply to 'Forensic DNA phenotyping: Predicting human appearance from crime scene material for investigative purposes' by Manfred Kayser" (2016) 22 FSI Genetics e1 at e2.

<sup>16</sup> Nathan Scudder and others "A law enforcement intelligence framework for use in predictive DNA phenotyping" (2019) 51 *Australian Journal of Forensic Sciences* S255 at S255.

in someone's phenotype (a person's physical appearance). One genetic marker is not responsible for one physical characteristic. Rather, a number of markers are involved. EVCs other than hair and eye colour involve a complex interrelationship of genes and will require considerably more research before scientists are sure which markers are responsible for those characteristics. For instance, for facial structure, scientists have only identified some of the hundreds or possibly thousands of genes involved.<sup>17</sup>

14.14 It is also unclear how reliable commercially available analysis kits are when used with different population groups.<sup>18</sup> The underlying research for these kits was conducted on European population groups.<sup>19</sup> This has implications in Aotearoa New Zealand where insufficient research has been conducted on some of the groups that make up the population.<sup>20</sup>

14.15 This concern was echoed in England and Wales by the National DNA Database Ethics Group (now the Biometrics and Forensics Ethics Group or BFEG):<sup>21</sup>

The error rates of these new technologies have not been fully explored, or not sufficiently within a worldwide population. While we may be able to predict that someone has blue eyes with 91% certainty, if you are Dutch, how does that translate across populations?

14.16 The BFEG cautioned, therefore, that criminal investigators must be aware an offender may look very different from what the analysis results suggest. For example, "he may have blue eyes despite the test 'predicting' brown eyes with 68 per cent likelihood".<sup>22</sup> Even if a prediction of hair or eye colour were 100 per cent accurate, a person's appearance can change, for example, by using dye, removing or losing hair or wearing coloured contact lenses. The possibility of a skewed investigation is a real concern with the use of phenotyping.<sup>23</sup>

14.17 In addition, geneticists are still debating the role that external and environmental factors play in influencing someone's appearance.<sup>24</sup> Some non-genetic factors clearly influence

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<sup>17</sup> Sense About Science and EUROFORGEN *Making Sense of Forensic Genetics: What can DNA tell you about a crime?* (2017) at 32.

<sup>18</sup> National DNA Database Ethics Group (United Kingdom) *Ethical Dimensions of the Application of Next Generation Sequencing Technologies to Criminal Investigations* (March 2017) at 19–20.

<sup>19</sup> See generally Manfred Kayser "Forensic DNA Phenotyping: Predicting human appearance from crime scene material for investigative purposes" (2015) 18 *FSI Genetics* 33.

<sup>20</sup> For instance, the kit that ESR is validating for use in New Zealand targets genetic markers for blue and brown eyes, but the underpinning research was conducted on European populations. This is being addressed in ESR's validation process. See Chapter 7 for discussion on the process of validation.

<sup>21</sup> As they also note, eye colour is one of the best externally visible trait methods available: National DNA Database Ethics Group (United Kingdom) *Ethical Dimensions of the Application of Next Generation Sequencing Technologies to Criminal Investigations* (March 2017) at [8.1].

<sup>22</sup> At [7.3]. Nathan Scudder and others discuss the need to apply an appropriate intelligence doctrine when incorporating phenotyping intelligence into criminal investigations: Nathan Scudder and others "A law enforcement intelligence framework for use in predictive DNA phenotyping" (2019) 51 *Australian Journal of Forensic Sciences* S255 at S257.

<sup>23</sup> Nathan Scudder and others "Massively parallel sequencing and the emergence of forensic genomics: Defining the policy and legal issues for law enforcement" (2018) 58 *Science & Justice* 153 at 154–155.

<sup>24</sup> For example, a *Listener* article cited research from a behavioural geneticist and psychologist, Robert Plomin, whose "polygenic" research confirms the thesis that genes are "exponentially more important than environmental factors in determining what we are like as individuals": Glenda Lewis and Jane Clifton "Gene Pull" *The Listener* (Online ed, Auckland, 22 February 2020) at 14. However, at 16–18 of the article, Professor Richie Poulton is cited, too. Professor

outcomes, such as the role of nutrition in determining someone's height, but with other factors, the correlation is not so clear.<sup>25</sup>

- 14.18 Despite these limitations, some companies market phenotyping services to criminal investigators, including the ability to produce identikit-style images or a “photofit” derived from genetic information,<sup>26</sup> although it is conceded that such images are only meant to be a general snapshot of what a person may look like and not a photo-realistic image.<sup>27</sup> Phenotyping has also been used in Hong Kong “to generate billboard images of suspected litter-bugs”.<sup>28</sup>
- 14.19 Some academics argue that “the probable inaccuracies of these images are outweighed by their deterrence value”, and that phenotyping generally has the potential to deter criminals.<sup>29</sup> Others, however, point out that photofit technology has not yet been scientifically validated, which would require published studies of its methods and effectiveness in peer-reviewed journals.<sup>30</sup> As one Canadian biological anthropologist noted, the technology used to create these images “simply isn’t there”.<sup>31</sup> In his view, using phenotyping in this way presents a twofold risk:<sup>32</sup>

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Richie Poulton, who heads the Otago Longitudinal study, says there is conflicting scientific evidence and that, whilst genes matter, they are not deterministic.

<sup>25</sup> Sense About Science and EUROFORGEN *Making Sense of Forensic Genetics: What can DNA tell you about a crime?* (2017) at 30.

<sup>26</sup> Parabon Nanolabs, a United States-based company, says of its product “Snapshot”:

Snapshot is ideal for generating investigative leads, narrowing suspect lists, and solving human remains cases ... Starting with extracted DNA or biological evidence from your case, we will ... perform a genetic genealogy screening ... [W]e can optionally produce a detailed phenotyping report and composite sketch ... Armed with this scientifically objective information, you can conduct your investigation more efficiently and close cases more quickly.

It also provides a “forensic art enhancement service” that can depict how a person might look at different ages or can generate a digital facial reconstruction: Parabon Nanolabs “Parabon Snapshot Advanced DNA Analysis: Genetic Genealogy, Phenotyping, Ancestry and Kinship Analysis” <<http://snapshot.parabon-nanolabs.com>>.

<sup>27</sup> Sarah Rieger “Police sketch created with DNA technology is potentially useless or even misleading, says scientist” *CBC News* (online ed, Toronto, 22 February 2018). The article notes that the Parabon spokesperson went on to say:

Once the program has created a shape of the face, forensic artists then fill in the eyes[,] nose, mouth and other features as best as possible ... One real challenge [the artists] face ... is knowing how old the person is ... [A]rtists can work to age [the image] if needed, or make them look younger.

<sup>28</sup> Nathan Scudder and others “Massively parallel sequencing and the emergence of forensic genomics: Defining the policy and legal issues for law enforcement” (2018) 58 *Science & Justice* 153 at 155.

<sup>29</sup> At 155.

<sup>30</sup> Sense About Science and EUROFORGEN *Making Sense of Forensic Genetics: What can DNA tell you about a crime?* (2017) at 32; and Sarah Rieger “Canada still isn’t using a leading forensic technique to solve crimes — here’s why” *CBC News* (online ed, Toronto, 7 December 2018). As we discuss in Chapter 7, scientific validation is essential with any new scientific technique.

<sup>31</sup> See Sarah Rieger “Police sketch created with DNA technology is potentially useless or even misleading, says scientist” *CBC News* (online ed, Toronto, 22 February 2018). Canadian police used Parabon’s Snapshot service in late December 2017 or early 2018 in an attempt to identify the mother of an abandoned baby. The publication of this image was criticised by Benedikt Hallgrímsson, a biological anthropologist and evolutionary biologist who studies the significance of phenotypic variation and variability at the University of Calgary. He commented that the genetic markers that determine facial features are “extraordinarily complex”. He would estimate that scientists could predict skin colour “with 25 per cent accuracy” and that the “precision of predicting a person’s face shape would likely be much lower”: Sarah Rieger “Canada still isn’t using a leading forensic technique to solve crimes — here’s why” *CBC News* (online ed, Toronto, 7 December 2018).

<sup>32</sup> Sarah Rieger “Police sketch created with DNA technology is potentially useless or even misleading, says scientist” *CBC News* (online ed, Toronto, 22 February 2018). In this same article, Benedikt Hallgrímsson noted an additional concern – that use of phenotyping might undercut faith in science:

It’s dangerous to oversell science. It’s dangerous to tell people that science can do something that it can’t do, because when it becomes clear that it’s not capable of doing that then it undercuts faith in science.

First, the image might lead to someone being falsely accused of a crime. Second, the actual suspect might not look anything like the picture and could be overlooked.

- 14.20 Another academic has expressed concern at the possible stigmatising effect such photofits may have on population groups:<sup>33</sup>

The idea that a person's face is reconstructed from DNA traces alone, and the result publicly displayed as a 'photo-fit' to aid police investigations is disconcerting. DNA analysis may be able to predict but cannot determine the actual likeness of a person. However, some may take such images at face value. This could lead to endangering or stigmatising groups of people who may be considered to look similar to such DNA-generated images, even though they are not remotely connected to a crime, or may be innocent.

- 14.21 The BFEG has also noted the dangers of using photofits of potential suspects that may be erroneous. It commented that “[s]uch an approach, currently based on very limited information ... can be very dangerous, although the separate predictions can be useful intelligence”.<sup>34</sup>

### Ancestry inferencing

- 14.22 Ancestry inferencing involves analysing ancestry informative markers (also known as “biogeographic markers”) in order to generate a profile. Some ancestry markers are found on the Y chromosome and some are located on other parts of the genome.<sup>35</sup> We refer to this process as ancestry inferencing.<sup>36</sup> It is also known as “biogeographic ancestry inferencing” or “ethnicity (or ethnic) inferencing”. However, ethnicity is now widely accepted as being a social construct, not a biological one that can be genetically inferred. As Statistics New Zealand notes:<sup>37</sup>

Ethnicity is a measure of cultural affiliation. It is not a measure of race, ancestry, nationality, or citizenship. Ethnicity is self-perceived and people can belong to more than one ethnic group.

- 14.23 Therefore, the most an ancestry inference can do is provide an indicator of the geographical region or regions of a person's ancestors.
- 14.24 Proponents of ancestry inferencing suggest it may assist investigators to prioritise leads and narrow down a suspect pool.<sup>38</sup> Some academics argue that ancestry inferencing

<sup>33</sup> Sense About Science and EUROFORGEN *Making Sense of Forensic Genetics: What can DNA tell you about a crime?* (2017) at 33.

<sup>34</sup> National DNA Database Ethics Group (United Kingdom) *Ethical Dimensions of the Application of Next Generation Sequencing Technologies to Criminal Investigations* (March 2017) at 18.

<sup>35</sup> This analysis can be conducted using massively parallel sequencing technology to target the Y chromosome or other areas of the genome where there are ancestry markers. Alternatively, analysis kits that target the Y chromosome can be used. We understand that the markers on the Y chromosome targeted for ancestry inferencing are different to those markers targeted when Y-STR profiling is conducted to distinguish male DNA in the presence of overwhelming female DNA (usually in sexual offending cases). Y-STR profiling is discussed in Chapter 6.

<sup>36</sup> In the agreement between Police and ESR, this technique is categorised as an “advanced analysis technique” and is referred to as “predictive DNA analysis (YSTR Ethnicity Inference)”: *Forensic Science Services Agreement between the New Zealand Police and the Institute of Environmental Science and Research Limited 2018–2021* (2018).

<sup>37</sup> Tauranga Aotearoa | Stats NZ “Ethnicity” <[www.stats.govt.nz](http://www.stats.govt.nz)>. See also Sense About Science and EUROFORGEN *Making Sense of Forensic Genetics: What can DNA tell you about a crime?* (2017) at 34.

<sup>38</sup> Nathan Scudder and others “Massively parallel sequencing and the emergence of forensic genomics: Defining the policy and legal issues for law enforcement” (2018) 58 *Science & Justice* 153 at 155; and Manfred Kayser “Forensic

(and phenotyping more broadly) could be used to challenge racial bias.<sup>39</sup> For example, it has been reported that:<sup>40</sup>

The law in the Netherlands was changed in 2003 to allow forensic DNA samples to be analysed for biogeographical origin as well as for physical characteristics such as colouring. This was because of a 1999 rape and murder for which suspicion had fallen on a local home for asylum seekers. To restore public order, a court had ordered the forensic sample to be tested — it showed that the attacker was of north European origin, not from the Middle East as most of the refugees were. The murderer was eventually found to be a local farmer.

- 14.25 However, the results of ancestry inferencing can also be misleading.<sup>41</sup> One reason is that ancestry inferencing involves an inference or prediction based on the results of the analysis. As noted by the Nuffield Council: “Any ethnic inference may be more or less specific, but it is unlikely ever to be unambiguous. Global mobility and ethnic mixing limit the value of such inferences.”<sup>42</sup> More recently, the BFEG has noted:<sup>43</sup>

... already some companies are producing ‘heat maps’ of likely ancestry that may be used to drive an inappropriate investigation, and revealing this descriptive information to the public in a high profile case is likely to undermine the usefulness of the approach in the future if revealed to be wrong.

- 14.26 A further risk is that investigators may conflate a given ancestry with the physical characteristics commonly associated with an ethnic group. This may lead them down a wrong track, wasting time and resource and may result in the public not trusting such techniques in future.<sup>44</sup>

- 14.27 There is also a risk that ancestry inferencing could discriminate against and stigmatise “ethnic minority populations”. As one recent report noted:<sup>45</sup>

These risks relate to the context of structural racism, which does not require intent but is rather embodied by, and inscribed in, our societal and political institutions and shared practices. Discrimination could happen at a number of levels, including police misinterpretations of [phenotyping] findings which could lead to racial profiling; if [phenotyping] findings are released to the public it could upset community and social relations; bias inherent in the algorithms and data sets used in [phenotyping]; and in leading to reification of the mistaken belief of a biological basis of race, which might, in

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DNA Phenotyping: Predicting human appearance from crime scene material for investigative purposes” (2015) 18 FSI Genetics 33.

<sup>39</sup> Particularly Jennifer K Wagner “DNA, Racial Disparities, and Biases in Criminal Justice: Searching for Solutions” (2017) 27 Alb LJ Sci and Tech 95. See also Debra Wilson *Genetics, Crime and Justice* (Edward Elgar Publishing, Cheltenham (UK), 2015) at 64–65.

<sup>40</sup> As noted in Editorial “Forensics: Germany considers wider use of DNA evidence in criminal cases” *Nature* (online ed, London, 30 March 2017) at 590.

<sup>41</sup> This was the situation in Operation Minstead, which ran from 1992–2009 and sought to identify a serial burglar and rapist. Sense About Science and EUROFORGEN *Making Sense of Forensic Genetics: What can DNA tell you about a crime?* (2017) at 34 notes that London’s Metropolitan Police used a USA-based, DNA testing company to:

... help them establish his ancestral origins ... The company used unspecified ancestry and pigmentation markers to predict that the assailant came from Southern Caribbean regions, so investigators flew to Trinidad. When the perpetrator was finally caught, it turned out he was from Jamaica. Biogeographic ancestry tests can only narrow down to broad geographic regions not specific countries.

<sup>42</sup> Nuffield Council on Bioethics *The forensic use of bioinformation: ethical issues* (September 2007) at [2.17].

<sup>43</sup> National DNA Database Ethics Group (United Kingdom) *Ethical Dimensions of the Application of Next Generation Sequencing Technologies to Criminal Investigations* (March 2017) at 20.

<sup>44</sup> Nathan Scudder and others “Massively parallel sequencing and the emergence of forensic genomics: Defining the policy and legal issues for law enforcement” (2018) 58 Science & Justice 153 at 155.

<sup>45</sup> Gabrielle Samuel and Barbara Prainsack *Report on recommendations to address the ethical and societal challenges of FDP* (VISAGE, May 2020) at 15–16.

turn, deepen the social divide between different groups or individuals, and lead to stigmatisation.

### *Phenotyping in Aotearoa New Zealand*

- 14.28 Only ancestry inferencing is currently available in Aotearoa New Zealand. Since 2007, Police has asked ESR to provide an ancestry inference in 12 criminal investigations.<sup>46</sup>
- 14.29 The ancestry inferencing process involves comparing the profile generated from the analysis on the Y chromosome to New Zealand Y-STR population databanks and, if necessary, international Y-STR population databanks, in order to identify the DNA source's likely ancestry.<sup>47</sup> This is based on how many times the exact same Y-STR profile as that obtained from the analysis appears within each population databank. The forensic scientist reports this information back to investigators and offers their opinion as to whether the results are indicative of the DNA source having a particular ancestry.
- 14.30 Police policy is that the use of ancestry inferencing is reserved for serious criminal cases where there are no other investigative leads.<sup>48</sup> Any request to ESR for an ancestry inference must be pre-approved by a Police District Crime Manager. Police is currently finalising a written protocol confirming this policy. It will be similar to that in place for familial searching.
- 14.31 In the meantime, Police and ESR have collaborated to prepare an information sheet for investigators that notes what the technique involves and its objective. It should be noted that Police uses the term "ethnicity inferencing":<sup>49</sup>
- The technique involves the comparison of DNA profiling results from a sample of interest such as a crime stain believed to have originated from an unknown offender, with profiles held within population DNA databases. The objective is to determine whether an ethnicity can be attributed to the individual who is the source of the DNA in the crime stain of interest with the intention this may be useful intelligence for Police.
- 14.32 The information sheet then sets out the technique's limitations, stressing caution in the use of results:<sup>50</sup>
- ... as testing infers ethnicity based on the ancestral line of the male DNA and not on physical features of the individual, it's possible that the results may actually provide misinformation. This is because the physical appearance of the person of interest may be quite different to his male ancestors. The use of ethnic inference testing and the application of any results must therefore be carefully considered.
- 14.33 Looking to the future, ESR is currently conducting validation of an analysis kit that uses MPS technology.<sup>51</sup> This kit targets the same loci currently used for generating STR profiles for casework comparisons and databank searching, but also the genetic

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<sup>46</sup> See the Issues Paper at [6.18]–[6.20] for a discussion of 11 of these cases.

<sup>47</sup> Y-STR population databanks contain anonymised Y-STR profiles from volunteers who have also provided information about their ancestry. See Chapter 7 for discussion of anonymised population datasets.

<sup>48</sup> The form notes that testing can also be considered for body identifications and where an inferred ethnicity may assist with the identification of human remains.

<sup>49</sup> Ngā Pirihimana o Aotearoa | New Zealand Police and ESR "Ethnic Inference Information Sheet" (20 May 2016).

<sup>50</sup> Ngā Pirihimana o Aotearoa | New Zealand Police and ESR "Ethnic Inference Information Sheet" (20 May 2016).

<sup>51</sup> Validation is of the MiSeq kit developed by the company Illumina. See ESR *Forensic: Crime Science and Intelligence 2016–2017* (2017) at 7.



markers for hair and eye colour and the markers for ancestry. The validation testing is to ensure that the results claimed by the manufacturers can be reproduced using samples from Aotearoa New Zealand population groups. ESR advises that, after validation and if accepted for use by Police, this kit could be in use within one or two years.<sup>52</sup> In a recent Statement of Corporate Intent, ESR noted its intent to explore opportunities in MPS technologies in order to:<sup>53</sup>

... maintain our position as a world leader in forensic DNA analysis, including the prediction of physical characteristics of alleged offenders based on the DNA sequences obtained from case samples, leading to faster identification of alleged offenders.

## ISSUES

- 14.34 In our view, Police’s current use of ancestry inferencing, and its potential future use of other forms of phenotyping, raises several concerns:
- (a) phenotyping constitutes a significant privacy intrusion;
  - (b) phenotyping, and ancestry inferencing in particular, risks having a disproportionate impact on Māori; and
  - (c) the use of phenotyping lacks transparency and accountability.

### Privacy implications of phenotyping

- 14.35 We are concerned that some uses of phenotyping may constitute an unreasonable intrusion of privacy, inconsistent with the right to be secure against unreasonable search and seizure, affirmed in section 21 of the Bill of Rights Act.
- 14.36 Phenotyping is inherently intrusive of privacy because its aim is to reveal information about a person’s genetic characteristics. As noted above, this is a fundamental departure from the original justification for DNA profiling on which the CIBS Act and other DNA profiling regimes were based. As the Australian Law Reform Commission (ALRC) has noted:<sup>54</sup>

While information about an unknown offender’s eye or hair colour or other features might be useful in identifying that individual, this form of analysis represents a fundamentally different use of the DNA molecule from that contemplated when the Model Bill was being developed.

- 14.37 Proponents justify phenotyping as “an extension of the way in which a biological gender informative marker has been used for nearly 20 years”.<sup>55</sup> Manfred Kayser argues that

<sup>52</sup> As noted in Chapter 6, ESR advises that, initially at least, massively parallel sequencing (MPS) analysis kits would not replace all STR profiling kits due to the cost and length of time analysis takes – around two to three days compared to half a day to conduct STR analysis. MPS analysis is slower due to analysing a much greater amount of information. Instead, this technique would be used to generate DNA profiles for casework comparisons as the extra information MPS kits produce at each STR would be helpful in distinguishing between profiles. In time, if it were to become more efficient to use the MPS kit to generate profiles for databank searching purposes, ESR advises this may change. Phenotyping information (including ancestry information) would be automatically generated by the MPS kit whilst also generating the DNA profile information for casework comparisons. Although ESR has advised it sees no particular benefit in having this information (as it would not assist in distinguishing between profiles), the information would be generated nonetheless.

<sup>53</sup> ESR *Statement of Corporate Intent 2019–2024* (2019) at 17.

<sup>54</sup> Australian Law Reform Commission *Essentially Yours: The Protection of Human Genetic Information in Australia* (ALRC R96, 2003) at [41.108].

<sup>55</sup> Nathan Scudder and others “Massively parallel sequencing and the emergence of forensic genomics: Defining the policy and legal issues for law enforcement” (2018) 58 *Science & Justice* 153 at 157.

EVCs “in principle cannot be considered private data” as appearance traits are already known to anyone who has ever seen the person and cannot therefore be intrusive of privacy.<sup>56</sup> However, this view does not take into account that markers currently thought to be predictive of an EVC may, in future, be found to reveal more sensitive information such as health information.<sup>57</sup> There is also a risk that, left unregulated, phenotyping will evolve over time so that “[i]ndividual laboratories may have little control over additional markers added by the instrument manufacturers in future”.<sup>58</sup> This may include health markers.<sup>59</sup>

- 14.38 In our view, obtaining health information would be a significant and unreasonable intrusion on privacy with the potential for major repercussions. For instance, if analysis revealed a person’s tendency towards a mental illness or susceptibility towards a particular disease, it “may undermine an individual’s personal and professional relationships or affect one’s ability to obtain life or health insurance”.<sup>60</sup> The privacy intrusion could also have an effect more broadly on genetic relatives. As the ALRC has said:<sup>61</sup>

If sensitive information as to a suspect, offender or volunteer’s behavioural characteristics were to be obtained from a DNA sample and inserted into the DNA database system—for example, where the individual has a predisposition to a particular medical or mental condition—this could undermine the individual’s own (and his or her genetic relatives’) privacy in a way that is not directly necessary for the purpose of physical identification.

- 14.39 Some academics speculate that phenotyping may not stop with disease-related markers but may include “DNA-based prediction of behavioural traits”.<sup>62</sup> Analysing samples of known individuals may suggest a person has a predisposition to criminality, and analysing samples from crime scenes could be used in behavioural profiling of offenders.<sup>63</sup> The BFEG noted the risks in this regard:<sup>64</sup>

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<sup>56</sup> Manfred Kayser “Forensic DNA Phenotyping: Predicting human appearance from crime scene material for investigative purposes” (2015) 18 FSI Genetics 33 at 45. However, Kayser considers that this is different for ancestry inferencing: “If indeed [ancestry is] not externally visible, privacy issues including the right-not-to-know can apply for genetic ancestry testing”: at 45.

<sup>57</sup> As Scudder and others also note, it is quite conceivable that markers now considered to be only capable of predicting ancestry, for instance, may “later be found to be health informative”: Nathan Scudder and others “Forensic DNA phenotyping: Developing a model privacy impact assessment” (2018) 34 FSI Genetics 222 at 226.

<sup>58</sup> At 227.

<sup>59</sup> Targeting disease markers for analysis may be considered potentially useful as “[c]ommon and rare SNPs have been shown to underpin many diseases”: National DNA Database Ethics Group (United Kingdom) *Ethical Dimensions of the Application of Next Generation Sequencing Technologies to Criminal Investigations* (March 2017) at 12.

<sup>60</sup> Erin E Murphy *Inside the Cell: The Dark Side of Forensic DNA* (Nation Books, New York, 2015) at 29. In addition, if the health information was previously unknown to the individual, it would undermine an individual’s right not to know about that health condition as set out in the *Universal Declaration on the Human Genome and Human Rights* UNESDOC 29/C Resolutions (11 November 1997). Article 5(c) of the Declaration affirms the “right of each individual to decide whether or not to be informed of the results of genetic examination and the resulting consequences should be respected”.

<sup>61</sup> Australian Law Reform Commission *Essentially Yours: The Protection of Human Genetic Information in Australia* (ALRC R96, 2003) at [41.109].

<sup>62</sup> Nathan Scudder and others “Forensic DNA phenotyping: Developing a model privacy impact assessment” (2018) 34 FSI Genetics 222 at 224.

<sup>63</sup> At 224.

If SNP data correlating with known (not externally visible) phenotypes are held in national databases, then governments could query the databases to assess if associations for aggressive behaviour or criminally relevant traits or phenotypes are evident. When research in this field advances, profiles of ‘risky’ individuals, even in the absence of (re-) offending, could then be retained for longer periods than those of others. Similarly, if SNP data were divulged to third parties (such as employers or insurance companies), discrimination on the basis of supposed genetic risks could ensue.

- 14.40 The privacy risks of phenotyping are exacerbated if personal genetic information is aggregated in a databank or index. Additionally, digital storage also “renders the information usable and losable for different purposes and by different actors”.<sup>65</sup> For instance, there would be security concerns, and the information may also constitute an attractive dataset for further research on certain genetic markers, such as the behavioural markers described above.
- 14.41 A further challenge is that DNA recovered from a crime scene may not be that of the offender but that of an unrelated third party.<sup>66</sup> This is a problem for all forms of crime scene DNA analysis, including phenotyping.<sup>67</sup>
- 14.42 A particular issue with ancestry inferencing is that it could result in someone finding that their ancestry markers do not match “their beliefs, based on their own cultural or familial self-identity”<sup>68</sup> or may reveal or cast doubt on family connections and relatedness. This may affect not only an individual but have an impact on the identity of a whole family, its connectedness and relationships. This constitutes a significant invasion of individual and collective privacy and has implications in terms of tikanga associated with whakapapa, such as kaitiakitanga, whanaungatanga and manaakitanga.

### Disproportionate impact on Māori

- 14.43 In the Issues Paper, we concluded that Police’s current policy and use of ancestry inferencing probably does not amount to unjustified discrimination under the Bill of Rights Act. Even if its use does disadvantage one group, this is demonstrably justified when only used to investigate serious crimes in accordance with Police policy.<sup>69</sup>

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<sup>64</sup> National DNA Database Ethics Group (United Kingdom) *Ethical Dimensions of the Application of Next Generation Sequencing Technologies to Criminal Investigations* (March 2017) at 16–17.

<sup>65</sup> Victor Toom and others “Approaching ethical, legal and social issues of emerging forensic DNA phenotyping (FDP) technologies comprehensively: Reply to ‘Forensic DNA phenotyping: Predicting human appearance from crime scene material for investigative purposes’ by Manfred Kayser” (2016) 22 FSI Genetics e1 at e1.

<sup>66</sup> As described in Chapter 6, due to the increasing sensitivity of DNA analysis, a DNA profile can be generated from even a few cells found at a crime scene.

<sup>67</sup> Nathan Scudder and others “Forensic DNA phenotyping: Developing a model privacy impact assessment” (2018) 34 FSI Genetics 222 at 227.

<sup>68</sup> At 222. See also Nathan Scudder and others “Massively parallel sequencing and the emergence of forensic genomics: Defining the policy and legal issues for law enforcement” (2018) 58 Science & Justice 153 at 156.

<sup>69</sup> See discussion in ch 6 of the Issues Paper. For ancestry inferencing to be an unjustified limitation on the right to be free from discrimination on the grounds of race or ethnic origin under s 19(1) of the New Zealand Bill of Rights Act 1990 it would need to meet the following tests:

- (a) It must involve differential treatment, in that it creates a distinction (in the sense of treating a group of people differently from a comparator group) based on a prohibited ground;
- (b) the distinction must cause a material disadvantage; and
- (c) if there is a limitation on the right to be free from discrimination, by virtue of s 5 of the New Zealand Bill of Rights Act 1990, it must be “demonstrably justified in a free and democratic society” and “prescribed by law”.

- 14.44 Nonetheless, in practice, ancestry inferencing is likely to have disproportionate impact on Māori and other minority groups. The United States' National Council of Research described this aspect of discrimination against minority groups as “differential effect discrimination” which it defined as “treatment on the basis of inadequately justified factors other than race that disadvantages a racial group”.<sup>70</sup> With ancestry inferencing, the differential effect or disproportionate impact occurs because the technique is most useful in cases where identified ancestry is a minority in the geographic area. In other words, the concern is that ancestry inferencing could be “applied in a skewed manner”.<sup>71</sup> In addition, the results of any ancestry inference are probabilistic, and if the person's ancestry is mixed, it may not give a useful indication to investigators.
- 14.45 To make use of ancestry inferencing, investigators may overlay social assumptions as to what someone of that ancestry may look like. Some commentators argue that the use of ancestry inferencing in criminal investigations is “unavoidably linked to prior social assumptions and categories. This means that forensic geneticists are by default steeped in a controversial history of classifying human individuals and groups through their genetic properties”.<sup>72</sup>
- 14.46 Making broad assumptions or relying on inaccurate and misleading information may result in an ethnic group being targeted and stigmatised or a group of similar looking people being classed by investigators as “suspect populations” that require investigation.<sup>73</sup> In the New Zealand context, Māori are already over-represented at all stages of criminal justice process. Phenotyping, and ancestry inferencing in particular, presents a risk that Māori, as well as other minority groups, will be disproportionately impacted, stigmatised and investigated.
- 14.47 The stigmatising effect is compounded if the results of ancestry inferencing or phenotyping were publicised, particularly if in the form of a photofit, or used as a basis for mass screening. We discuss this further in Chapter 10.
- 14.48 Some even fear ancestry inferencing (and phenotyping generally) may lead to a resurgence of eugenics if the linkage is made between criminality and certain ethnicities. As one academic notes:<sup>74</sup>

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<sup>70</sup> Rebecca M Blank, Marilyn Dabady and Constance F Citro *Measuring Racial Discrimination* (National Research Council of the National Academies, 2004) at 4. It should be noted that the report says of “race” at 2:

There is no single concept of race. Rather, race is a complex concept, best viewed for social science purposes as a subjective social construct based on observed or ascribed characteristics that have acquired socially significant meaning. In the United States, ways in which different populations think about their own and others' racial status have changed over time in response to changing patterns of immigration, changing social and economic situations, and changing societal norms and government policies.

<sup>71</sup> Nathan Scudder and others “Massively parallel sequencing and the emergence of forensic genomics: Defining the policy and legal issues for law enforcement” (2018) 58 *Science & Justice* 153 at 154.

<sup>72</sup> Robin Williams and Matthias Wienroth *Ethical, Social and Policy Aspects of Forensic Genetics: A Systematic Review* (15 May 2014).

<sup>73</sup> Victor Toom and others “Approaching ethical, legal and social issues of emerging forensic DNA phenotyping (FDP) technologies comprehensively: Reply to ‘Forensic DNA phenotyping: Predicting human appearance from crime scene material for investigative purposes’ by Manfred Kayser” (2016) 22 *FSI Genetics* e1 at e2.

<sup>74</sup> Erin Murphy “Legal and Ethical Issues in Forensic DNA Phenotyping” [2013] New York University School of Law Public Law and Legal Theory Research Paper Series, Working Paper No 13-46 at 24. The Nuffield Council also noted in relation to ‘crime genes’:

Although the notion of a ‘crime gene’ is simply wrong, forensic DNA databases may still be of use to behavioural geneticists who wish to explore genetic variations influencing behaviours such as novelty seeking or impulsiveness which some believe are linked to criminal or anti-social conduct. Research of this type may extend to include comparative research by racial or ethnic type, in an effort

The most troubling discriminatory effect of phenotypic testing arises from articulating a relationship between genes and expressed traits in the criminal justice context. Allowing crime and criminals to be framed in biological terms opens a conversation that history suggests rarely ends fruitfully.

### Lack of transparency and accountability

14.49 The use of phenotyping, including ancestry inferencing, occurs at the intelligence stage of investigations. This means often only criminal investigators and forensic scientists understand the implications of these techniques.<sup>75</sup> In Aotearoa New Zealand, ancestry inferencing has come into use without widespread awareness or scrutiny of the technique and without any independent oversight.

14.50 We agree with the view of one group of academics and researchers that phenotyping and ancestry inferencing “merit extensive democratic deliberation before they are widely utilized in criminal investigations” and that:<sup>76</sup>

... if a technology is intended for use in society, forensic scientists and professionals, social scientists and ethicists, as well as commissioners and potential users need to work together to engage with its social contingencies.

### OPTIONS FOR REFORM

14.51 In the Issues Paper, we identified two broad options for reform:<sup>77</sup>

- (a) a complete statutory ban on phenotyping; or
- (b) a permissive but conservative statutory regime.

14.52 Our preliminary view was that a permissive statutory regime was the better approach. We suggested that phenotyping should remain reserved for use in investigations into serious offending where there is a case-specific need. One option identified was to only permit phenotyping in relation to EVCs, with the permitted EVCs to be preapproved by Order in Council or by an oversight body. Another option we identified was for legislation to set out clear guiding principles indicating whether any form of phenotyping would be permissible and to empower an oversight body to decide what analysis techniques could be used based on these principles.

14.53 We also identified a range of additional safeguards that could be introduced alongside a permissive statutory regime, including:

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to establish if those variants implicated in particular behaviours appear more or less frequently among members of particular ethnic or racial groups.

Nuffield Council on Bioethics *The forensic use of bioinformation: ethical issues* (September 2007) at [6.42]. In Aotearoa New Zealand, were phenotypic information to be added to the databank and research permitted, this would be likely to disproportionately impact Māori (as Māori are currently over-represented on the databank). We discuss issues related to research using the proposed DNA databank in Chapter 23.

<sup>75</sup> As Scudder and others note:

The introduction of MPS, making prediction of EVC and [ancestry inferencing] more cost-effective, has occurred without a great deal of scrutiny by other actors in the criminal justice system. However, this is expected, as the contribution of these processes is in the forensic intelligence rather than the prosecution phase of an investigation.

Nathan Scudder and others “Massively parallel sequencing and the emergence of forensic genomics: Defining the policy and legal issues for law enforcement” (2018) 58 *Science & Justice* 153 at 157.

<sup>76</sup> Victor Toom and others “Approaching ethical, legal and social issues of emerging forensic DNA phenotyping (FDP) technologies comprehensively: Reply to ‘Forensic DNA phenotyping: Predicting human appearance from crime scene material for investigative purposes’ by Manfred Kayser” (2016) 22 *FSI Genetics* e1 at e3.

<sup>77</sup> Issues Paper at [6.78]–[6.88].

- (a) limiting the use of phenotyping to cases where its use is approved by a judge or an oversight body;
- (b) requiring Police and ESR to develop policies, possibly in conjunction with the oversight body, to address confidentiality of results, how to avoid unconscious bias in analysis, how to avoid police officers over-estimating the significance of the results, data security and storage;
- (c) requiring regular audits and reporting to promote transparency and accountability; and
- (d) the oversight body having a monitoring role over the use of phenotyping and compliance with policies.

## RESULTS OF CONSULTATION

14.54 We received 51 submissions that commented on phenotyping. Thirty-four submitters expressed concerns about the use of phenotyping and 17 submitters had no concerns.

### Concerns about phenotyping

14.55 Five submitters were concerned about the accuracy of phenotyping and that this might result in innocent people being investigated or convicted. Seven submitters were concerned the information might lead Police down the wrong investigative track, especially as people could change their appearance.

14.56 Dr David Eccles, a genetic researcher, expressed concern about the use phenotyping when the underlying research on trait associations has been conducted with population groups outside Aotearoa New Zealand (see discussion at paragraph 14.14). He did not approve of trait associations established within one population being “transferred by proxy to another population”. His view was that any trait association needs “evidence of multi-population research (e.g. a well-distributed study of NZ individuals) to identify the association and demonstrate that it holds regardless of the ancestry of the individual”.

14.57 Nineteen submitters were concerned that phenotyping might result in discrimination against certain ethnic groups. Most were concerned about discrimination against Māori. The Human Rights Commission considered that ancestry inferencing could amount to discrimination under the Bill of Rights Act and that “the practice raises issues of racial profiling and stigmatisation, particularly for Māori”.

14.58 Te Mana Raraunga | Māori Data Sovereignty Network was concerned that ancestry inferencing draws on population data held by ESR. This data comes from ethnicity information voluntarily supplied by sampled individuals. However, Te Mana Raraunga noted this is problematic as “ethnicity is not a measure of ancestry or geographic origins and should not be conflated as such. This risks stigmatising population groups, and is contrary to the Māori data sovereignty principle of Manaakitanga.”<sup>78</sup> It also noted that phenotyping would disproportionately impact Māori due to “the smaller population size of Māori relative to NZ European making ‘ethnic inferencing’ relatively more useful

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<sup>78</sup> We discuss the concept of manaakitanga in Chapter 2.

and practical as an investigative tool ... This provides even more support for the critical need for strong Māori governance and independent oversight”.

- 14.59 Professor Dennis McNevin supported the use of phenotyping of physical characteristics and ancestry for use as investigative leads but noted that terms like “ethnicity” and “race” should be avoided and not used publicly “as ethnicity includes cultural aspects of an individual’s identity that are not able to be determined from DNA”. In addition, these terms may stereotype particular sub-populations. Instead, a preferable term is “biographical ancestry” as “it is a term that better reflects what DNA can reveal about an individual ... but should not be used to associate an individual with a particular race or ethnicity”. For these reasons, Dennis McNevin also argued against the use of public descriptions of potential offenders that imply they belong to a particular race, ethnicity, minority or subpopulation.
- 14.60 The New Zealand Law Society (NZLS) and the New Zealand Bar Association (endorsing NZLS’s submission in its entirety) submitted that limiting the use of phenotyping to a small number of cases “would minimise the risk of damage to social cohesion which might result from identifying an offender’s ethnic or racial group”.
- 14.61 Three submitters raised concerns about potential breaches of privacy. Te Hunga Rōia Māori o Aotearoa | The Māori Law Society submitted that phenotyping risks breaching privacy and “will disproportionately affect Māori as they have greatest contact with the criminal justice system”. The Public Defence Service (PDS) submitted that phenotyping should not be used in New Zealand for a number of reasons, including concerns about accuracy, that the information might ultimately be used by insurance companies or employers, and the privacy implications of the process — for example, a person identified by phenotyping might discover personal information about themselves of which they were previously unaware.
- 14.62 The Privacy Commissioner likened phenotyping to a form of predictive modelling and noted that information derived from phenotyping may not be sufficiently accurate. This may indicate the technique is not fit for the purpose for which it is intended and therefore not sufficiently accurate to meet the requirements of information privacy principle 8 (that an agency must take steps to ensure personal information it uses is accurate).

### Support for phenotyping

- 14.63 Seventeen submitters supported phenotyping. Police, ESR and three others thought that it should be used if there were safeguards and protocols to manage concerns. Police considered that the way phenotyping is currently managed is appropriate but acknowledged that it could provide “misinformation” as people may not look like their ancestors or may change their appearance. ESR also considered the current processes and procedures mitigate the risks involved but did not disagree that phenotyping may be a decision for Parliament. One individual agreed with its use if it did not lead to racial prejudice and another individual preferred it to maintaining a database of named DNA profiles. One individual supported its use if predictions were accurate but noted that ethnicity is a measure of cultural affiliation and is self-perceived so cannot be analysed from DNA. Dennis McNevin supported its use with the caveats noted above.

## Regulation of phenotyping

- 14.64 Fourteen submitters commented on how phenotyping should be regulated. Two submitters, PDS and Karaitiana Taiuru, said that it should not be allowed, but if it were, they along with six others supported close judicial or independent oversight. The Privacy Commissioner submitted that judicial pre-approval may be warranted as a safeguard. The Judges of the District Court favoured independent oversight. Te Mana Raraunga stressed the importance of strong Māori governance and independent oversight. NZLS and two others submitted that a permissive but conservative regime would be appropriate.
- 14.65 Police submitted that phenotyping should be regulated and limited to information relevant to a criminal investigation. It should not capture information about a person that is not relevant, such as health information. Police also noted its general support for proposals “which enable a greater Māori say on how DNA is managed and a more consistent approach to how tikanga is applied”.
- 14.66 Sue Petricevic and the Auckland District Law Society Criminal Law Committee (ADLS) both raised the issue that ancestry inferencing is akin to a mass screen “given the breadth of phenotypic information available and the potential donors”. They both noted it would be hard to say where to draw the line when deciding who to screen (for instance, only those living close to where a particular crime occurred or all people of that ancestry in the country).

## PHENOTYPING IN COMPARABLE JURISDICTIONS

- 14.67 Currently, most countries neither prohibit nor permit phenotyping. In the United Kingdom, there is no legislation governing phenotyping. This is interpreted as meaning it is permitted, although it has rarely been used.<sup>79</sup> If phenotyping was to be introduced, the London Metropolitan Police, for example, has stated that:<sup>80</sup>

... they would consult with the National Strategy Board and the National DNA Database Biometrics and Forensics Ethics Group before using [phenotyping], and have a gatekeeper/authorisation system (already put in place for Y-STR testing) to ensure there is a good understanding and communication of the findings at the police level when and if they start using [phenotyping] techniques.

- 14.68 Although Ireland’s legislation neither directly permits nor prohibits phenotyping, Forensic Science Ireland (Ireland’s forensic services provider) has interpreted this to mean that it is not permissible.<sup>81</sup> However, it has been used in Canada, where legislation

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<sup>79</sup> Gabrielle Samuel and Barbara Prainsack *The regulatory landscape of forensic DNA phenotyping in Europe* (VISAGE, November 2018) at 69.

<sup>80</sup> At 70.

<sup>81</sup> Email from Geraldine O’Donnell (Director of DNA Forensic Science Ireland) to the Law Commission regarding Ireland’s DNA database system (21 January 2020).



is similarly silent.<sup>82</sup> In Australia, phenotyping is also not regulated by statute, and we understand it has only been used in one case.<sup>83</sup>

- 14.69 Until recently, only the Netherlands expressly permitted phenotyping in legislation. Since 2003, the Dutch Code of Criminal Procedure has permitted, in a serious case, the public prosecutor (or the investigating judge) to order testing of DNA found at a crime scene belonging to an unknown suspect or the unknown victim. The testing may only be conducted in respect of sex, race or “other externally observable personal characteristics” that have been pre-approved by Governmental Decree.<sup>84</sup> At present, the only characteristics that meet these requirements are race (as identified through ancestry informative markers), sex, hair colour and eye colour.<sup>85</sup>
- 14.70 In 2018, Slovakia passed legislation that permits “the prediction of visible phenotype demonstrations” but only in relation to a particularly severe crime.<sup>86</sup> In November 2019, the German Parliament and Federal Council approved a change in the law that would permit analysis of eye, hair and skin colour and age but not ancestry inferencing.<sup>87</sup> This was after considerable public debate in Germany in the wake of a high-profile rape and murder in 2016, which sparked calls for changes to Bavarian law to permit phenotyping. Bavarian law now permits the use of phenotyping for eye, hair, skin colour, age and ancestry inferencing for the purposes of “averting danger”.<sup>88</sup>

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<sup>82</sup> Sarah Rieger “Canada still isn’t using a leading forensic technique to solve crimes — here’s why” *CBC News* (online ed, Toronto, 7 December 2018).

<sup>83</sup> A country overview of phenotyping is set out in the report by Gabrielle Samuel and Barbara Prainsack *The regulatory landscape of forensic DNA phenotyping in Europe* (VISAGE, November 2018). The information is based on “a survey emailed to a range of forensic science stakeholders residing in relevant countries, as well as advertised on Facebook”: at 3. The information regarding Australia’s position is set out at 2. It specifies that phenotyping has not been used except for one case for “confirmation purposes”. (We note that it is unclear what is meant by “confirmation purposes”).

<sup>84</sup> Code of Criminal Procedure (The Netherlands) 2012, s 151d, which states:

1. The public prosecutor may, in the interest of the investigation, order DNA testing aimed at establishing externally observable personal characteristics of the unknown suspect or the unknown victim to be conducted. Section 151a(2) shall apply mutatis mutandis.
2. The DNA testing may only be aimed at establishing the sex, race or other externally observable personal characteristics designated by Governmental Decree.
3. The proposal for a Governmental Decree to be enacted pursuant to subsection (2) shall not be made any earlier than four weeks after the draft Governmental Decree has been submitted to both chambers of the States General.
4. The DNA testing may be ordered only in the case of suspicion of a serious offence as defined in section 67(1).
5. Further rules pertaining to the manner of conduct of the DNA testing may be set by Governmental Decree.

<sup>85</sup> Bert-Jaap Koops and Maurice Schellekens “Forensic DNA Phenotyping: Regulatory Issues” (2008) 9 *STLR* 158 at 169 noted the following (citations omitted):

According to the Dutch government, this limitation to externally perceptible traits has two limitations itself. First, only traits that can contribute to a criminal investigation may be investigated. It is clear that most externally perceptible traits satisfy this requirement, since they can be used to draw up a composite drawing or a description of the suspect. Second, the DNA source’s privacy and the right not to know must be respected. This implies that traits that the DNA source does not know about because they have not come to expression may not be investigated. As is apparent from the parliamentary history of the bill, the government takes a precautionary approach in this respect: if it is uncertain that the source knows about the trait, it may not be investigated. In the later stages of the legislative process, the government operationalized the precautionary approach by indicating in the parliamentary proceedings that the traits should be visible from birth.

<sup>86</sup> Gabrielle Samuel and Barbara Prainsack *The regulatory landscape of forensic DNA phenotyping in Europe* (VISAGE, November 2018) at 3.

<sup>87</sup> See generally Peter M Schneider, Barbara Prainsack and Manfred Kayser “The Use of Forensic DNA Phenotyping in Predicting Appearance and Biogeographic Ancestry” (2019) 116 *Dtsch Arztebl Int* 873.

<sup>88</sup> There was speculation on social media that the crime had been committed by a “foreigner” and “initiatives and individuals on the far right began to call for the introduction of phenotyping and ancestry inferencing to identify the ‘race’ of the murderer and to ‘stop protecting murderers’”: STS@Freiburg “Contextualization” <[www.stsfreiburg.wordpress.com](http://www.stsfreiburg.wordpress.com)>. An open letter was published by a number of academics opposed to the Bill. See STS@Freiburg “Open Letter” (8 December 2016) <[www.stsfreiburg.wordpress.com](http://www.stsfreiburg.wordpress.com)>; and Verfassungsblog “From

## RECOMMENDATIONS

### Controlling phenotyping to infer evidentially visible characteristics

#### RECOMMENDATION

**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.

- 14.71 In Chapter 6, we recommend that new DNA legislation should provide that only those DNA analysis techniques that have been approved in regulations made under that Act should be used in the investigation and prosecution of offences and the investigation of missing and unidentified people. We also recommend in Chapter 5 that the DNA Oversight Committee should have the role of evaluating and providing advice to the Minister of Justice on proposals to make or amend such regulations.
- 14.72 In our view, this framework is appropriate for future DNA analysis techniques that predict EVCs.
- 14.73 As highlighted in this chapter, analysing a DNA sample for genetic information about the person who is the source of the DNA, rather than simply generating a DNA profile for comparison against other profiles of known people, is a significant departure from the intent of the CIBS Act and presents a significant privacy intrusion. Nevertheless, we consider that in some situations there may be a legitimate public interest and law enforcement need to analyse DNA from a crime scene to ascertain some genetic information about the DNA source. A privacy intrusion limited to EVCs may be justified for this purpose, as this is information that might have been available to an eyewitness.
- 14.74 If the DNA Oversight Committee were to consider a proposal for DNA analysis of EVCs, then, as part of its assessment against the considerations set out in R29, we would expect the Committee to consider whether such analysis will be of assistance to investigators. This will require the Committee to consider the strength of the scientific evidence regarding analysis of the proposed EVCs. As highlighted above, phenotyping is predictive only. For example, if the EVC proposed to be analysed is eye colour, the Committee will need to consider the scientific evidence as to how likely it is that the unknown person whose DNA is being analysed using the technique will actually have that particular eye colour. Crucially, this likelihood needs to apply to the population of Aotearoa New Zealand.
- 14.75 Further, as part of its duty to advise on the purpose for which any technique should be approved, and any other parameters or conditions that should be put in place (set out in R30), the DNA Oversight Committee should consider parameters or conditions such as the following:

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DNA Tracing to DNA Phenotyping – Open Legal Issues and Risks in the New Bavarian Police Task Act (PAG) and beyond” (15 May 2018) <[www.verfassungsblog.de](http://www.verfassungsblog.de)>.

- (a) The technique may only be used to analyse crime scene samples of unknown origin. In our view it would be a disproportionate use of phenotyping to analyse a crime scene sample where the person who is the source of that sample has already been identified.
- (b) The crime scene sample must only contain DNA from one contributor and must be reasonably suspected to be from the offender. In our view, mixed crime scene samples should not be analysed, as this risks intruding on the privacy of people unrelated to the offending.
- (c) The information resulting from analysis should not be compared to any other profile in any index of the proposed DNA databank.

14.76 In addition, the DNA Oversight Committee could recommend conditions such as where any analysis results will be stored, when they should be destroyed, and any requirements to publicly report on the use of the technique.

### Prohibiting ancestry inferencing

#### RECOMMENDATION

R99

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

14.77 We recommend that new DNA legislation should specifically prohibit the use of DNA analysis techniques to conduct ancestry inferencing. While we recognise that this would require Police to stop its current limited use of ancestry inferencing, we are satisfied that this is appropriate, for several reasons:

- (a) First, unlike the use of phenotyping to infer EVCs, we consider that the use of ancestry inferencing poses an unjustified risk that Māori, along with other minority population groups, will be disproportionately impacted and stigmatised. As we explained above, the technique is most useful in cases where the ancestry identified is a minority in that geographic area. There is, therefore, a risk that the use of ancestry inferencing may result in Māori and other minority groups becoming “suspect” populations that are disproportionately impacted through more regular Police investigation. This may exacerbate unconscious bias in policing and existing negative stereotypes in society.
- (b) Second, we are not satisfied that ancestry inferencing is a sufficiently reliable indicator of physical appearance. To be of any use to investigators, there is an unavoidable risk of overlaying cultural constructs of ethnicity onto the results of ancestry inferencing. We do not think these concerns can be adequately addressed by prior approval on a case-by-case basis. We acknowledge that using phenotyping to infer EVCs for hair, eye and skin colour could also arguably result in cultural constructs of ethnicity being drawn on. However, in that context, the EVCs themselves, when used together, may more appropriately inform an overall view of a person’s possible appearance.

- (c) Third, as we note in Chapter 2, in accordance with the Treaty and the principles of equity and active protection, the Crown has a number of duties — to protect Māori DNA, to guarantee Māori freedom from discrimination, and to act fairly to reduce inequities between Māori and non-Māori. We consider that the use of ancestry inferencing risks the Crown breaching these duties.
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## CHAPTER 15

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# Genetic genealogy searching

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## INTRODUCTION

- 15.1 This chapter considers genetic genealogy — the application of DNA analysis and traditional genealogy to infer relationships between individuals. This new investigative technique has been made possible by the growth of databases consumers use to find out ancestry information from their DNA, such as GEDmatch, AncestryDNA, 23andMe and FamilyTreeDNA.<sup>1</sup>
- 15.2 Genetic genealogy searching in criminal investigations is the process of comparing a DNA profile generated from a crime scene sample (crime scene profile) believed to be from the offender against DNA profiles on a genetic ancestry database.<sup>2</sup>
- 15.3 The objective of genetic genealogy searching, like familial searching on law enforcement DNA databanks,<sup>3</sup> is to identify genetic links to people on a genetic ancestry database.<sup>4</sup> A near match might indicate that a genetic relative of the person on the database is the source of the DNA left at the crime scene. Police officers can then use the results of a genetic genealogy search alongside publicly available information (such as birth, death and marriage records and electoral records) and construct family trees to build a list of potential suspects.
- 15.4 To date, genetic genealogy searching has not been used in Aotearoa New Zealand, and Police advises that this is not something it is actively considering. However, the technique has been used with some success elsewhere, including in the high-profile

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<sup>1</sup> AncestryDNA, 23andMe and FamilyTreeDNA are privately owned commercial services that are operated as subscriber databases. A consumer provides a saliva sample, and that sample is analysed by the service. GEDmatch is a publicly available database to which users themselves upload DNA test results obtained from another service for comparison with other registered members. As at April 2019, the sizes of these databases were as follows: AncestryDNA (15 million); 23andMe (10 million); FamilyTreeDNA (2 million) and GEDmatch (1 million): Debbie Kennett “Using genetic genealogy databases in missing persons cases and to develop suspect leads in violent crimes” (2019) 301 FSI 107 at 109.

<sup>2</sup> As we explain below, this involves subjecting a crime scene sample to the same type of DNA analysis used by the genetic ancestry database. This is a different form of analysis than that traditionally used for law enforcement purposes.

<sup>3</sup> Familial searching, discussed in Chapter 23, is the process of searching a law enforcement DNA databank for a near match between a crime scene profile and a known person profile. Because relatives share DNA, a near match might indicate that a close genetic relative of the known person (such as a parent, child or sibling) left the DNA at the crime scene, thereby implicating them as a potential suspect.

<sup>4</sup> Police may also search for a direct match, which might inculpate the person whose profile is on the database, but more often, police will be looking for near matches.

case of the “Golden State Killer”.<sup>5</sup> In 2019, the United States Department of Justice reported that “Investigative Genealogy has resulted in more arrests in one year than any previously used familial DNA searches in the last 25 years”.<sup>6</sup>

- 15.5 This chapter considers whether new DNA legislation should anticipate and provide for Police to use genetic genealogy searching in future.

## CURRENT LAW AND PRACTICE

- 15.6 Genetic genealogy searching is not regulated by the CIBS Act. That legislation focuses on the collection of DNA samples directly from known people and the use of law enforcement DNA databanks to identify potential suspects in unresolved offending. We discuss the DNA databanks in Part C of this Report.

### Genetic genealogy searching with consent

- 15.7 In theory, Police may be able to undertake genetic genealogy searching on a voluntary basis. Police might provide a crime scene profile to the administrators of a genetic ancestry database, and they may agree to conduct a comparison and report the results back to Police. However, whether a database would comply with such a request will depend in part of their terms of service. We discuss the current practice regarding the largest genetic ancestry databases at paragraphs 15.19–15.22 below.
- 15.8 If a genetic genealogy search is undertaken on a voluntary basis, the information privacy principles of the Privacy Act 1993 (and its successor, the Privacy Act 2020) would likely apply to Police.<sup>7</sup> As we explain in Chapter 5, these information privacy principles should apply to all DNA samples obtained in the investigation and prosecution of offences and any information generated from the analysis of these samples, including DNA profiles.

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<sup>5</sup> The “Golden State Killer” was accused of multiple murders, rapes and burglaries from 1976 to 1986. A crime scene profile was uploaded to GEDmatch, which identified 10 to 20 distant relatives, roughly equivalent to third cousins. Using publicly available information and official records, law enforcement built a list of possible suspects, which ultimately led to surveillance of Joseph DeAngelo. A DNA sample was obtained indirectly (from sweat left on his car door and from facial tissues discarded in his rubbish), which matched the crime scene sample. DeAngelo was arrested in April 2018, and in June 2020, he pleaded guilty to 13 counts of murder. The technique has also led to a conviction in 2019 for the 1987 murders of a couple and the rape of a female victim: Seattle Times staff “SeaTac man convicted of 1987 murders of Canadian couple after DNA evidence linked him to case” *The Seattle Times* (online ed, Seattle, 28 June 2019). Genetic genealogy searching was instrumental in the exoneration of Christopher Tapp who was convicted in 1998 of rape and murder. In 2019, a person located via a GEDmatch search became the investigative focus, and all charges against Tapp were dismissed: Mia Armstrong “In an Apparent First, Genetic Genealogy Aids a Wrongful Conviction Case” (17 July 2019) The Marshall Project <[www.themarshallproject.org](http://www.themarshallproject.org)>.

<sup>6</sup> United States Department of Justice *FY 2019 Annual Performance Report/FY 2021 Annual Performance Plan* (2019) at 53. However, this needs to be considered against the observations of the Biometrics and Forensics Ethics Group in England and Wales:

The apparent high clear-up rate of cold cases in the USA using genetic genealogy masks the USA’s backlog of unanalysed DNA from rape cases, and issues in adding DNA profiles from both suspects and convicted individuals to the US DNA database (CODIS). Of note, the brother of the ... Golden State killer was a convicted felon and if his DNA profile had been present on CODIS and familial searching had been used then the suspect could have been identified earlier.

See Biometrics and Forensics Ethics Group *Should we be making use of genetic genealogy to assist in solving crime? A report on the feasibility of such methods in the UK* (September 2020) at 5.

<sup>7</sup> The Privacy Act 1993 will be replaced by the Privacy Act 2020 on 1 December 2020. In this Report, we refer to both statutes for completeness. Section 4 of the Privacy Act 2020 makes it clear that the information privacy principles apply to Police (a New Zealand agency) regardless of whether the genetic ancestry database is located in New Zealand or in another jurisdiction.

- 15.9 Principle 2 states that an agency must collect personal information directly from the individual concerned. However, it is not necessary to comply with this requirement in certain situations, including if the agency believes, on reasonable grounds, that:
- (a) the information is publicly available;
  - (b) non-compliance is necessary “to avoid prejudice to the maintenance of the law”, including “the prevention, detection, investigation, prosecution, and punishment of offences”; or
  - (c) compliance is not reasonably practicable in the circumstances of the particular case.
- 15.10 Principle 4 is also relevant. This provides that an agency can only collect personal information by lawful means and by a means that, in the circumstances of the case, is fair and does not intrude to an unreasonable extent upon the personal affairs of the individual concerned.<sup>8</sup>
- 15.11 Because genetic genealogy searching also involves the disclosure of personal information by Police to the genetic ancestry database (in the form of the crime scene profile), principle 11 and the new principle 12 are also relevant.<sup>9</sup>
- 15.12 Principle 11 enables an agency to disclose personal information to another agency in certain situations, including when disclosure is necessary “to avoid prejudice to the maintenance of the law by any public sector agency” including prejudice to “the prevention, detection, investigation, prosecution, and punishment of offences”. Principle 12 is introduced by the Privacy Act 2020. It imposes restrictions on the disclosure of personal information to a foreign person or entity under principle 11. New principle 12(1) requires the agency disclosing the information to be satisfied that the foreign recipient is subject to comparable privacy obligations. However, this requirement does not apply if it is not reasonably practicable for the disclosing agency to comply with the requirement.<sup>10</sup>
- 15.13 Compliance with these principles would require the use of genetic genealogy searching to be justified in the circumstances. This might be the case, for example, if police officers are investigating serious offending and all other investigative leads have been exhausted. While information privacy principles do not create rights that are enforceable through the courts,<sup>11</sup> they may affect the interpretation of the Search and Surveillance Act 2012, discussed below. A breach of a privacy principle may also be relevant to an assessment of whether evidence has been obtained unfairly and should be ruled inadmissible under section 30 of the Evidence Act 2006.<sup>12</sup>

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<sup>8</sup> This reflects the language of information privacy principle 4 as expressed in the Privacy Act 2020, which differs from the Privacy Act 1993 in design but not substance. Note that principle 4 in the Privacy Act 2020 also makes explicit reference to the importance of ensuring collection is fair and does not unreasonably intrude on personal affairs, particularly where personal information is being collected from children and young people: Privacy Act 2020, s 22.

<sup>9</sup> We discuss the status of crime scene samples and crime scene profiles as “personal information” under the Privacy Act 1993 and Privacy Act 2020 in Chapter 5.

<sup>10</sup> Privacy Act 2020, s 22 (information privacy principle 12(2)).

<sup>11</sup> Privacy Act 1993, s 11; and Privacy Act 2020, s 31. This is subject to an exception in relation to sub-cl (1) of information privacy principle 6, which concerns the right to access personal information from a public sector agency.

<sup>12</sup> *R v Alsford* [2017] NZSC 42, [2017] 1 NZLR 710 at [38].

## Genetic genealogy searching pursuant to a search warrant

15.14 It is unclear whether Police can rely on their general search powers under the Search and Surveillance Act to obtain a search warrant for the purposes of conducting a genetic genealogy search. Section 6 provides the authority for issuing search warrants in relation to places, vehicles and other things. It states:<sup>13</sup>

An issuing officer may issue a search warrant, in relation to a place, vehicle, or other thing, on application by a constable if the issuing officer is satisfied that there are reasonable grounds—

(a) to suspect that an offence specified in the application and punishable by imprisonment has been committed, or is being committed, or will be committed; and

(b) to believe that the search will find evidential material in respect of the offence in or on the place, vehicle, or other thing specified in the application.

15.15 The Search and Surveillance Act defines “evidential material” as “evidence of the offence, or any other item, tangible or intangible, of relevance to the investigation of the offence”.<sup>14</sup> Therefore, section 6 requires reasonable grounds to believe that the search will find items of relevance to the investigation.

15.16 It is unclear whether the requirements of section 6 can be satisfied in relation to genetic genealogy searching. This is because such searching is by its nature very speculative. Any near matches that are identified by searching a genetic ancestry database would need to undergo further investigation before it is known whether the search was a success. Currently, genetic ancestry databases are located overseas, and it is unclear how many New Zealanders are represented on these databases. For these reasons, it is unlikely that Police could satisfy the requirement for reasonable grounds to believe that the search will find items of relevance to the investigation. This might change in future, however, if the use of such databases by New Zealanders continues to grow.<sup>15</sup> A high use per capita by a small population, combined with the long-range searching ability that is an inherent feature of genetic genealogy searching, might make this threshold easier to cross.

### *Executing search warrants in relation to genetic ancestry databases offshore*

15.17 Currently, all genetic ancestry databases are located overseas. Therefore, even if a search warrant is issued under the Search and Surveillance Act, it is unlikely to be enforceable.<sup>16</sup>

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<sup>13</sup> Section 110(a) and (d) of the Search and Surveillance Act 2012 provide that any person lawfully executing a search warrant can enter and search the place, vehicle or other thing that is the subject of the search warrant (including any item or items found in that place, vehicle or thing) and seize anything that is the subject of the search or anything else that may be lawfully seized.

<sup>14</sup> Section 3 definition of “evidential material”.

<sup>15</sup> The Commission has sighted a communication from Curtis Rogers (then CEO of GEDmatch) from 20 June 2019 that indicated he believed at that time New Zealand had “by far” the greatest per capita use of GEDmatch (based on membership in a group of advanced programs offered by the service): Communication from Curtis Rogers (CEO of GEDmatch) to Mac Gardner (Adjunct Professor, University of Otago, Clinical Genetic Group) detailed in an email from Mac Gardner to the responsible Commissioner (Law Commission) (20 February 2020).

<sup>16</sup> *Stevenson v R* [2012] NZCA 189, (2012) 25 CRNZ 755 at [57]. In that case, Police applied for a search warrant under the Summary Proceedings Act 1957 (the predecessor to the Search and Surveillance Act 2012) for records kept in the United States. The appellant challenged the validity of the warrant on the basis that it purported to authorise the execution of a search outside New Zealand. The Court of Appeal observed that, while the Summary Proceedings Act



- 15.18 It is more likely that Police would have to request foreign assistance from the jurisdiction in which the genetic ancestry database is located. The Mutual Assistance in Criminal Matters Act 1992 (MACMA) provides a statutory framework for making requests for foreign assistance in criminal investigations, including for assistance in issuing a search warrant in another jurisdiction.<sup>17</sup> Such requests can only be made by the Attorney-General and only if satisfied there are reasonable grounds to believe that information is relevant to a New Zealand criminal matter punishable by a term of imprisonment of two years or more.<sup>18</sup> However, for the same reasons identified at paragraph 15.16 above, it may be difficult to satisfy this requirement.<sup>19</sup>

### Current practice outside Aotearoa New Zealand

- 15.19 While Police has not given formal consideration to the use of genetic genealogy searching, below we summarise the current policies on law enforcement access in relation to the largest genetic ancestry databases. These policies are, however, subject to change.
- 15.20 AncestryDNA, 23andMe and FamilyTreeDNA each have privacy policies that typically restrict law enforcement access to information on their databases, although there are significant variations.<sup>20</sup> The current privacy policies for AncestryDNA and 23andMe state that they will not supply genetic information to law enforcement authorities unless they are required to do so by a court order, search warrant or subpoena.<sup>21</sup> These companies also publish transparency reports that record the number of warrants issued for access to their databases. AncestryDNA's July 2020 report covers the previous six-month period and records that, in that period, it received two requests seeking access to its genetic ancestry database, one of which has been withdrawn and one of which remains unresolved.<sup>22</sup> 23andMe records that, since 2015, it has received seven government

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1957 did not require the warrant to be limited to within New Zealand, "of course it could not be practically enforced outside of New Zealand". There is no obvious reason to consider that the position is different under the Search and Surveillance Act 2012.

<sup>17</sup> The Law Commission completed a report in February 2016 that recommended the repeal and replacement of the Mutual Assistance in Criminal Matters Act 1992. See *Te Aka Matua o te Ture | Law Commission Modernising New Zealand's Extradition and Mutual Assistance Laws* (NZLC R137, 2016). The Commission's recommendations are yet to be adopted.

<sup>18</sup> Mutual Assistance in Criminal Matters Act 1992, s 20.

<sup>19</sup> The requirements for issuing a search warrant in the jurisdiction in which the genetic ancestry database is located must also be satisfied. In relation to genetic ancestry databases located in the United States, there is a question whether the standard of probable cause would be met under r 41 of the Federal Rules of Criminal Procedure to issue a search warrant. However, it appears that search warrants have been issued in relation to GEDmatch in some states. See Cassie Martin "Why a warrant to search GEDmatch's genetic data has sparked privacy concerns" (12 November 2019) ScienceNews <[www.sciencenews.org](http://www.sciencenews.org)>; and Kashmir Hill and Heather Murphy "Your DNA Profile is Private? A Florida Judge Just Said Otherwise" *The New York Times* (online ed, New York, 5 November 2019).

<sup>20</sup> See Andelka M Phillips *Buying your Self on the Internet: Wrap Contracts and Personal Genomics* (Edinburgh University Press, Edinburgh, 2019) for an overview of these companies and their terms and conditions of access. See also Feilidh Dwyer "Your DNA is only a click away: Home DNA tests and privacy" (6 August 2019) Office of the Privacy Commissioner <[www.privacy.org.nz](http://www.privacy.org.nz)>.

<sup>21</sup> AncestryDNA's privacy statement states that "[w]e do not voluntarily share your information with law enforcement". Instead, AncestryDNA requires all government agencies seeking access to AncestryDNA customer data to follow valid legal processes: AncestryDNA "Your Privacy" (23 September 2020) <[www.ancestry.com](http://www.ancestry.com)>. Similarly, 23andMe also states "[w]e will not provide information to law enforcement or regulatory authorities unless required by law to comply with a valid court order, subpoena, or search warrant for genetic or Personal Information": 23andMe "Privacy Highlights" (1 January 2020) <[www.23andme.com](http://www.23andme.com)>.

<sup>22</sup> AncestryDNA "Ancestry Transparency Report" (10 July 2020) <[www.ancestry.com](http://www.ancestry.com)>.

requests for customer information but has not produced any data without prior, explicit consent by the individual specified in the request.<sup>23</sup>

- 15.21 FamilyTreeDNA has a more permissive approach. It provides law enforcement access to its database with its written permission in limited circumstances, namely to identify the perpetrator of a serious offence (homicide, sexual assault or abduction) or to identify the remains of an unknown deceased person.<sup>24</sup> However, users of FamilyTreeDNA can opt out of law enforcement accessing their information.<sup>25</sup>
- 15.22 GEDmatch also provides for law enforcement access in order to identify the perpetrator in serious offending.<sup>26</sup> However, since the Issues Paper was published, GEDmatch has changed its terms of service and now requires users to opt in to their DNA being made available for comparison to DNA uploaded for law enforcement purposes.<sup>27</sup>

## ISSUES WITH GENETIC GENEALOGY SEARCHING

- 15.23 Genetic genealogy searching raises issues relating to:<sup>28</sup>
- (a) privacy;
  - (b) inconsistency with tikanga Māori;
  - (c) user consent;
  - (d) the quality of sampling and methodology of genetic ancestry databases; and
  - (e) the use of genetic ancestry databases as an alternative to law enforcement databases.

### Privacy implications

- 15.24 Genetic genealogy searching raises several privacy concerns. For people whose profiles are on the database, genetic genealogy searching, like familial searching, involves their genetic information being used for a different purpose to the one they provided it for. It may potentially implicate their family and whānau members in criminal offending, thereby making them an unsuspecting genetic informant on their relatives.
- 15.25 While familial searching of law enforcement databanks can only identify possible genetic links with close relatives (such as a parent, sibling or child), genetic genealogy searching can identify genetic links in much wider degrees of relationships.<sup>29</sup> As it was

<sup>23</sup> 23andMe “Transparency Report” (14 August 2020) <[www.23andme.com](http://www.23andme.com)>.

<sup>24</sup> FamilyTreeDNA “Terms of Service” (12 March 2019) <[www.familytreedna.com](http://www.familytreedna.com)>.

<sup>25</sup> FamilyTreeDNA “FamilyTreeDNA Privacy Statement” (7 May 2019) <[www.familytreedna.com](http://www.familytreedna.com)>.

<sup>26</sup> The law enforcement portal can be used in relation to murder, non-negligent manslaughter, aggravated rape, robbery or aggravated assault: GEDmatch “Terms of Service and Privacy Policy” (9 December 2019) <[www.gedmatch.com](http://www.gedmatch.com)>.

<sup>27</sup> When the Issues Paper was written in 2018, all profiles on GEDmatch could be accessed by law enforcement in relation to serious offending. Following the change in the terms of service, as at November 2019, 185,000 of 1.3 million GEDmatch users had opted in to allowing police to access their data: Kashmir Hill and Heather Murphy “Your DNA Profile is Private? A Florida Judge Just Said Otherwise” *The New York Times* (online ed, New York, 5 November 2019).

<sup>28</sup> Issues Paper at [9.114]–[9.116].

<sup>29</sup> In this context, degrees of relationship denote the number of steps back to a common ancestor. For example, first-degree relatives would include an individual’s parents, siblings and children. Second-degree relatives would include an individual’s grandparents, grandchildren, uncles, aunts, nephews, nieces and half-siblings. Third-degree relatives would include an individual’s great-grandparents, great-grandchildren, great-uncles, great-aunts and first cousins.

put by the Chief Science Officer of MyHeritage, “you are a beacon who illuminates 300 people around you”.<sup>30</sup> Genetic genealogy searching therefore constitutes a significant intrusion not only on the privacy of database users but also on the privacy of users’ relatives.<sup>31</sup>

- 15.26 In addition, genetic genealogy searching raises privacy implications for the person who is the source of the crime scene sample (who may or may not be the offender). This is because, in order to conduct a genetic genealogy search, the crime scene sample must be analysed in the same way as profiles on the genetic ancestry database.<sup>32</sup> This type of analysis reveals a far greater amount of personal genetic information about a person than is currently the case with a DNA profile generated for law enforcement purposes.<sup>33</sup> The privacy intrusion for the source of the crime scene profile is, therefore, greater than with familial searching.

### Inconsistency with tikanga Māori

- 15.27 Genetic genealogy searching, like familial searching, involves the use of whakapapa information to identify potential suspects. In Chapter 2, we explain that whakapapa information is considered a taonga that is tapu. Whakapapa is also determinative of personal tapu.<sup>34</sup> The use of whakapapa information in criminal investigations generally, and genetic genealogy searching in particular, gives rise to certain rights and responsibilities for Māori according to tikanga. This includes the responsibility of Māori individuals and whānau, hapū and iwi to exercise kaitiakitanga to protect whakapapa. Responsibilities in relation to whanaungatanga and manaakitanga, to maintain relationships and uphold the mana of Māori individuals and communities, are also engaged. Genetic genealogy searching could undermine these tikanga, as the actions of one person in the kin group could bring other members of the family and whānau to Police attention and because it may circumvent the exercise by Māori of control over their whakapapa in accordance with tikanga.

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Fourth-degree relatives would include an individual’s great-great-grandparents, great-great-grandchildren and first cousins once removed (that is, the children of the individual’s first cousins).

<sup>30</sup> Benjamin Oreskes, Joseph Serna and Richard Winton “False starts in search for Golden State Killer reveal the pitfalls of DNA testing” *Los Angeles Times* (online ed, Los Angeles, 4 May 2018).

<sup>31</sup> Other privacy concerns identified in Chapter 23 in relation to familial searching also arise here. For example, conducting a genetic genealogy search may reveal previously unknown or concealed genetic relationships.

<sup>32</sup> Law enforcement agencies seeking to use genetic ancestry databases have to get DNA samples analysed on a SNP chip. We understand that currently ESR does not have capacity to do this. ESR advises, however, that future analysis kits using massively parallel sequencing (MPS) technology will enable forensic laboratories to generate data required for comparison to genetic ancestry databases. MPS technology is discussed in Chapter 6.

<sup>33</sup> DNA analysis used for genetic ancestry databases targets large numbers of SNPs. These reveal a person’s ancestry and information about other personal genetic characteristics. SNPs refer to variations at the level of single base pairs, the simplest and most common form of genetic variation, accounting for about 90 per cent of variations in humans. The type of DNA analysis used for law enforcement purposes is called short tandem repeat (STR) profiling. STR profiling targets certain points on the genome where there is known variation amongst humans but where analysis is not believed to reveal an individual’s genetic characteristics. This produces a DNA profile that consists of a series of numbers and letters that can accurately identify an individual. For more information about DNA analysis techniques, see Chapter 6.

<sup>34</sup> Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (rev ed, Huia Publishers, Wellington, 2016) at 47–51.

## User consent to genetic genealogy searching

- 15.28 The terms of service of genetic ancestry databases may cover matters such as the possibility that the database may be searched for law enforcement purposes (see discussion at paragraphs 15.20–15.22 above). However, just because law enforcement use is referred to in the terms of service does not necessarily mean that database users have given informed consent to their DNA information being used for such a different purpose. As explained above, searches of genetic ancestry databases affect not just the users but also their relatives. The fact that a user’s DNA can lead to the investigation of a relative may not be widely understood.
- 15.29 Accordingly, permitting genetic genealogy searches other than pursuant to a court order, search warrant or subpoena raises questions about the adequacy of consent. The question that arises is whether it is valid to rely on the consent of a person who shares DNA with the potential suspect and who is essentially operating as a “genetic informant”. We identify a similar concern in Chapter 12 in relation to obtaining a DNA sample from a suspect’s close genetic relative.

## Sampling and methodology quality concerns

- 15.30 The provision of DNA samples to genetic ancestry databases occurs in an informal and unregulated way. This raises concerns regarding the authenticity of the sample. For example, a person might use an alias or send in someone else’s DNA if they manage to obtain it. A parent may send in a child’s DNA under an alias, for example, to investigate paternity. Concerns have also been expressed around the robustness of the DNA analysis process undertaken by these private companies compared to the stringent casework comparison undertaken for law enforcement processes.<sup>35</sup> These concerns undermine the reliability of the results of genetic genealogy searching.

## Genetic ancestry databases as an alternative to law enforcement databases

- 15.31 Finally, there is a concern that law enforcement may increasingly rely on genetic ancestry databases in preference to law enforcement DNA databanks.<sup>36</sup> The more restrictive the law enforcement databank (in terms of databank sampling and permitted uses of the databank), the greater the risk that this will occur.
- 15.32 Increasing reliance on genetic ancestry databases for law enforcement purposes raises a concern that these will become quasi-universal databanks. It has been observed that only a low percentage of DNA profiles from a target population needs to be in a genetic ancestry database before it would be possible to search the entire target population.<sup>37</sup>

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<sup>35</sup> For example, see Nathan Scudder and others “Policy and regulatory implications of the new frontier of forensic genomics: direct-to-consumer genetic data and genealogy records” (2019) 31 CICJ 194 at 11.

<sup>36</sup> See, for example, JW Hazel and others “Is it time for a universal genetic forensic database?” (2018) 362 Science 898.

<sup>37</sup> For example, Erlich and others suggest that a genetic ancestry database would need to cover only 2 per cent of a target population to provide a third-cousin match to nearly any person within that target population. Using basic demographic information to then filter results (such as geography of offending, age and sex) and public genealogical and other records, the authors suggest that genetic genealogy searching offers a powerful alternative to familial searches in the United States. The target population used in the modelling was Americans of Northern-European descent: Yaniv Erlich and others “Identity inference of genomic data using long-range familial searches” (2018) 362 Science 690 at 690. This modelling has implications for any increased use by Māori of such genetic ancestry databases for research for land succession purposes or to reconnect with whānau.

We identify a similar concern in Chapter 12 in relation to Police access to blood spot cards stored as part of the Ministry of Health's Newborn Metabolic Screening Programme. In Chapter 18, we explore the possibility of a universal DNA databank for criminal investigations and express our view that this could never constitute a reasonable and proportionate infringement on human rights values.

## OPTIONS FOR REFORM

- 15.33 In the Issues Paper, we observed that there is little that can be done to regulate the privacy policies or informed consent procedures used by genetic ancestry databases based in another jurisdiction.<sup>38</sup>
- 15.34 We did observe, however, that there may be benefits in Police developing a policy statement to explain to the public the circumstances in which genetic genealogy searching may be used in future.<sup>39</sup> Alternatively, an independent oversight body could be given a monitoring role to ensure that the collective privacy of individuals is given adequate weight when police officers make investigative decisions.

## RESULTS OF CONSULTATION

- 15.35 We received 14 submissions from seven organisations and seven individuals that addressed genetic genealogy searching. All submitters expressed concerns about the use of genetic ancestry databases in criminal investigations.
- 15.36 Common concerns identified by submitters were the privacy implications of genetic genealogy searching, the lack of informed consent and the fact that information being used for one purpose (to make family connections) was being used for a very different purpose (to identify suspects in unresolved criminal offending).
- 15.37 Karaitiana Taiuru pointed to trust issues that could arise from Police use of information from genetic ancestry databases:
- I have many serious concerns about the Police using information that is publicly available on genealogical websites as an investigative resource. Vulnerable people without sufficient knowledge submit for DNA tests to public web sites. Giving the Police such powers would be create significant trust issues. Though the tapu of the DNA sample has already been compromised when it is on a public web site, these actions of the police are likely to create social and trust issues.
- 15.38 Another individual stated that such use should not be allowed and that individuals who have no presence on a law enforcement database should not have to worry about deeply personal information being used as a law enforcement investigative tool.
- 15.39 The Auckland District Law Society Criminal Law Committee (ADLS) and Sue Petricevic pointed to the lack of informed consent by users of genetic ancestry databases, even where that personal information is freely provided or made publicly available. ADLS and Petricevic also raised concerns regarding the accuracy of results and interpretation

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<sup>38</sup> We observed that public genetic information services such as GEDmatch make its DNA information publicly available, so Police use of this data probably would not amount to a "search" under s 21 of the New Zealand Bill of Rights Act 1990, as it would be difficult to maintain a reasonable expectation of privacy in genetic data that a person voluntarily shares. However, since then, GEDmatch has changed its terms of service to restrict law enforcement access to genetic data unless a person opts in, as discussed above: Issues Paper at [9.117].

<sup>39</sup> At [9.120].

issues. At the same time, however, ADLS considered that, where such information is publicly available, police should be able to use it but as an investigative lead only.

- 15.40 The Privacy Commissioner observed that searches of genetic ancestry databases raise significant privacy issues, including genetic data provided for one purpose being used for another. He also pointed out that such data is not subject to the scientific method and storage protocols that operate in the criminal justice system and supported statutory limitations on the process. Four individual submitters supported a court order of some kind to provide appropriate oversight of genetic genealogy searching.
- 15.41 Te Mana Raraunga | Māori Data Sovereignty Network did not support the use of Māori genealogical information in criminal investigations, whether obtained from a publicly available website or other sources. It submitted that “[t]hese are Māori data, and their use should be governed and controlled by Māori”.
- 15.42 Associate Professor Nessa Lynch considered the difficulties of regulating companies or websites in other jurisdictions recognised in the Issues Paper and instead supported advising individuals to exercise care when handing personal information to genetic genealogical services. Similarly, the New Zealand Law Society (NZLS) and the New Zealand Bar Association (endorsing NZLS’s submission in its entirety) submitted that the public should be made aware that DNA submitted to genetic ancestry databases could be used by Police.

## GENETIC GENEALOGY SEARCHING IN COMPARABLE JURISDICTIONS

- 15.43 Because genetic genealogy searching is a new investigative technique, few jurisdictions have considered it or regulated for it.
- 15.44 An interim policy issued by the United States Department of Justice appears to be the first attempt.<sup>40</sup> This policy came into effect in November 2019, with a final policy expected to be published in 2020.<sup>41</sup> The policy is for internal use by federal or federally funded investigations and is not intended to create any enforceable substantive or procedural rights or benefits.<sup>42</sup>
- 15.45 The policy acknowledges that “the decision to pursue [genetic genealogy searching] may affect privacy interests, the consumption of forensic samples, and law enforcement’s ability to solve violent crime”.<sup>43</sup> It includes criteria a case must meet before genetic genealogy searching is contemplated and how it is used to generate investigative leads in unsolved crimes.

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<sup>40</sup> United States Department of Justice *Interim Policy: Forensic Genetic Genealogical DNA Analysis and Searching* (2 September 2019). The policy uses the term “FGGS” (forensic genetic genealogical DNA analysis and searching). It formally defines FGGS as “law enforcement’s use of DNA analysis combined with traditional genealogy research to generate investigative leads for unsolved violent crimes”: at 3. The policy applies to all criminal investigations where an investigative agency in the Department of Justice has jurisdiction, where it provides funding, or where its employees or contractors are involved in FGGS or where any federal agency/other unit of state, local or tribal government receives funding from the Department to carry out FGGS: at 2.

<sup>41</sup> At the time of writing this Report, a final policy is yet to be issued.

<sup>42</sup> United States Department of Justice *Interim Policy: Forensic Genetic Genealogical DNA Analysis and Searching* (2 September 2019) at 1, n 1.

<sup>43</sup> At 1.

- 15.46 Aside from this policy, Bills attempting to ban or restrict genetic genealogy searching have been introduced in several states in the United States.<sup>44</sup>
- 15.47 In England and Wales, the Biometrics and Forensics Ethics Group (BFEG) produced a report in September 2020 on the feasibility and the necessity of the use of genetic genealogy in criminal investigations.<sup>45</sup> BFEG addressed genetic genealogy searching against the context of the use of familial searching in the National DNA Database, which has been conducted in serious cases where the offender’s profile is not in the National DNA Database and only with the approval of the Forensic Information Databases (FIND) Strategy Board.<sup>46</sup>
- 15.48 The BFEG pointed to the lack of regulation of the entire process of genetic genealogy searching and the numerous technical, legal and ethical considerations that would need to be addressed.
- 15.49 The report’s overall view was that the technique should only be used “once traditional methods have been exhausted and must be authorised by the appropriate body so that its use is proportionate”.<sup>47</sup>

## RECOMMENDATIONS

### Establishing a statutory regime for future use of genetic genealogy searching

#### RECOMMENDATION

#### R100

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

- 15.50 We recommend that new DNA legislation anticipates and regulates the likely future use of genetic genealogy searching in criminal investigations. While Police has not yet given formal consideration to the use of this investigative technique, its success elsewhere

<sup>44</sup> In Maryland, a Senate Bill was introduced in 2019 to ban genetic genealogy searching. See Public Safety – DNA Analysis – Search of Data Base MD HB30. A differently drafted and only slightly less restrictive Senate Bill, the Public Safety – DNA Collection, Records, Analysis, and Reporting MD SB 848, was introduced in 2020. See also the attempt in 2019 in New York State to establish an online genealogy web search policy to limit searching to only the most necessary cases: Establishes the New York state online genealogy website search policy NY S00703. In Washington State, a Bill was introduced in 2020: Concerning the collection, use, and disclosure of genetic data by direct-to-consumer genetic testing companies WA HB2485.

<sup>45</sup> The Biometrics and Forensics Ethics Group is an advisory non-departmental public body, sponsored by the Home Office, that provides advice on ethical issues in the use of biometric and forensic identification techniques including DNA. Biometrics and Forensics Ethics Group *Should we be making use of genetic genealogy to assist in solving crime? A report on the feasibility of such methods in the UK* (September 2020) canvases the technical and economic challenges to the use of genetic genealogy searching by law enforcement and considers the ethical and legal safeguards that would be required.

<sup>46</sup> The report notes at 9 and 11 that, since 2012, familial searches have been authorised in only 120 cases, with nine resolved through this approach.

<sup>47</sup> At 13. The report makes more detailed comments on the legality of such use in the light of Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms 213 UNTS 221 (opened for signature 4 November 1950, entered into force 3 September 1953) under the Human Rights Act 1998 (UK) and the additional requirements and safeguards under pt 3 of the Data Protection Act 2018 (UK). It signals the need for legislative reform to deal with transmission, length of retention and destruction of the sample, profile and collected genealogical data.

suggests that this will likely become an area of interest, particularly if membership of New Zealanders on genetic ancestry databases continues to grow. Establishing a regulatory framework for the use of genetic genealogy searching would therefore ensure that new DNA legislation is able to respond to future developments, consistent with our broader objective of ensuring the DNA regime is fit for purpose.

- 15.51 We consider genetic genealogy searching should be available to Police in the conduct of criminal investigations, subject to appropriate safeguards and oversight. Those safeguards and oversight would recognise the significant privacy implications of this kind of searching as well as tikanga issues that arise when using whakapapa information. Our recommendations seek to minimise intrusions on privacy and the applicable tikanga to those that are reasonable and proportionate to the public interest in the resolution of serious offending.
- 15.52 We do not recommend the alternative option of Police developing a policy statement on the use of genetic genealogy searching. We do not consider this alone would provide appropriate safeguards or oversight should this kind of searching be used in future. We note that some genetic ancestry databases permit access to their records without the need for a court order or search warrant.
- 15.53 Should Police use genetic genealogy searching in future, there would be clear advantages in developing and publishing practice, policy and procedure to support new DNA legislation. These could address matters such as when a genetic genealogy search should be contemplated, how the crime scene profile information will be managed, who should have access to the results of the search, how the results should be followed up with possible genetic relatives and how provision will be made for the exercise of kaitiakitanga by Māori over whakapapa information.<sup>48</sup> This would ensure consistent practice across Aotearoa New Zealand and that applications for genetic genealogy search orders are only made in appropriate circumstances. Like other guidance that we recommend underpins the new DNA legislation, it should be developed by Police and the forensic services provider (discussed in Chapter 7) in consultation with the DNA Oversight Committee. While we do not recommend the development of such practice, policy and procedure now, we note that it would be within the monitoring role of the DNA Oversight Committee, discussed in Chapter 5, to identify the need for such guidance in future.

### Requiring court authorisation for genetic genealogy searching

#### RECOMMENDATION

#### 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).

<sup>48</sup> Similar to the matters addressed in United States Department of Justice *Interim Policy: Forensic Genetic Genealogical DNA Analysis and Searching* (2 September 2019).



- 15.54 We recommend that genetic genealogy searches should be subject to judicial approval, consistent with our approach to indirect sampling in Chapter 12 and to familial searching in Chapter 23. Because issuing a genetic genealogy search order involves accommodating different human rights and law enforcement values,<sup>49</sup> we consider that such orders should only be made by a High Court or District Court Judge rather than a community magistrate or other court officer.<sup>50</sup>
- 15.55 We recommend that judicial approval must be obtained for any disclosure of 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. Currently, genetic genealogy searching involves law enforcement submitting a DNA profile for searching rather than any biological material for DNA analysis. However, given our objective is to future-proof new DNA legislation, our recommendation has been worded broadly to respond to potential future changes in practice. This will also ensure appropriate oversight is in place, regardless of whether a genetic genealogy search can be undertaken with or without a search warrant, court order or subpoena. If a genetic genealogy search order is granted, police officers would then be able to arrange for access to the genetic ancestry database, either pursuant to the database's terms of service or through the mutual assistance procedure under MACMA discussed at paragraph 15.18 above.
- 15.56 We do not recommend a new search warrant procedure in respect of genetic ancestry databases in recognition of the likelihood that they will continue to be located offshore so any specific search warrant procedure would unlikely be enforceable. Should genetic ancestry databases become established in Aotearoa New Zealand, the general search powers under the Search and Surveillance Act could apply.

### Requirements for issuing genetic genealogy search orders

#### RECOMMENDATION

#### 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.

<sup>49</sup> As reflected in the proposed purpose statement of the new DNA legislation, which is addressed in Chapter 3.

<sup>50</sup> This is consistent with the requirements in relation to the issuance of surveillance device warrants under s 53 of the Search and Surveillance Act 2012.

- 15.57 Our view is that genetic genealogy searching should be used as a last resort and only in relation to offending that, when considered in its full context, is sufficiently serious to warrant the use of such an intrusive investigative technique. We therefore recommend that a Judge should only issue a genetic genealogy search order if a databank search of the proposed DNA databank has failed to identify a suspect and if conducting a genetic genealogy search is reasonable in all the circumstances, having regard to a prescribed list of relevant considerations. These considerations are the same as those recommended in Chapter 23 in relation to familial searching (and reflect current Police practice relating to familial searching).
- 15.58 As with mass screening and familial searching, we have not proposed a minimum level of seriousness of offending that must be met to conduct a genetic genealogy search. Defining serious offending would be a necessarily arbitrary task, regardless of whether the definition depends on a maximum sentence that may be imposed for the offending, the sentence actually imposed or a prescribed list of offences. Our preference therefore is for a decision to be made in all the circumstances of the particular case as to whether the offending concerned is serious enough to warrant such a measure. We doubt genetic genealogy searching for minor offending could ever meet this threshold.
- 15.59 Genetic genealogy searches should only be carried out in relation to crime scene samples of a suitable quality. If a crime scene profile does not meet the quality threshold for databank searching (discussed in Chapter 17), a judge cannot be satisfied of R102.a and a genetic genealogy search will not be an available option.

### Using the results of a genetic genealogy search

#### RECOMMENDATION

#### 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.

- 15.60 The results of genetic genealogy searching should not be sufficient to constitute reasonable grounds to suspect a person of committing the offence under investigation, either for the purpose of obtaining a DNA sample under the suspect sampling regime (discussed in Chapter 8) or for any other purpose such as filing charges, making an arrest or issuing a search or surveillance warrant.<sup>51</sup> Genetic genealogy searching is speculative in nature. It may generate a number of investigative leads that police officers can then use to identify potential suspects. It cannot confirm the identity of the offender unless a direct match is identified. However, this is unlikely as the offender

<sup>51</sup> A constable may arrest and take into custody without a warrant any person if the constable has good cause to suspect the person of having committed any offence punishable by imprisonment: Crimes Act 1961, s 315(2)(b). Similarly, a person commencing criminal proceedings must state in the charging document that they have good cause to suspect that the defendant has committed the offence specified in the charge: Criminal Procedure Act 2011, s 16(2)(c). A search warrant may be issued under s 6 of the Search and Surveillance Act 2012 if there are reasonable grounds to suspect that an imprisonable offence has been or will be committed, while a surveillance device warrant may be issued under s 51 if there are reasonable grounds to suspect that an offence has been committed, is being committed or will be committed.

would have had to submit their own DNA to the genetic ancestry database. In any event, further investigation and additional evidence to support a reasonable suspicion should be necessary.

### **Reporting the use of genetic genealogy searching**

- 15.61 In Chapter 5, we recommend that new DNA legislation should include comprehensive reporting requirements. This should include reporting requirements in relation to the number of applications for genetic genealogy search orders and the outcome of those applications. This will enable ongoing monitoring and review of the operation of the new DNA legislation in this area.
- 15.62 We have not recommended requiring Police to report on whether a genetic genealogy search resulted in investigative leads. Like familial searching, discussed in Chapter 23, we consider that the efficacy of genetic genealogy searching is best reviewed through regular auditing and oversight by the DNA Oversight Committee. We discuss oversight in Chapter 5.
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## CHAPTER 16

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# Management of casework and crime scene samples

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## INTRODUCTION

- 16.1 This chapter considers the management of casework samples and crime scene samples.
- 16.2 Casework samples are DNA samples obtained from known people in a criminal investigation for the purpose of casework comparison and include samples obtained from people who are suspects (suspect samples), people who are asked to provide an elimination sample (elimination samples) and people who are asked to participate in a mass screen (mass screen samples).<sup>1</sup> Below we consider the storage, retention and destruction of casework samples as well as any information derived from the analysis of casework samples, including DNA profiles (casework profiles).
- 16.3 Crime scene samples are DNA samples collected from crime scenes and are discussed in Chapter 13. Below we consider the storage, retention and destruction of crime scene samples. The storage and retention of crime scene profiles on the proposed DNA databank is addressed in Chapter 17.

## CASEWORK SAMPLES

### Current law and practice

- 16.4 The criteria for obtaining casework samples is addressed in the previous chapters in this part of the Report. The methods of obtaining a DNA sample directly from a person providing the sample (the donor) are addressed in Chapter 11. There, we explained that the most common sampling method involves the use of a buccal (mouth) swab to obtain a sample of epithelial cells (skin cells from the mouth lining). On rare occasions, a blood sample may be obtained (either a fingerprick sample or a venous sample).

### *Process following collection of a casework sample*

- 16.5 If a person uses a buccal swab or provides a fingerprick sample, cards known as “FTA” cards are used to collect the casework sample. For samples taken by buccal swab, a police officer will press the swab onto the FTA card immediately after the sample is

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<sup>1</sup> Suspect samples are discussed in Chapter 8, elimination samples are discussed in Chapter 9 and mass screen samples are discussed in Chapter 10. Indirect samples are discussed in Chapter 12. This includes suspect samples obtained indirectly and elimination samples obtained indirectly with informed consent.

taken, thereby transferring the cellular material to the card. In most cases, the FTA card will be sent to ESR (Police's forensic services provider) for analysis along with the used buccal swab, which is sent to ESR for destruction.<sup>2</sup> Similarly, with a fingerprick sample, a person's finger is firmly pressed onto the FTA card, and the card is then sent to ESR for analysis. If a venous sample is provided, a vial of blood is collected, which is then sent to ESR for analysis. When ESR receives the vial of blood, some of the blood is transferred to an FTA card, which is then stored.<sup>3</sup> The vial and any remaining blood is destroyed.

- 16.6 Once ESR receives a casework sample, it is analysed to generate a DNA profile for casework comparison.<sup>4</sup> Casework profiles are then stored on an electronic case file maintained by ESR. The process of analysis of DNA samples is discussed in Chapter 6 of this Report.
- 16.7 Casework profiles are retained on the case file and casework samples (either the FTA card or the vial of blood) are stored by ESR until disposal is required following the expiry of the relevant retention period.

### *Retention and destruction of suspect samples and profiles*

- 16.8 The CIBS Act governs the retention and destruction of suspect samples, any material extracted from suspect samples and any "related records", which are described as follows:<sup>5</sup>
- (b) every record of any analysis of any such bodily sample carried out on behalf of any constable; and
  - (c) every record, to the extent that it contains—
    - (i) information about the sample; and
    - (ii) particulars that are identifiable by any person as particulars identifying that information with the person from whom the sample was taken ...
- 16.9 Material extracted from a sample includes FTA cards, and related records include any DNA profile derived from a suspect sample and any information retained on Police databases, such as its National Intelligence Application system and Biotrak.<sup>6</sup>
- 16.10 The CIBS Act requires a suspect sample, any material extracted from that suspect sample and all related records to be destroyed "as soon as practicable" after:<sup>7</sup>
- (a) the expiry of 24 months from the date the sample was taken if no charge has been filed in relation to the offence for which the sample was obtained (or a related offence), unless this period is extended by a Judge (see paragraph 16.11 below);

<sup>2</sup> In rare cases, a sample may be obtained by a police officer but not sent to ESR for analysis. This might occur, for example, if a supervisor decides not to send the sample for analysis or if a decision is made not to charge a person. In these circumstances, the sample would be destroyed by Police.

<sup>3</sup> ESR advises that the transfer process is conducted under a fume hood by an ESR scientist wearing personal protective equipment.

<sup>4</sup> The process of casework comparison is described in Chapter 17.

<sup>5</sup> Criminal Investigations (Bodily Samples) Act 1995, s 60(1)(b)–(c). Section 63 requires that, when a suspect sample is to be destroyed, any material extracted from that sample must also be destroyed.

<sup>6</sup> Police developed Biotrak in response to the 2009 amendments to the CIBS Act and the increased complexity it introduced to databank sampling and the retention of samples and profiles. Biotrak is a computer system that has inbuilt gatekeeper rules to ensure that the correct forms are generated for sample collection and that sample and profile retention and destruction is managed in accordance with the rules in the CIBS Act. It tracks sample submission to ESR and is also linked with Police's National Intelligence Application system and Court records.

<sup>7</sup> Criminal Investigations (Bodily Samples) Act 1995, s 60(d)–(f).

- (b) the charge is withdrawn;
  - (c) the person is acquitted; or
  - (d) the period for appeal has expired if the person is convicted of an offence but it does not qualify the DNA profile for retention on the DNA Profile Databank (DPD).<sup>8</sup>
- 16.11 If no charge has been filed within 24 months of the suspect sample being taken, the retention period can only be extended by order of a High Court or District Court Judge.<sup>9</sup> An application for an extension must be made before the 24-month period expires by a police officer of or above the position of inspector and must be made without notice.<sup>10</sup> An extension may be ordered only if the Judge is satisfied that either of the two circumstances below exist:<sup>11</sup>
- (a) that there is still good cause to suspect that the person committed [the offence in relation to which the sample was taken, or a related offence] and—
    - (i) there is a good reason for the person not having been charged; and
    - (ii) it is important to the investigation of the offence that the bodily sample, and any records that would otherwise be required to be destroyed, be retained; or
  - (b) that—
    - (i) there is not, or no longer, good cause to suspect that the person committed an offence referred to in subsection (3)(a); but
    - (ii) it is important to the investigation of the offence, or to criminal proceedings in relation to that offence, that the bodily sample, and any records that would otherwise be required to be destroyed, be retained.
- 16.12 If a suspect is convicted of the offence for which a suspect sample was obtained (or a related offence) and the offence qualifies that person's DNA profile for retention on the DPD, the suspect sample may be retained only for as long as necessary to enable a DNA profile to be obtained from the sample and must then be destroyed.<sup>12</sup> The DNA profile generated from that sample may then be retained on the DPD for the period specified in the CIBS Act. The retention of DNA profiles on the DPD is discussed in Chapter 20.

### Suspect samples and profiles from non-prosecutable children

- 16.13 If a suspect sample is obtained from a child (aged between 10 and 14 years) who cannot lawfully be prosecuted, different retention and destruction requirements apply.<sup>13</sup> As we

<sup>8</sup> Currently, a DNA profile may be retained on the DNA Profile Databank (DPD) in respect of any imprisonable offence or the non-imprisonable offence of peeping or peering into a dwellinghouse: ss 5(a) and 26. Section 5(a) authorises the collection of a DNA sample in relation to any imprisonable offence or any offence listed in Part 3 of Schedule 1, and s 26 authorises the retention of a DNA profile derived from a suspect sample if that person is convicted of the offence in respect of which the sample is taken (or a related, qualifying offence). Notably, however, all but one of the offences listed in Part 3 are imprisonable. The single exception is the offence of peeping or peering into a dwellinghouse, which is an offence under s 30 of the Summary Offences Act 1981, punishable by a maximum fine of \$500.

<sup>9</sup> Criminal Investigations (Bodily Samples) Act 1995, s 61.

<sup>10</sup> Section 61(2).

<sup>11</sup> Section 61(3A). The retention period can be extended by up to six months or, where previous extensions have been made amounting to in the aggregate one year or more, for a period of 12 months: s 61(4).

<sup>12</sup> Section 60(2)–(3). In many instances, a DNA profile will already have been generated and will be held on the case file. Upon conviction, the profile is automatically transferred to the DPD.

<sup>13</sup> Section 61A. Whether a child can be lawfully prosecuted for an offence is determined by s 272 of the Oranga Tamariki Act 1989. Section 272(1) of that Act provides that a child aged 10 or 11 may only be prosecuted for murder or

explain in Chapter 8, the purpose of obtaining a suspect sample from a non-prosecutable child is to determine whether that child is in need of care and protection.<sup>14</sup> The CIBS Act requires that these samples and related records must be destroyed:<sup>15</sup>

- (a) as soon as practicable after Police receives results that do not tend to confirm the suspect was involved in the offending; or
- (b) no later than 60 days after Police receives results that tend to confirm the suspect's involvement if Police makes no application for a care and protection order within that time; or
- (c) if an application for a care and protection order is made based on the results of analysis that tend to confirm the suspect's involvement as soon as practicable after the Family Court makes its decision on that application.

### Destruction process and notification requirements

- 16.14 The CIBS Act does not regulate the disposal methods for suspect samples, material extracted from suspect samples or related records, nor does it provide for these to be returned to the suspect.
- 16.15 In practice, ESR destroys suspect samples and related material such as FTA cards by disposing of them in a biohazard waste bin. The company responsible for disposing of the biohazard waste uses a process of autoclaving, which involves heating the waste to 140 degrees Celsius and grinding it down. The remains are then disposed of in a landfill.
- 16.16 ESR notifies Police when it has destroyed a suspect sample. There is, however, no requirement to notify a suspect when their DNA sample and any related material and records are destroyed.

### Elimination samples and profiles

- 16.17 As we explain in Chapter 9, the CIBS Act does not provide for elimination sampling. In the absence of a statutory regime, elimination samples are obtained on a purely voluntary basis. Police has developed a standard form to be used when requesting an elimination sample. This records that the elimination sample and any information derived from it will be destroyed once the information is no longer needed for the purpose for which it was provided.<sup>16</sup> The form does not specify a specific retention period, but ESR has informed us that it deals with and retains elimination samples and profiles in the same way and for the same length of time as suspect samples and profiles.

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manslaughter and that a child aged 12 or 13 may only be prosecuted for murder, manslaughter or any offence for which the maximum penalty available is or includes imprisonment for life or for at least 14 years. Section 272(1)(c) provides that, if a child aged 12 or 13 years is a "previous offender" within the meaning of subss (1A) or (1B), they may also be prosecuted for any offence for which the maximum penalty available is or includes imprisonment for at least 10 years but less than 14 years.

<sup>14</sup> On the ground that the child's offending is of sufficient number, nature or magnitude to cause serious concern for their well-being. See s 24D(b)(ii) of the Criminal Investigations (Bodily Samples) Act 1995, which refers to s 14(1)(e) of the Oranga Tamariki Act 1989.

<sup>15</sup> Criminal Investigations (Bodily Samples) Act 1995, s 61A.

<sup>16</sup> Ngā Pirihimana o Aotearoa | New Zealand Police "DNA Elimination Sample Consent Form" (DNA300 – 08/17) referred to in Ngā Pirihimana o Aotearoa | New Zealand Police "DNA Sampling" in *Police Manual* at 46. This form is used for DNA sampling not governed by the CIBS Act including missing person and disaster victim identification. As noted in the Issues Paper, Police has used this form since 2011. Prior to that, Police relied on the suspect sampling regime in Part 2 of the CIBS Act on the basis that DNA samples sought for elimination purposes would tend to "disprove" the person's involvement in the commission of the offence: Issues Paper at [8.24].

### ***Mass screen samples and profiles***

16.18 Mass screening, like elimination sampling, is not provided for in the CIBS Act. It is, however, possible to conduct a voluntary mass screen using the suspect sampling regime under the CIBS Act (see discussion in Chapter 10). This means that the retention and disposal requirements explained above in relation to suspect samples and profiles also apply to mass screen samples.

### ***Indirect suspect samples and profiles***

16.19 Suspect samples that are obtained indirectly (discussed in Chapter 12) are also not provided for under the CIBS Act. If an indirect suspect sample is obtained pursuant to a search warrant under the Search and Surveillance Act 2012, the provisions in that Act would apply. Section 150 of the Search and Surveillance Act provides that a thing seized or produced must, if not required for investigative or evidential purposes, be returned to its owner or the person entitled to possession or destroyed if it is likely to pose a risk to public health.

16.20 The Search and Surveillance Act does not require the destruction of related records such as a DNA profile derived from an indirect suspect sample. This means that indirect suspect profiles could be retained indefinitely.

### ***Issues with management of casework samples***

16.21 We have identified two broad issues with the storage, retention and destruction of casework samples and related information such as casework profiles:

- (a) The lack of recognition and provision for human rights values and applicable tikanga Māori as well as cultural and spiritual values that may be engaged by the storage, retention and destruction of human tissue and related information.
- (b) The lack of transparency and accountability in the storage, retention and destruction of human tissue and related information.

16.22 We explore these issues below. We also note that similar issues also arise in relation to crime scene samples (discussed at paragraph 16.95 below), even though the source of the DNA is unknown at the time of collection. In Chapter 18, we recognise that these issues also arise in relation to DNA samples obtained for the DNA databanks.

### ***Lack of recognition and provision for human rights and tikanga Māori***

16.23 DNA samples are a unique form of personal information because they comprise human tissue, which contains a wealth of information about that person. As we explain in Chapter 2, the collection and use of DNA samples by the State for law enforcement purposes constitutes an intrusion on privacy. This intrusion does not end once the sample is obtained and analysed. It continues as long as the sample and related information is retained. Bodily integrity and the broader human rights concept of individual autonomy are also affected, because the ongoing retention and subsequent destruction of DNA samples restricts a person's ability to control what happens to their human tissue. The extent of these intrusions may be felt particularly strongly if the sample was originally obtained from a person by compulsion rather than consent and if it was obtained using reasonable force.



- 16.24 For Māori, the human body is considered tapu and human tissue a taonga.<sup>17</sup> The management of human tissue therefore engages tikanga Māori associated with personal tapu, mana and whakapapa, including whanaungatanga, manaakitanga and kaitiakitanga (described in Chapter 2). The storage, retention and destruction of human tissue and related information can also intrude on cultural and spiritual values.
- 16.25 The CIBS Act does not recognise that these values are engaged and therefore does not provide for their consideration in the management and destruction of casework samples and related information.<sup>18</sup> This is inconsistent with other legislation that governs the collection and use of human tissue, as we identify in Chapter 3. For example, the Human Tissue Act 2008 recognises that the collection and use of human tissue engages the human rights values of individual autonomy and dignity as well as cultural and spiritual values.<sup>19</sup> These values must be recognised and respected alongside the public good associated with the collection or use of human tissue and the health and safety of members of the public.<sup>20</sup> Similarly, the Coroners Act 2006 recognises the cultural and spiritual needs of the family, whānau and close friends of a person who has died and the need to balance these needs against the public good associated with a proper and timely understanding of the causes and circumstances of deaths.<sup>21</sup>
- 16.26 The lack of recognition and provision for tikanga Māori can also be contrasted to the collection and use of human tissue from Māori in the health research context, outlined in *He Tangata Kei Tua: Guidelines for Biobanking with Māori* (Biobanking Guidelines).<sup>22</sup> These guidelines have been developed to ensure that biological material is collected from Māori participants and used in a manner that is consistent with tikanga. While it can be difficult to apply concepts that are developed in the health research context to the criminal justice context, in some respects, it may be possible to develop policies around the retention and disposal of biological samples that are consistent with tikanga Māori as reflected in the Biobanking Guidelines.<sup>23</sup>
- 16.27 In the Issues Paper, we identified several aspects of the current regime that may unjustifiably intrude on privacy, bodily integrity, individual autonomy and tikanga Māori:<sup>24</sup>

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<sup>17</sup> Pūtaiora Writing Group *Te Ara Tika: Guidelines for Māori research ethics – A framework for researchers and ethics committee members* (Health Research Council of New Zealand, 2010) at 15; and Maui Hudson and others *He Tangata Kei Tua: Guidelines for Biobanking with Māori* (Te Mata Hautū Taketake | Māori and Indigenous Governance Centre, October 2016) at 8. See Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (rev ed, Huia Publishers, Wellington, 2016) at 52–54, where Mead notes that some parts of the body are more tapu than others.

<sup>18</sup> We note that ESR has done some work in the past to create awareness of cultural issues in forensics: Maui Hudson and others “The Impact of Māori Cultural Values on Forensic Science Practice in New Zealand” (2008) 53 JFS 380 at 382.

<sup>19</sup> Human Tissue Act 2008, s 3(a)(i)–(iii).

<sup>20</sup> Section 3(a)(iv) and (b).

<sup>21</sup> Coroners Act 2006, s 3(2)(b).

<sup>22</sup> Maui Hudson and others *He Tangata Kei Tua: Guidelines for Biobanking with Māori* (Te Mata Hautū Taketake | Māori and Indigenous Governance Centre, October 2016). Hudson and others have also published separate guidelines on genomic research (which looks at the functions of groups of genes and their interactions with the environment) with Māori that outline the same cultural foundation: Maui Hudson and others *Te Mata Ira: Guidelines for Genomic Research with Māori* (Te Mata Hautū Taketake | Māori and Indigenous Governance Centre, October 2016). See also Pūtaiora Writing Group *Te Ara Tika: Guidelines for Māori research ethics – A framework for researchers and ethics committee members* (Health Research Council of New Zealand, 2010).

<sup>23</sup> See discussion in Chapter 2, and in relation to the storage and destruction of samples, see the discussion in the Issues Paper at [14.30]–[14.32].

<sup>24</sup> See discussion in the Issues Paper at [14.16]–[14.35].

- (a) First, the length of time for which suspect samples and related information may be retained appears to be longer than is necessary for law enforcement purposes. Prior to 2009, the retention period for suspect samples was 12 months if no charges had been filed. When the retention period was extended to 24 months, the Privacy Commissioner voiced concerns, describing the proposed length of time as “excessive and disproportionate”.<sup>25</sup>
- (b) Second, there is no ability to request the return of casework samples and no requirement to notify a donor when their sample has been destroyed. For Māori, this may be a particular concern if the donor dies. According to tikanga, that person should be buried along with any body parts or significant biological material that has been separated from them during life.<sup>26</sup> The lack of any process for return of samples is out of step with the Human Tissue Act and the Coroners Act, both of which prescribe more nuanced regimes for return and destruction of human tissue that give weight to the views of individuals concerned.<sup>27</sup> It is also out of step with the Newborn Metabolic Screening Programme, discussed in Chapter 12, which provides for blood spot cards to be returned on request.
- (c) Third, the destruction process may raise concerns for Māori, as well as people from other cultures or religious communities. In relation to consistency with tikanga Māori, Hudson and others observe:<sup>28</sup>

The destruction of samples as biohazardous waste by, for example, burning, also has considerable potential for interaction with cultural values as cremation is not a traditional burial process.

16.28 By failing to recognise the human rights values and tikanga Māori engaged by the storage, retention and destruction of DNA samples, the CIBS Act undermines fundamental constitutional values and principles of a democratic society. The failure to recognise and provide for tikanga Māori also risks inconsistency with the guarantee of tino rangatiratanga under te Tiriti o Waitangi | the Treaty of Waitangi (the Treaty), and with the Treaty principles of partnership and active protection, discussed in Chapter 2.

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<sup>25</sup> Te Mana Matapono Matatapu | Privacy Commissioner “Submission to the Justice and Electoral Committee on the Criminal Investigations (Bodily Samples) Amendment Bill 2009” (6 April 2009) at [1.12].

<sup>26</sup> Maui Hudson and others “The Impact of Māori Cultural Values on Forensic Science Practice in New Zealand” (2008) 53 JFS 380 at 381–382.

<sup>27</sup> The Human Tissue Act 2008, s 20(g) provides that human tissue should only be destroyed without informed consent if necessary for health and safety or if all reasonable attempts to return the human tissue to the relevant person have been made and have failed. Section 48(2) of the Coroners Act 2006 provides that a pathologist can retain bodily samples after the release of the body but only in certain circumstances. The first circumstance is where the sample is “minute” and is taken for analysis that, in the pathologist’s opinion, is necessary for the purposes of the post-mortem. The second circumstance is where the sample is not minute but its retention is authorised by the coroner. The third circumstance is where the people to whom the body is to be released have been informed of the pathologist’s intention to retain a sample and have not objected to the retention. In all three circumstances, the people to whom the body is released must be notified of the right to request return of retained samples (ss 50–51), and samples must generally be returned on request when return is unlikely to prejudice any investigation or prosecution (s 54(2)) to the extent the sample has not been destroyed in the course of analysis (s 55(2)). Samples need not be returned if, in the pathologist’s opinion, that would endanger the health and safety of the public or a member of the public: s 54(1). Samples also need not be returned if the makers of the request for return cannot be located: s 55(3).

<sup>28</sup> Maui Hudson and others “The Impact of Māori Cultural Values on Forensic Science Practice in New Zealand” (2008) 53 JFS 380 at 382.

### *Lack of transparency and accountability*

- 16.29 In Chapter 4, we identify that the management of casework samples and profiles, including how they are stored and how and when they are destroyed, lacks transparency. Donors are not informed about these matters nor is there any publicly available information that explains to donors what will happen once they have given a sample. In addition, the casework comparison process, discussed in Chapter 17, also lacks transparency as it occurs within the electronic case file and is not subject to any reporting requirements.
- 16.30 We are particularly concerned that the CIBS Act does not govern elimination or indirect samples. This means there are no reporting requirements or statutory requirements that govern the management of these types of samples.
- 16.31 There is also a lack of independent oversight of the storage, retention and destruction of casework samples and profiles. Currently, Police and ESR rely on their own management and internal auditing systems to ensure that samples are not inappropriately accessed and are otherwise stored securely and destroyed when required.<sup>29</sup> We discuss the need for oversight of the DNA regime, including in these important areas, in Chapter 5.

### **Options for reform**

- 16.32 In the Issues Paper, we identified several options for reform that sought to minimise intrusions on human rights and applicable tikanga Māori and improve the transparency and accountability of the DNA regime:
- (a) Establishing a uniform retention policy for all casework samples that better reflects the ongoing intrusion posed by the retention of DNA samples. This might require a shorter timeframe for disposal, such as six or 12 months from collection, or disposal of a sample as soon as practicable after a DNA profile is obtained (consistent with the approach to databank sampling, discussed in Chapter 18), with an exception for a judge to permit retention if satisfied there are case-specific reasons for doing so.<sup>30</sup>
  - (b) Giving the donor some input into what happens to their sample when retention is no longer required.<sup>31</sup> For example, the donor could be given information at the time the sample is obtained regarding the donor's options to have the sample returned or be informed of its destruction.
  - (c) Developing policies on the retention and disposal of DNA samples that recognise and provide for tikanga Māori, similar to the Biobanking Guidelines that have been developed in the health research context.<sup>32</sup>
- 16.33 Independent oversight of the retention and destruction of samples and profiles was also identified as an option for reform in the Issues Paper.<sup>33</sup> We discuss oversight of the DNA regime in Chapter 5.

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<sup>29</sup> Police has advised that audit oversight has been passed to the Police Assurance Group to add a layer of independence. The Group often uses external members for audit purposes but maintains oversight.

<sup>30</sup> Issues Paper at [14.50]–[14.51].

<sup>31</sup> At [14.23]–[14.26].

<sup>32</sup> At [14.30]–[14.35].

<sup>33</sup> At [14.40]–[14.42] and [14.85]–[14.86].

## Results of consultation

16.34 We received 14 submissions that commented on the retention and destruction of casework samples and profiles, comprising nine submissions from organisations and five submissions from individuals.

### *Retention of casework samples*

16.35 We received 12 submissions that commented on the retention period for suspect and elimination profiles.

16.36 Five submitters, the New Zealand Law Society (NZLS), the New Zealand Bar Association (endorsing NZLS's submission in its entirety), the Independent Forensic Practitioners Institute (IFPI), Associate Professor Nessa Lynch and one other individual, were in favour of retaining casework samples only until a DNA profile is generated. However, NZLS and Nessa Lynch noted the need for a mechanism (such as approval from an independent oversight body or a court order) to permit retention of samples for a longer period if necessary.

16.37 Three submitters, the Auckland District Law Society Criminal Law Committee (ADLS), the Public Defence Service (PDS) and Sue Petricevic, supported retaining casework samples until the case is concluded. PDS noted that it was possible that suspect samples may become relevant to the defence case but submitted that retention until the case is concluded should be subject to strict restrictions and that any subsequent access to and searches of casework samples should be regarded as "a distinct search, which must be subject to renewed scrutiny, and can be considered unreasonable".

16.38 The Privacy Commissioner similarly submitted that casework samples should be retained until the primary use for that sample is spent, such as where law enforcement and evidential needs have elapsed, and the donor no longer has an interest in that sample being retained. The Commissioner rejected the possibility of long-term retention (in case samples become relevant in future) and submitted that the privacy rights of individuals favour the "setting of clear rules around retention and destruction" that are informed by factors such as the purpose of collection, the nature of consent, cost and efficiency. Special consideration must be paid, the Commissioner noted, to youth samples:

A one-off consent to provide a sample, especially by a young person, cannot be treated as a lifetime consent to the retention of their genetic material and information, and should be reviewed after a suitable period.

16.39 Police and ESR submitted in favour of specific retention periods for casework samples, with Police favouring the current 24-month retention period and ESR supporting a retention period of no less than 12 months. ESR submitted that suspect and elimination samples must be retained after a DNA profile is generated, as "different DNA profiling information" may subsequently be required after the first profile has been obtained. ESR observed the need to strike a balance between retaining samples "longer than necessary versus the intrusion on the donor having a second sample taken for further analysis".

16.40 Te Mana Raraunga | Māori Data Sovereignty Network did not recommend a specific retention period for casework samples but instead submitted that there should be wide consultation with Māori around retention periods for samples and any derived data as well as under what circumstances samples and derived data should be retained.

### *Return of casework samples*

- 16.41 We received 11 submissions that commented on whether a person should be able to choose to have their sample returned to them when retention is no longer required.
- 16.42 Four submitters (including NZLS, Te Mana Raraunga and Karaitiana Taiuru) supported donors having an opportunity to request the return of their DNA sample. NZLS noted that such requests are unlikely to arise in most cases or be necessary for all types of samples, depending on the requirements of tikanga Māori and other cultural norms, but that it is preferable to allow for that choice if possible. NZLS acknowledged that a significant amount of information is already provided to donors at the time of sampling, so it suggested that brief information be provided at the time of collection and that further information on processes for return of samples be made available online, perhaps on a website hosted by a regulatory body. Te Mana Raraunga and Karaitiana Taiuru similarly submitted that a person should be able to have input into whether or not they would like a bodily sample returned to them.
- 16.43 PDS and Nessa Lynch agreed in principle that people should be able to choose whether a DNA sample is returned to them but acknowledged there are significant practical difficulties. PDS noted that it may be difficult to locate the person and that it might not be cost-effective. The law would have to specify what should happen if a person who wished to have their sample returned to them cannot be contacted or has died. PDS suggested consideration of an option where a person can choose to have their sample returned via a group or organisation set up for that purpose. This would be largely symbolic, as the person would not directly receive their sample, but it may resolve some of the practical issues with contacting individual donors. Nessa Lynch also noted that, while samples can be returned on request in the health context, it may not be practicable in the law enforcement context.
- 16.44 Police, ESR, ADLS and Sue Petricevic also raised practical difficulties with providing for the return of DNA samples. Police questioned whether this would be viable based on the numbers involved (143,622 samples taken from known people between 2010 and 2018). ESR submitted that there are practical and logistical implications that would make the return of samples difficult, including health and safety considerations given the biological nature of samples. A similar concern was expressed by ADLS and Sue Petricevic.
- 16.45 The Privacy Commissioner submitted that, for some individuals, the return of DNA samples will be culturally important, and for others, it will not. In the Commissioner's view, the cultural significance of returning a sample should inform the design of rules around retention, return and destruction, and the groups affected should be consulted.

### *Destruction procedures*

- 16.46 We received 10 submissions that commented on destruction procedures for DNA samples.
- 16.47 Several submitters expressed support for developing destruction procedures that align with tikanga Māori. Karaitiana Taiuru submitted that DNA is a taonga and is tapu and that legislation must ensure that DNA is both stored and destroyed in a tikanga-appropriate manner. He also emphasised the need to recognise rights under the Treaty in all aspects of DNA retrieval and storage. Te Mana Raraunga and NZLS also supported the development of processes that consider appropriate tikanga Māori.
- 16.48 No submitter expressed support for a donor being able to choose how their DNA sample is destroyed. Police submitted that it was not viable to allow for a choice about

the method of destruction, given the high volume of samples collected. PDS and Nessa Lynch also saw choice as impractical, with PDS submitting that donors should be given a choice only if “there is a workable way for [choice] to occur that does not compromise health and safety or sanitation, as the samples are biohazards”. ESR preferred a regime where the principles governing destruction (for example, security, transparency and alignment with tikanga Māori) are articulated in legislation but the exact method of destruction is not mandated.

16.49 Several submitters, including NZLS, PDS and Nessa Lynch, were in favour of clear standardised destruction procedures to promote transparency and ensure appropriate safeguards are in place. NZLS submitted that:

It is preferable for destruction procedures to be standardised to make it more likely that destruction will occur correctly and at the appropriate time. Minimising the complexity of the process will also minimise the risk of errors and omissions.

16.50 NZLS submitted that destruction procedures should be determined by an oversight body, observing the requirements of tikanga Māori.

16.51 Views were mixed on whether donors should be notified when their sample is destroyed. Te Mana Raraunga, PDS, ADLS and Sue Petricevic supported notification. Te Mana Raraunga considered notification to be an important transparency and accountability mechanism and submitted that people should also be given clear information about the destruction process at the time the sample is obtained. Te Mana Raraunga also submitted that a person should be notified when their DNA profile has been destroyed/removed from the databank. PDS noted that a group or organisation could receive destruction notifications if it were too challenging to notify individual donors (see paragraph 16.43 above). ADLS and Sue Petricevic supported notification prior to destruction so that requests to take certain steps in accordance with tikanga Māori can be accommodated.

16.52 However, Police observed that notification could be difficult as Police do not always have up-to-date contact details for donors. NZLS echoed this concern, noting that there is a risk that out-of-date contact information could result in a destruction notification being sent to the wrong person. Additionally, NZLS believed notification is disproportionately complex and resource intensive.

### *Oversight of retention and destruction procedures*

16.53 We received 10 submissions on the question of whether an oversight body should audit compliance with retention and destruction rules. We explore these submissions in detail in Chapter 5. In summary, NZLS, Te Mana Raraunga, PDS, ADLS, the Privacy Commissioner, Nessa Lynch, Sue Petricevic and Karaitiana Taiuru expressed support for independent auditing of retention and destruction of samples and profiles. Police expressed general support for proposals that enable a greater Māori say on how DNA is managed and a more consistent approach to how tikanga is applied.

## Management of casework samples in comparable jurisdictions

- 16.54 We have reviewed the statutory regimes governing the storage and retention of casework samples and profiles in comparable jurisdictions. These regimes typically prescribe retention periods for casework samples and profiles, but they do not prescribe storage requirements or destruction processes.<sup>34</sup> Similarly, they do not provide for donors to request the return of their samples or to be notified when their sample and related material and records have been destroyed.
- 16.55 We discuss retention periods for casework samples and profiles below.

### *Suspect samples and profiles*

- 16.56 Most jurisdictions reviewed prescribe set retention periods for suspect samples, and these same periods usually extend to any DNA profile derived from that sample.
- 16.57 In Australia, most jurisdictions adopt similar retention rules, typically requiring forensic material taken from a suspect and any DNA profile stored on the DNA databank to be destroyed after 12 months if no charges have been filed. Destruction is earlier if charges are discontinued, no conviction is recorded or the suspect is acquitted and no appeal has been lodged or the appeal confirms the acquittal.<sup>35</sup> This retention period may be extended by a magistrate if satisfied there are special reasons for doing so.<sup>36</sup> However, in two jurisdictions, the suspect must apply to have their forensic material destroyed. In Western Australia, forensic material and related information is only destroyed if the suspect has made a request to the Commissioner of Police and either no charges are filed within two years or the charge is finalised without a finding of guilt.<sup>37</sup> In the Australian Capital Territory (ACT), a suspect must apply to a court for an order that the forensic material be destroyed, can only make an order one year after the material was obtained and cannot make an application if they were convicted or if proceedings have begun but have not been finally decided.<sup>38</sup> However, regardless of whether an application has been made, any identifying information on the DNA databank must be removed if one year has elapsed since the forensic material was taken and court proceedings have not commenced or have been discontinued.<sup>39</sup>
- 16.58 Ireland adopts similar retention rules to those most common in Australia. Suspect samples and DNA profiles must be destroyed no later than three months from:<sup>40</sup>

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<sup>34</sup> Some jurisdictions provide for the storage of DNA profiles on a DNA profile databank, although this is not always mandated. We discuss DNA profile databanks in Chapter 4.

<sup>35</sup> See Crimes Act 1914 (Cth), ss 23YD and 23YDAG(1); Crimes (Forensic Procedures) Act 2000 (NSW), ss 88 and 94(1); Crimes Act 1958 (Vic), ss 464ZG and 464ZGJ; Police Powers and Responsibilities Act 2000 (Qld), s 490; and Forensic Procedures Act 2000 (Tas), ss 51 and 55. In South Australia, the Criminal Law (Forensic Procedures) Act 2007 (SA) does not prescribe retention periods, and in the Northern Territory, samples may be retained for such period as the Commissioner thinks fit: Police Administration Act 1978 (NT), s 147C.

<sup>36</sup> See Crimes Act 1914 (Cth), s 23YD(5); Crimes (Forensic Procedures) Act 2000 (NSW), s 88(5); Crimes Act 1958 (Vic), s 464ZG(5); and Forensic Procedures Act 2000 (Tas), s 51(5).

<sup>37</sup> Criminal Investigation (Identifying People) Act 2002 (WA), ss 66–69.

<sup>38</sup> Crimes (Forensic Procedures) Act 2000 (ACT), s 92.

<sup>39</sup> Section 98A. This is subject to a warrant for the apprehension of the suspect being issued within that period.

<sup>40</sup> Criminal Justice (Forensic Evidence and DNA Database System) Act 2014 (Ireland), ss 76 and 80. However, DNA profiles may be retained on the DNA databank if that is necessary to assist in the investigation or prosecution of offences: s 81.

- (a) the end of 12 months from the date the sample was obtained if proceedings have not been filed in that time;
  - (b) the date of acquittal, dismissal of the charge or discontinuance of proceedings;
  - (c) the end of three years after the making of a probation order in respect of the relevant offence concerned if the person is not convicted of a relevant offence within that period; or
  - (d) when a person's conviction for the relevant offence is quashed or is declared to be a miscarriage of justice.
- 16.59 In addition, any suspect sample and profile must be destroyed as soon as practicable if it is established that no offence was committed, that the sample was obtained on the basis of mistaken identity or that the procedure was unlawful.<sup>41</sup> The retention period in respect of suspect samples can be extended by the Commissioner of the Garda Síochána (Ireland's national police service) if satisfied that retention is necessary for the investigation concerned.<sup>42</sup> The person concerned is notified of any extension and has the ability to appeal it to the District Court.<sup>43</sup>
- 16.60 Similar retention periods apply in Canada. Suspect samples taken by warrant and the results of forensic DNA analysis must be destroyed without delay after either:<sup>44</sup>
- (a) the results of analysis establish that the DNA found at the crime scene was not from that suspect;
  - (b) the suspect is acquitted; or
  - (c) the expiration of one year after the person is discharged or the charge is otherwise dismissed or stayed unless new charges are laid in relation to that offence.
- 16.61 A provincial court judge may order that the retention period be extended in limited circumstances.<sup>45</sup> Legislation also requires samples provided voluntarily and the results of DNA analysis to be destroyed after the results of that analysis establish that the DNA found at the crime scene was not from that person.<sup>46</sup>
- 16.62 The retention period is shorter in England and Wales. Any DNA samples taken in connection with an investigation must be destroyed as soon as a DNA profile has been derived from the sample or before the end of the period of six months from when the sample is obtained, whichever is sooner.<sup>47</sup> A sample may be retained for longer only if a District Judge is satisfied that, having regard to the nature and complexity of other material that is evidence in relation to the offence, the sample is likely to be needed in proceedings for the purpose of disclosure to or use by a defendant or for the purpose of responding to any challenge by a defendant in respect of the admissibility of evidence.<sup>48</sup>

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<sup>41</sup> Sections 78 and 82.

<sup>42</sup> Section 77.

<sup>43</sup> Section 77(5)–(6).

<sup>44</sup> Criminal Code RSC 1985 c C-46, s 487.09(1).

<sup>45</sup> Section 487.09(2).

<sup>46</sup> Section 487.09(3).

<sup>47</sup> Police and Criminal Evidence Act 1984 (UK), s 63R(4)–(5).

<sup>48</sup> Section 63R(6)–(7).



16.63 Legislation in Scotland does not prescribe a specific time-frame for retention. It simply requires that suspect samples and all information derived from such samples be destroyed as soon as possible following a decision not to institute criminal proceedings against the person or on the conclusion of such proceedings otherwise than with a conviction or discharge.<sup>49</sup>

### *Elimination and mass screen samples and profiles*

16.64 Samples obtained for elimination purposes are typically subject to different retention rules, except in England and Wales, where the same rules, described above, appear to apply to all samples obtained in criminal investigations.<sup>50</sup>

16.65 Legislation in most other jurisdictions provides for the retention periods of samples provided by “volunteers” (that is, people who are not suspects) to be agreed by the donor and gives the donor the right to withdraw consent to retention at any time. One exception is Western Australia, where legislation includes specific safeguards to prevent the inappropriate use of elimination samples. Identifying information from an “involved person” (defined as a person who is not a suspect but who is reasonably suspected to have been the victim of or to have witnessed the commission of the offence) must be destroyed if, within two years after the information is obtained, no person is charged or a person is charged and proceedings are completed.<sup>51</sup>

16.66 In Canada, DNA samples and profiles provided voluntarily must be destroyed as soon as analysis establishes that the DNA found at the crime scene did not come from that person.<sup>52</sup> Profiles from victims and voluntary donors must also be removed from the DNA databank without delay if comparison “will not assist in the investigation with respect to which the profile was obtained”.<sup>53</sup>

16.67 Less stringent safeguards exist in Ireland, where legislation requires the destruction of volunteer samples within three months after the investigation is concluded or proceedings are determined but does not require the destruction of volunteer profiles on the DNA databank unless consent is withdrawn by the volunteer.<sup>54</sup>

16.68 Ireland is also the only comparable jurisdiction to prescribe a specific regime for mass screening. It provides for a mass screen participant, as well as any volunteer, to request the destruction of the sample or the DNA profile generated from that sample.<sup>55</sup> If not already destroyed, mass screen samples and profiles must be destroyed within three months after the investigation is concluded or proceedings are determined.<sup>56</sup>

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<sup>49</sup> Criminal Procedure (Scotland) Act 1995, s 18(3).

<sup>50</sup> Police and Criminal Evidence Act 1984 (UK), s 63R. A DNA profile derived from a sample taken with consent may be retained until it has fulfilled the purpose for which it was taken or derived: s 63N(2).

<sup>51</sup> Criminal Investigation (Identifying People) Act 2002 (WA), ss 23 and 65(1)(c).

<sup>52</sup> Criminal Code RSC 1985 c C-46, s 487.09(3).

<sup>53</sup> DNA Identification Act SC 1998 c 37, s 8.1(2).

<sup>54</sup> Criminal Justice (Forensic Evidence and DNA Database System) Act 2014 (Ireland), s 87.

<sup>55</sup> Section 87(1).

<sup>56</sup> Section 87(8).

## RECOMMENDATIONS

### Developing procedures for storage and destruction of DNA samples

#### RECOMMENDATIONS

**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.

- 16.69 We recommend that procedures be developed to ensure proper management of all DNA samples, including casework samples, as well as any related information, including DNA profiles. These procedures should facilitate the collection and use of DNA for law enforcement purposes in a way that minimises interferences with relevant human rights values and recognises and provides for tikanga Māori (as reflected in the purpose of the new DNA legislation). For example, where a casework sample or profile needs to be retained after a person's death for investigation purposes, procedures could be developed to guide the storage of the sample and profile in a way that minimises intrusions of tikanga associated with the dead. These procedures should also have regard to cultural and spiritual values, alongside health and safety considerations. This will promote consistency with fundamental constitutional values and with the Crown's obligations under the Treaty described in Chapter 2.
- 16.70 These procedures should govern the storage and destruction of DNA samples. We agree with submissions by ESR and others that legislation should not specify the exact method of destruction but rather the principles that should govern management and destruction of samples.
- 16.71 We recommend that these procedures be developed in consultation with the DNA Oversight Committee and be published to promote accountability and transparency, which will in turn promote public confidence in the regime. In Chapter 5, we recommend that the Independent Police Conduct Authority (IPCA) be given a new function to conduct audits of the collection, use, storage and retention of DNA samples and DNA profiles to ensure compliance with legal requirements. This auditing function would therefore extend to assessing compliance against these storage and destruction procedures.

## Storing casework profiles on the proposed DNA databank

### RECOMMENDATIONS

**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.

- 16.72 In Chapter 4, we recommend the establishment of a new DNA databank to address the lack of transparency and accountability relating to the storage of casework profiles and the process of casework comparison. All casework profiles should be stored on the proposed DNA databank, and no casework comparison should be permitted outside the databank. This will promote transparency, provide for the secure storage of casework profiles and minimise the risk of improper use of profiles.
- 16.73 We recommend that profiles derived from suspect samples and indirect samples (suspect profiles) be stored on the pre-conviction index of the proposed DNA databank. The pre-conviction index should hold profiles of people who are suspected of committing an offence but who have not yet had the charges against them resolved. We discuss the use of profiles on the pre-conviction index in Chapter 18. In that chapter, we recommend that profiles on the pre-conviction index should not be compared against profiles on the crime scene index except by order of a High Court or District Court judge. Suspect profiles would continue to be available for casework comparisons, but all comparisons would have to take place on the proposed DNA databank – that is, a suspect profile would be able to be compared against a profile on the crime scene index that relates to the investigation in respect of which that suspect sample was obtained.
- 16.74 Elimination and mass screen profiles should be stored on a separate elimination index and should only be used for casework comparison (compared against the crime scene profile or profiles that relate to the investigation for which the sample was obtained). There should be no ability to compare these profiles against other profiles on the crime scene index, consistent with the recommendations made in Chapters 9 and 10.

## Retaining and destroying casework samples and related information

### RECOMMENDATIONS

#### 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.

- 16.75 To reduce the retention period for suspect samples where no charges are filed for the offence or a related offence,<sup>57</sup> we recommend that the retention period for casework samples be modified to 12 months from the date the sample was obtained. We consider that this is a reasonable and proportionate baseline given the intrusion on human rights and tikanga Māori inherent in the retention of DNA samples and the investigative needs of law enforcement. This would return the current retention period of 24 months to the pre-2009 retention period and would bring the law back into line with the approach in most comparable jurisdictions. Police should continue to be able to apply for an extension of the 12-month retention period in exceptional situations on grounds analogous to the current requirements.<sup>58</sup> This includes the ability to retain a suspect sample even if the person has been excluded from the investigation. We recognise that, in a small number of cases, there may be a need to retain a cleared suspect's sample for reasons connected to that investigation.<sup>59</sup>
- 16.76 We have recommended specifying a three-month period within which destruction must occur rather than the current requirement of "as soon as practicable". A three-month window is, we understand, consistent with ESR's current practice in relation to the destruction of databank samples "as soon as practicable after a DNA profile is obtained".<sup>60</sup> It is also consistent with the prescribed approach in Ireland (discussed at paragraph 16.58 above) and will be easier to audit practice against than a less defined "as soon as practicable" standard.
- 16.77 We have not preferred the alternative option in the Issues Paper of requiring the destruction of casework samples once a DNA profile has been generated. We accept that casework samples may need to be retained for investigative or evidential purposes until charges are filed and then, if filed, until the conclusion of any criminal proceedings. We note ESR's submission that, in some cases, a sample may need to be re-analysed and that, if the sample cannot be retained including after the conclusion of the associated criminal case, a second sample may need to be obtained. This is different to databank samples, which are obtained for the sole purpose of generating a DNA profile for the purpose of storing it on the proposed DNA databank.
- 16.78 We have also not preferred a blanket rule requiring suspect samples to be destroyed when they are no longer required for the investigation or subsequent proceedings. A retention period that is a fixed timeframe or that relies on specific events is easier to apply and audit. However, we note that these are maximum retention periods and that the procedures recommended above could include requirements to destroy samples sooner, in specific circumstances. These circumstances could be similar to the

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<sup>57</sup> Here, we adopt the explanation in s 2(2) of the Criminal Investigations (Bodily Samples) Act 1995 that "[f]or the purposes of this Act, 2 offences are related to one another if the elements of the 2 offences comprise substantially the same act or omission".

<sup>58</sup> See s 61(3A) of the Criminal Investigations (Bodily Samples) Act 1995. We do recommend updating the language from "good cause to suspect" to "reasonable grounds to suspect" to align with Legislation Design and Advisory Committee *Legislation Guidelines* (March 2018), the Search and Surveillance Act 2012 and our recommendations regarding suspect sampling in Chapter 8.

<sup>59</sup> In the Issues Paper at [14.46], we gave the example of a bar brawl that results in a serious assault. Person A may be on trial for the assault. Persons B and C may have been cleared of any wrongdoing after they provided elimination or suspect samples. At trial, Person A may attempt to blame B and C for the assault and may argue that the original casework comparisons were flawed. If B and C refuse to provide second samples, the Crown may not be able to disprove their involvement.

<sup>60</sup> Pursuant to s 60A(2) of the Criminal Investigations (Bodily Samples) Act 1995.

exceptional circumstances identified in the Irish legislation and described at paragraph 16.59 above.

- 16.79 We recommend simpler retention rules for elimination and mass screen samples. We appreciate that, in some cases, it may be necessary to retain such samples until the conclusion of the investigation or subsequent proceedings. Given these samples can only be used in relation to the investigation for which they were obtained and that these profiles are to be stored on the separate elimination index of the proposed DNA databank, we are satisfied that this is reasonable in all the circumstances. In order to ensure that samples are not obtained unnecessarily, the procedures recommended above could require Police to review the retention of elimination and mass screen samples and profiles at 12-month intervals and confirm whether or not retention continues to be necessary for the purpose of the investigation for which it was obtained.

### Returning certain DNA samples

#### RECOMMENDATION

**R113**

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

- 16.80 We recommend that donors (including suspects and people providing a sample for elimination purposes or as part of a mass screen) who provide a DNA sample by way of buccal swab should be given the opportunity to retain that swab once the biological material has been transferred to the FTA card for analysis. This would promote consistency with tikanga Māori (for example, by enabling the swab to be handled in a manner that is consistent with tikanga associated with personal tapu) and respect for bodily integrity and individual autonomy without undermining the sample collection or analysis process. If a person elects to receive the used buccal swab, this would involve Police sealing the swab in a bag and offering it to the person at the conclusion of the sampling process. If a person does not wish to receive the swab, it should be sent to the forensic services provider for destruction as is current practice.
- 16.81 We do not recommend a broader entitlement for donors to require the return of all DNA samples and material derived from samples, such as blood samples obtained by fingerprick or venous methods or the used FTA cards. While we recognise that tikanga Māori values and spiritual and cultural considerations may arise, there are significant logistical problems with requiring the return of samples once they have been sent to the forensic services provider for analysis, including health and safety risks that arise from the handling of biohazards.<sup>61</sup> We also acknowledge the practical concern raised by several submitters that the return of biological material to a person at some future time may be difficult. Police may no longer have current contact details for the donor, or a donor who is a suspect may be incarcerated. Reuniting samples to donors in these circumstances may create complexities and risk privacy breaches.

<sup>61</sup> ESR treats bodily samples as biohazards.

- 16.82 We recognise that this approach differs from the approach taken under the Human Tissue Act and Coroners Act and as part of the Newborn Metabolic Screening Programme. While we have carefully considered these different regimes, it is important to note they apply within different contexts and are used for different purposes. For example, the Coroners Act deals with human tissue from dead bodies, and reuniting samples with the body of the deceased is a culturally significant practice in tikanga Māori (see paragraph 16.27(b) above). We also note that both the Coroners Act and the Human Tissue Act provide for the destruction of samples on health and safety grounds or where the person who requested return of the sample cannot be reasonably located.<sup>62</sup> The Newborn Metabolic Screening Programme is also distinguishable in two respects. First, samples are retained long-term rather than for a limited period of time. Second, samples are obtained from newborns with the informed consent of their parents. In these circumstances, providing for a right to withdraw consent, including when the donor reaches an age where they are able to make informed decisions themselves, is consistent with human rights values of bodily integrity and individual autonomy.
- 16.83 Although we do not consider that the return of DNA samples obtained in criminal investigations is practical, we do recommend below providing an option to be notified of destruction of a sample. This, along with the development of procedures in consultation with the DNA Oversight Committee recommended above, goes some way to recognising the significance that samples will have to some donors, including according to tikanga Māori.

### Notifying destruction of DNA samples and biological material

#### RECOMMENDATION

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.

- 16.84 We recommend that, when a person provides a DNA sample, they should be given the opportunity to elect to be notified at an address they nominate when the DNA sample and all material derived from that DNA sample have been destroyed (that is, when the FTA card is destroyed). The notification should include the method of destruction.
- 16.85 This approach recognises that the retention and destruction of human tissue can have cultural and spiritual significance for the donor and that informing a donor when their human tissue has been destroyed restores a degree of dignity or mana.<sup>63</sup> The logistical difficulties of notification (see discussion at paragraph 16.81 above) are mitigated by

<sup>62</sup> Human Tissue Act 2008, s 20(g); and Coroners Act 2006, ss 48–55.

<sup>63</sup> The Biobanking Guidelines envisage a three-step process, the last of which is “Te Whakahoki i te Taonga” (return of the gift). This refers to the point in time when the samples are no longer required and are disposed of and responsibility for looking after the gift is returned to the community. The guidelines note that:

... often the actual tissue/DNA would not be able to be returned to participants/communities but a representation of those taonga in the form of reports or other information could be returned.

See Maui Hudson and others *He Tangata Kei Tua: Guidelines for Biobanking with Māori* (Te Mata Hautū Taketake | Māori and Indigenous Governance Centre, October 2016) at 14–18.

requiring the donor, at the time the sample is obtained, to nominate an address to which the notification can be sent. Because we are not recommending return of the actual sample, the biohazard risks are eliminated and the risks to privacy (if that address is no longer valid) are minimised.

## CRIME SCENE SAMPLES

### Current law and practice

- 16.86 When crime scene samples are collected pursuant to Police's general search powers under the Search and Surveillance Act, the ordinary rules regarding seized evidential material in that Act will apply.<sup>64</sup> However, the management of DNA samples collected from a public place are not subject to any statutory requirements. Rather, they are collected pursuant to Police's common law powers.<sup>65</sup>
- 16.87 Under the Search and Surveillance Act, if a "thing" that has been seized under a search warrant or search power, such as a crime scene sample, "is not required for investigative or evidentiary purposes", it must be returned to the person entitled to possession or destroyed if it is perishable, has perished or is likely to pose a risk to public health.<sup>66</sup>
- 16.88 If a "thing" seized is required for investigative or evidential purposes, it can be retained by or on behalf of Police only until the first of the following occurs:<sup>67</sup>
- (a) A decision is made not to bring proceedings for an offence in respect of which the thing was seized or produced.<sup>68</sup>
  - (b) The District Court grants an application for the release of the thing to the person who "produced the thing" or "from whom the thing was seized" or the "owner or person entitled to possession" or a person "with a legal or equitable interest" in the thing.<sup>69</sup>
  - (c) Six months after the thing was seized if proceedings have not commenced before that time, unless the period is extended by the District Court.<sup>70</sup>
  - (d) In any case where proceedings are brought:<sup>71</sup>
    - (i) the withdrawal or dismissal of the proceedings; or
    - (ii) the completion of the proceedings.

### Access to crime scene samples

- 16.89 Under the CIBS Act, if a person has provided a suspect sample and has been charged in relation to the offence for which they provided the sample (or a related offence), a part

<sup>64</sup> Search and Surveillance Act 2012, ss 149–163.

<sup>65</sup> The collection of crime scene samples from public places involves the exercise of Police's common law powers, as discussed in Chapter 13.

<sup>66</sup> Section 150(1)(a) and (d).

<sup>67</sup> Section 151(1).

<sup>68</sup> Section 151(1)(a).

<sup>69</sup> Section 151(1)(c). An application to the District Court is made pursuant to s 159.

<sup>70</sup> Section 151(1)(d).

<sup>71</sup> Section 151(1)(e).



of the crime scene sample sufficient for analysis may be made available to them, if practicable, on their request.<sup>72</sup>

16.90 When an item is seized under the Search and Surveillance Act, the person from whom it was seized or who is otherwise entitled to it can also apply to Police for its release or access to it at any time before proceedings are brought.<sup>73</sup> If that application is refused, the person can apply to the District Court for access.<sup>74</sup> A person can also apply to the District Court for release of a seized item, whether or not proceedings have been brought.<sup>75</sup>

16.91 If, however, an item is used as evidence at trial, the Criminal Procedure Act 2011 would apply. Section 324 states:

Any documents, exhibits, or other things connected with the trial of any person who, if convicted, is entitled or may be authorised to appeal against conviction or sentence—

(a) must be kept in the custody of the trial court or appeal court, as the case may be, in accordance with any rules of court:

(b) may be released in accordance with any rules of court.

16.92 The Court of Appeal has confirmed that this applies to biological samples used as evidence in court<sup>76</sup> and that, in the absence of specific rules of court on the release of biological samples, a court can give any directions or rulings about the matter as it considers appropriate in the interests of justice.<sup>77</sup>

### Current practice

16.93 Crime scene samples are stored by ESR or by Police on a physical case file. Police treats all physical samples as exhibits and interprets its statutory responsibility to hold evidential material until “not required for investigative or evidential purposes”<sup>78</sup> in a broad sense by adopting a policy of indefinite retention even after an investigation has been closed. This broad interpretation reflects the important goal of ensuring that samples remain available for possible exoneration purposes. However, some crime scene samples collected in cases categorised as “volume crime” (including general theft, burglary, or vehicle crime) are not submitted to ESR for analysis. This will be the case when other evidence has identified a suspect. These samples are destroyed or returned in accordance with Police’s Retention and Disposal Schedule, discussed below.

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<sup>72</sup> Criminal Investigations (Bodily Samples) Act 1995, s 57. The Act does not define “crime scene sample”. Rather, s 57(1)(a) includes a broad description of what might constitute a crime scene sample believed to be from the offender. It is the same description as that set out in ss 16 and 23 and is discussed in Chapter 13.

<sup>73</sup> Search and Surveillance Act 2012, s 156(1).

<sup>74</sup> Section 158.

<sup>75</sup> Section 159.

<sup>76</sup> *Milner v R* [2019] NZCA 619 at [30].

<sup>77</sup> Pursuant to r 1.5(2) of the Criminal Procedure Rules 2012.

<sup>78</sup> Search and Surveillance Act 2012, s 150(1).

16.94 Police records, in general, are governed by its Retention and Disposal Schedule. While biological samples may not meet the definition of a record, Police has advised that its preference is for sample retention and disposal to align with the schedule. This outlines retention periods for different record classes following the closure of a case, which are triggered by an offender being identified and convicted. Different retention periods apply depending on the seriousness of the offending, such as 25 years for homicide, 20 years for serious sexual assault and five years for burglary.<sup>79</sup>

### Issues with management of crime scene samples

16.95 The issues identified above in relation to the management of casework samples (discussed in paragraphs 16.21–16.31) are also relevant to crime scene samples. While the source of a crime scene sample is unknown when it is collected, it is still a sample of human tissue that contains a wealth of information. The lack of recognition and provision for human rights values and applicable tikanga Māori (discussed at paragraph 16.24) raises concerns, alongside the lack of transparency and accountability in the storage and destruction of crime scene samples. In addition, the current practice noted at paragraph 16.93 is that crime scene samples can be stored by ESR or by Police rather than in one location. This may undermine the ability to track and locate relevant samples with ease and precision. Recommendations R104 and R105 should address these issues and ensure that crime scene samples are managed in a manner that is consistent with the purpose of new DNA legislation.

16.96 The management of crime scene samples raises some additional concerns. Crime scene samples can constitute important evidential material, and their importance may endure beyond a person's conviction if the source of the sample is contested. As we explore in Chapter 6, many crime scene samples are poor quality and will only generate a partial DNA profile. Advances in DNA technology may, however, enable more information to be obtained from a crime scene sample, and that information could be used to help exonerate a person wrongly convicted. A crucial factor to successful exoneration is secure long-term preservation of biological evidence.<sup>80</sup>

16.97 In Aotearoa New Zealand, there has been an increasing focus on miscarriages of justice and post-conviction exoneration with the Supreme Court's decision in *Ellis v R*, granting leave to appeal convictions of sexual offending against child complainants despite the appellant's death,<sup>81</sup> and the establishment of the Criminal Cases Review Commission in 2020. The purpose of the Commission is "to investigate and review criminal convictions and sentences and decide whether to refer them ... to an appeal court".<sup>82</sup> This might include consideration of applications to re-examine forensic material as DNA technology

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<sup>79</sup> New Zealand Police Submission to Law Commission at [38].

<sup>80</sup> See generally Technical Working Group on Biological Evidence Preservation *Biological Evidence Preservation: Considerations For Policy Makers* (US Department of Commerce National Institute of Standards and Technology, NISTIR 8048, April 2015); and Carole McCartney and Louise Shorter "Police retention and storage of evidence in England and Wales" (2020) 22 *International Journal of Police Science and Management* 123.

<sup>81</sup> *Ellis v R* [2020] NZSC 89. Reasons for this decision will be published at the same time as the judgment on the substantive appeal: at [5].

<sup>82</sup> Criminal Cases Review Commission Act 2019, s 3.

advances.<sup>83</sup> The Commission also has the power to initiate and conduct inquiries into matters of practice, policy or procedure as well as other matters of a general nature that it considers may be related to cases involving a miscarriage of justice or has the potential to give rise to such cases.<sup>84</sup> This could include matters relating to forensic science.<sup>85</sup> These developments have implications for the management and retention of crime scene samples and other types of biological material that may be required in future for exoneration purposes.

- 16.98 Given this context, we have identified two further issues regarding the management of crime scene samples:
- (a) The retention rules in the Search and Surveillance Act are unsuitable for crime scene samples.
  - (b) There is no clear avenue by which a convicted person can seek to have a crime scene sample re-analysed for exoneration purposes.

### **Rules in Search and Surveillance Act unsuitable**

- 16.99 The general requirements in the Search and Surveillance Act around the return of evidential material are a poor fit for crime scene samples. They are predicated on a property interest in the item seized and upholding the rights of property owners by restoring things seized to the right person. They also assume that, once proceedings have concluded, there is no remaining evidential value in retaining that item. This is problematic in terms of crime scene samples for several reasons:
- (a) First, for the reasons we explain in Chapter 2, we do not consider it appropriate to explore biological material and DNA through a property rights lens. Rather, we think it is more appropriate to consider the human rights values and applicable tikanga Māori engaged by the collection and use of DNA.
  - (b) Second, returning crime scene samples raises several problems. Unlike casework samples, the source of a crime scene sample is unknown when it is collected. Many samples will contain a mixture of different people's DNA, which means it might not be practicable to separate out and return to each person their biological material. In addition, the logistical issues with returning biological material to a person discussed at paragraph 16.81 above apply.
  - (c) Third, it may be important to retain crime scene samples even after the trial has concluded for exoneration purposes, for the reasons explored at paragraphs 16.96–16.97 above.
- 16.100 For these reasons, the policy of return of evidential material that underpins the Search and Surveillance Act and other regimes regarding biological samples identified at paragraph 16.82 above is not appropriate for crime scene samples.

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<sup>83</sup> As noted in advice to the Minister, re-examined forensic evidence is one example of “fresh evidence” relating to guilt that might support a successful appeal: Tāhū o te Ture | Ministry of Justice *Criminal Cases Review Commission: areas for further discussion* (28 March 2018) at [43]–[45].

<sup>84</sup> Criminal Cases Review Commission Act 2019, s 12(1).

<sup>85</sup> Tāhū o te Ture | Ministry of Justice *Supplementary advice on the Criminal Cases Review Commission model* (9 March 2018) at 13, n 13.

### **Process to access samples for exoneration purposes unclear**

- 16.101 Neither the CIBS Act nor the Search and Surveillance Act provides adequately for access to crime scene samples by the convicted person for reanalysis. The rights provided for in the CIBS Act only apply to charged people, and the rights under the Search and Surveillance Act only apply to people who have some form of relationship to or proprietary interest in the thing seized. We think it would be a stretch to interpret this as permitting access to crime scene samples for reanalysis, particularly where the convicted person contests the source of the sample.
- 16.102 If a convicted person wanted to access samples used as evidence in their trial, they could apply to the court as the custodian of the samples under the Criminal Procedure Act. However, this would not apply to samples that may have been collected but not used in evidence at trial. A person appealing a conviction or applying to the Criminal Cases Review Commission for a review of their conviction may wish to draw on material that was not part of the trial.<sup>86</sup>
- 16.103 The Criminal Cases Review Commission might be able to access crime scene samples when performing its functions. Section 31 of the Criminal Cases Review Commission Act 2019 provides that the Commission investigating any matter may “obtain ... any information [it] considers relevant”, including requiring a person to “produce documents or things”, provided it has taken reasonable steps to obtain the information by consent.<sup>87</sup> However, the scope of this power remains unclear, and not all applications for reanalysis of crime scene samples will necessarily originate from that Commission.

### **Management of crime scene samples in comparable jurisdictions**

- 16.104 The value of crime scene samples to exoneration has been recognised in many comparable jurisdictions.
- 16.105 In the United States, Congress has enacted post-conviction DNA testing legislation as has each of the 50 states.<sup>88</sup> This followed a 1996 National Institute of Justice report on wrongfully convicted individuals who had been exonerated by post-conviction DNA testing.<sup>89</sup> The federal code now requires that the government must preserve biological evidence in the event a defendant is sentenced to imprisonment.<sup>90</sup> This stipulation guarantees retention unless a defendant has exhausted all opportunities to review the conviction. The defendant is then notified that the evidence may be destroyed and must file a motion for preservation within 180 days. These regimes have different

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<sup>86</sup> The Criminal Cases Review Commission Act 2019 came into force on 1 July 2020. Under that Act, the Commission has the responsibility to investigate and refer back to the courts possible miscarriages of justice.

<sup>87</sup> Sections 31 and 32. We note there may be an interpretation question as to whether a crime scene sample is a “thing” that can be required to be produced under s 32. By way of contrast, the Criminal Cases Review Commission in England and Wales has the power to require the production of a “document or other material”.

<sup>88</sup> 18 USC § 3600. State statutes vary in form but contain similar provisions. See, for example, Criminal Procedure Act NC Gen Stat § 15A-269; Post-Conviction DNA Analysis Act 2001 TCA § 40-30-304; and MO Rev Stat § 547.035.

<sup>89</sup> Kayleigh E McGlynn “Remedying Wrongful Convictions Through DNA Testing: Expanding Post-Conviction Litigants’ Access to DNA Database Searches to Prove Innocence” (2019) 60 BC L Rev 709 at 729. For access to the 1996 Report, see Edward Connors and others *Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial* (US Department of Justice, Research Report NCJ 161258, June 1996).

<sup>90</sup> 18 USC § 3600A.

requirements for seeking access to crime scene samples for reanalysis, with some providing detail on how the sample will be tested and who will bear the cost.<sup>91</sup>

- 16.106 In England and Wales, police forces are under a duty to retain seized material “so long as is necessary in all the circumstances”.<sup>92</sup> Detailed guidance applies to seized material, including material recovered from an item such as a swab and trace material and material generated by the forensic services provider such as DNA extracts.<sup>93</sup> The guidelines provide different minimum retention periods depending on the seriousness of the offending. For serious offending, the guideline is 30-year retention alongside 10-year reviews during that period. For material related to less serious offending, the minimum period is six years or three years for “simple possession of drugs cases and alcohol/drugs driving offences”.<sup>94</sup> The Criminal Cases Review Commission may order a public authority not to destroy any material it holds and may require disclosure to the Commission.<sup>95</sup>
- 16.107 In New South Wales, a convicted person can apply to the Commissioner of Police to have a crime scene sample analysed or reanalysed by the official forensic service. If the Commissioner declines, the convicted person may apply to the Supreme Court for an order requiring the Commissioner to comply.<sup>96</sup>

### Options for reform

- 16.108 In the Issues Paper, we noted that the goal of retaining crime scene samples for potential exoneration purposes is important but that it would be preferable if retention rules were more accessible, subject to oversight and auditing and assessed for consistency with constitutional values and principles arising from the Treaty, tikanga Māori and human rights values.<sup>97</sup> We expressed a general preference in favour of long-term retention in serious cases and that the rules should be plainly stated in statute.<sup>98</sup>
- 16.109 Regarding access to crime scene samples for exoneration purposes, we noted the New South Wales model could be an option or, alternatively, the Criminal Cases Review

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<sup>91</sup> See discussion in Kayleigh E McGlynn “Remedying Wrongful Convictions Through DNA Testing: Expanding Post-Conviction Litigants’ Access to DNA Database Searches to Prove Innocence” (2019) 60 BC L Rev 709 at 730.

<sup>92</sup> Police and Criminal Evidence Act 1984 (UK), s 22(1).

<sup>93</sup> National Police Chiefs’ Council *Guidance Regarding the Storage, Retention and Destruction of Records and Materials That Have Been Seized for Forensic Examination* (December 2017). See [8.1.2] for a description of the types of materials created by the seizure and submission of items to a forensic services provider. These guidelines note that the production of generated materials that are used at intermediate stages in the process, such as extracts from material for analysis and DNA dispersions used for dilution processes, are created with the intention that their existence should be short lived. Retention of these generated materials is not normally required, and they may be destroyed at the discretion of the forensic services provider: at [10.1.6].

<sup>94</sup> At [14.1.3].

<sup>95</sup> Criminal Appeal Act 1995 (UK), ss 17–21. Section 18A provides the equivalent power in relation to non-public bodies.

<sup>96</sup> Crimes (Appeal and Review) Act 2001 (NSW), s 97. Between 2007 and 2014, NSW also operated a DNA Review Panel, which was tasked with considering any application by a person convicted of an offence punishable by at least 20 years’ imprisonment to assess whether DNA evidence would affect that person’s claim of innocence; arranging searches for, and DNA testing of, biological material; referring matters to the Court of Criminal Appeal for review of a person’s conviction, where this is appropriate following receipt of DNA test results; and making reports and recommendations to the Minister regarding the use of DNA technology in assessing claims of innocence. The Panel was abolished in 2014 largely due to insufficient workload: New South Wales Department of Attorney General and Justice *The DNA Review Panel: Review of Division 6 of Part 7 of the Crimes (Appeal and Review) Act 2001* (2013).

<sup>97</sup> Issues Paper at [14.58].

<sup>98</sup> At [14.61].

Commission could have a clearer role in arranging for samples to be analysed or reanalysed following an application from a convicted person to review their case.<sup>99</sup>

## Results of consultation

### *Retention of crime scene samples*

- 16.110 We received 13 submissions that addressed the retention of crime scene samples. All submitters were in favour of retaining crime scene samples beyond the closure of the criminal investigation. Several submitters thought that samples should only be retained in relation to serious offending. NZLS and Nessa Lynch supported retention for serious offending only, acknowledging the tension between the general rule that evidential material should be returned to its owner and the potentially significant role that subsequent DNA analysis may have in exonerating people in future. ADLS similarly suggested this could possibly be only for offending over a certain level of seriousness.
- 16.111 In contrast, the Innocence Project New Zealand was uncomfortable with any division according to the seriousness of the crime, commenting that:
- Internationally, there is little understanding of the rate of wrongful convictions for less serious criminal offences; this is primarily because the extremely limited pro bono resources are prioritised towards serious offences that come with a long period incarceration, not because they don't happen. In our view, the suggestion that "at a minimum, long-term retention of crime scene samples should be required in serious cases" ignores the significant and lifelong consequences that any wrongful conviction can have on an innocent person's life – beyond incarceration (e.g. difficulty in securing employment, tensions in interpersonal relationships).
- 16.112 The Innocence Project strongly supported long-term retention of crime scene samples. However, it acknowledged the practical considerations involved with storing a large amount of samples indefinitely. It raised the option that individuals convicted of "non-qualifying" offences could request to have the materials stored beyond the closure of the criminal investigation. The Independent Forensic Practitioners Institute (IFPI) agreed with the approach adopted by the Innocence Project United States, which is a policy of preserving crime scene samples for as long as a person is incarcerated or otherwise experiences any consequences of a potentially wrongful conviction.
- 16.113 The Privacy Commissioner submitted that the general principle is that samples may be retained until the primary use for that sample is spent, such as where law enforcement and evidential needs have passed and the offender no longer has an interest in that sample being retained. The Commissioner accepted that, in the case of crime scene samples, retention for a considerable period will be necessary.
- 16.114 Several other submitters supported long-term retention or retention based on the seriousness of the offence. NZLS suggested that retention could be linked to the maximum available sentence for the offence, for example, offences punishable by life imprisonment might be retained indefinitely while shorter retention periods might be appropriate for less serious offences. PDS similarly favoured long-term retention for serious violent or sexual offending and shorter retention periods for less serious offences to reflect the gravity of the offending and the limitation period for filing charges in relation to less serious offences. One individual submitted that crime scene

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<sup>99</sup> At [14.65]–[14.66].

samples that match the convicted person should be kept indefinitely except in relation to low-level offending, when the sample should be destroyed after 10 years. That individual also submitted that crime scene samples that match to someone other than the convicted person should be destroyed once the investigation ends unless there is an appeal, in which case, such samples should be removed after all proceedings have been completed or after five years.

- 16.115 ESR supported indefinite retention of all crime scene samples, submitting that there are numerous examples where ESR has reanalysed crime scene samples at a later date, sometimes more than 25 years after the offending. Reanalysis is not possible if the provenance of the sample is not known or if it has been destroyed.
- 16.116 Police submitted that crime scene samples should be retained in accordance with guidelines in its Retention and Disposal Schedule. This schedule creates disposal periods based on specific periods of time after the closure of a case and connected to seriousness of the offence. A closure occurs after an offender has been identified and convicted.

### *Access to crime scene samples for reanalysis*

- 16.117 We received eight submissions that addressed a convicted person's access to crime scene samples for reanalysis.
- 16.118 Several submitters supported the Criminal Cases Review Commission having a role in the reanalysis of crime scene samples, including the Innocence Project, NZLS, the New Zealand Bar Association, PDS and Nessa Lynch. However, the Innocence Project and NZLS also supported a separate procedure for another party independent of Police to receive and grant reanalysis requests when a case is not before the Commission.
- 16.119 IFPI, ADLS and Sue Petricevic also supported a statutory right to have access to crime scene samples for reanalysis due to current difficulties securing access. IFPI noted that, while it is only rarely necessary for the defence to do additional testing, it pointed to the case of David Dougherty where, had the samples not been transferred to the defence as the Judge ordered, Mr Dougherty "would probably have never been fully exonerated or compensated".<sup>100</sup> ADLS and Sue Petricevic noted that there may be different processes depending on whether the request for repeated analysis is to be conducted by ESR or for analysis conducted by an independent laboratory.

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<sup>100</sup> David Dougherty was convicted of kidnapping and raping an 11-year-old girl in 1993. However, new DNA evidence led to a retrial in 1997 where Mr Dougherty was acquitted.

## RECOMMENDATIONS

### Retaining crime scene samples

#### RECOMMENDATIONS

**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.

16.120 We recommend that new DNA legislation requires retention of crime scene samples for a 50-year period in any case where a person has been convicted of the offence in relation to which the sample is obtained. In our view, requiring long-term retention of crime scene samples in legislation is the best way to ensure continued access to those samples for exoneration purposes.<sup>101</sup> Crime scene samples collected in cases where there has been no conviction should continue to be retained pursuant to the general requirements in the Search and Surveillance Act — that is, for as long as they are “required for investigative or evidential purposes”.

16.121 We have preferred a fixed retention period rather than indefinite retention, acknowledging the principle that personal information such as DNA samples should not be retained for longer than is required.<sup>102</sup> While the choice of a 50-year period is arbitrary, we consider it should be appropriate for exoneration purposes in most situations. This retention period should be able to be extended by order of a High Court or District Court Judge if the Judge is satisfied that it is in the interests of justice to do so, having regard to a list of relevant considerations. This acknowledges the potential

<sup>101</sup> A similar conclusion has been reached by other law reform bodies. See Australian Law Reform Commission *Essentially Yours: The Protection of Human Genetic Information in Australia* (ALRC R96, 2003) at [45.1]–[45.31]; and Law Reform Commission of Ireland *The Establishment of a DNA Database* (LRC 78, 2005) at [3.04]–[3.06]. Compare Victorian Parliament Law Reform Committee *Forensic Sampling and DNA Databases in Criminal Investigations* (2004) at 434–435.

<sup>102</sup> Privacy Act 1993, s 6 (information privacy principle 9); and Privacy Act 2020, s 22 (information privacy principle 9). In Chapter 5, we recommend that new DNA legislation should clarify that DNA samples are “personal information” for the purposes of the Privacy Act 1993 (and its successor, the Privacy Act 2020).



for posthumous appeals following the decision in *Ellis v R*,<sup>103</sup> and is consistent with the threshold for the Criminal Cases Review Commission referring a conviction or sentence to the appeal court.<sup>104</sup>

- 16.122 We have not preferred imposing a seriousness threshold on offending for crime scene samples to be retained or a tiered retention regime that depends on the seriousness of the conviction. We acknowledge the Innocence Project's concerns at paragraph 16.111 above that the risk of wrongful conviction is not limited to serious offending and that any wrongful conviction can have significant consequences. In addition, a tiered retention regime would still involve a measure of arbitrariness and would also be more difficult to apply in practice.

### Accessing crime scene samples for reanalysis

#### RECOMMENDATION

R117

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

- 16.123 For the reasons explained above, the current provisions in the Search and Surveillance Act and Criminal Procedure Act fail to provide for all situations where access to biological material held by or on behalf of Police in connection with criminal proceedings may legitimately be sought. This has implications for all forms of forensic analysis of biological material, not just DNA analysis of crime scene samples. We therefore recommend making clear provision in legislation for accessing biological material held by or on behalf of Police for exoneration purposes.

- 16.124 Further work is necessary to determine how applications for access to biological material should be managed and decided. This should involve consideration of the role of the Criminal Cases Review Commission, which has been established since the publication of our Issues Paper, how applications for access and reanalysis will be made in practice and how reanalysis will be conducted.

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<sup>103</sup> *Ellis v R* [2020] NZSC 89.

<sup>104</sup> Criminal Cases Review Commission Act 2019, s 17(1).

## **PART C**

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# **THE PROPOSED DNA DATABANK**



## CHAPTER 17

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# The crime scene index

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## INTRODUCTION

- 17.1 In Chapter 4, we recommend the establishment of a new, indexed DNA databank to store all DNA profiles generated from DNA samples that have been collected for the purpose of criminal investigations (the proposed DNA databank). This includes DNA profiles generated for the purpose of casework comparison and databank searching.
- 17.2 This chapter addresses the crime scene index of the proposed DNA databank, which will store DNA profiles generated from DNA found at crime scenes (crime scene profiles) for the purposes of casework comparison and databank searching. Below we consider:
- (a) when a crime scene profile should be stored on the crime scene index;
  - (b) how crime scene profiles should be used in casework comparison and databank searching; and
  - (c) when crime scene profiles should be removed from the crime scene index.

## CURRENT LAW AND PRACTICE

- 17.3 As noted in earlier chapters, the CIBS Act is largely silent on the collection and analysis of DNA samples collected from crime scenes (crime scene samples) and the subsequent use, storage, and retention of crime scene profiles.
- 17.4 In the absence of statutory regulation, the processes of casework comparison and databank searching are largely governed by the Forensic Science Services Agreement between Police and ESR (Services Agreement).<sup>1</sup> Under that agreement, ESR is the sole provider of forensic science services to Police. ESR's responsibilities include DNA analysis and services relating to establishing, administering and maintaining DNA databanks, including the Crime Sample Databank (CSD).<sup>2</sup>
- 17.5 We discuss current practice in relation to casework comparison and databank searching below. We then discuss the implications of the New Zealand Bill of Rights Act 1990 (the Bill of Rights Act) and the Privacy Act 1993 (and its successor, the Privacy Act 2020) for the use, storage and retention of crime scene profiles.<sup>3</sup>

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<sup>1</sup> *Forensic Science Services Agreement between the New Zealand Police and the Institute of Environmental Science and Research Limited 2018–2021* (2018). The Services Agreement is negotiated every three years.

<sup>2</sup> See discussion in Chapter 7.

<sup>3</sup> The Privacy Act 1993 will be replaced by the Privacy Act 2020 on 1 December 2020. In this Report, we refer to both statutes for completeness.

## Casework comparison

- 17.6 A casework comparison is a one-to-one comparison of a crime scene profile to the DNA profile of a known person to determine, in lay terms, the likelihood that the profiles are from the same person. For this comparison to be conducted, the profiles need to have been analysed in the same way.<sup>4</sup> A full casework comparison is usually conducted between a crime scene profile and a suspect profile to determine the “likelihood ratio”. The likelihood ratio is a statistical calculation that divides the probability of obtaining the crime scene profile results if the suspect contributed the DNA by the probability of obtaining the crime scene profile results if the DNA was contributed by a member of the public selected at random.<sup>5</sup> Likelihood ratios are generally accepted as being “the most appropriate method for evaluating the evidential strength of DNA profiles”.<sup>6</sup>
- 17.7 A casework comparison might also be conducted for elimination purposes to identify and exclude any crime scene profiles that match a victim or a third party who had a legitimate reason to be at the crime scene.<sup>7</sup> This helps to isolate the crime scene samples that may be from the offender.
- 17.8 Casework comparisons will be conducted in investigations of serious crimes such as homicide and sexual assault where Police has identified a suspect or suspects.<sup>8</sup> ESR creates an electronic case file for these cases to store all crime scene profiles, suspect profiles and elimination profiles from victims or third parties. Casework comparison occurs within the confines of the case file, and the results of casework comparisons are also stored on the case file. If a casework comparison indicates that a suspect was likely to be the source of the crime scene profile, the relevant profiles remain on the case file and the results of the casework comparison can be relied on as evidence in any subsequent proceedings.
- 17.9 If, however, casework comparison indicates that a suspect was not likely to be the source of the crime scene profile, Police may decide to load a crime scene profile or profiles to the CSD to conduct a databank search.<sup>9</sup> A databank search may then provide Police with an intelligence lead to another potential suspect.

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<sup>4</sup> We discuss the analysis of DNA samples for the purpose of casework comparisons in Chapter 6. Currently, the two main means of analysis for casework comparisons are through short tandem repeat (STR) profiling and Y-STR profiling. STR profiling is described briefly at [17.13] and Y-STR profiling at [17.12].

<sup>5</sup> See The Royal Society and The Royal Society of Edinburgh *Forensic DNA analysis: A primer for courts* (November 2017) at 36. We discuss the likelihood ratio and the process of calculating it in Chapter 6.

<sup>6</sup> The Royal Society and The Royal Society of Edinburgh *Forensic DNA analysis: A primer for courts* (November 2017) at 36.

<sup>7</sup> A full casework comparison to calculate the likelihood ratio is not usually conducted when comparing a crime scene profile against a profile for elimination purposes. Usually in this instance, the two profiles are compared to see whether they have the same number of STRs at each of the analysed loci (locations on the genome). This will be sufficient to eliminate the crime scene profile as being that of the likely offender.

<sup>8</sup> These cases are classified by Police and ESR as “priority crime” cases. When a sample is sent to ESR, it is categorised as either “priority crime” or “volume crime”. Volume crime is the term used to describe general theft, burglary or vehicle crime where police officers do not have a suspect sample for comparison. Priority crime refers to all other crime including sexual and violent offences.

<sup>9</sup> ESR advises that, on limited occasions when case circumstances demand, a profile confirmed as corresponding to a suspect may be loaded to the CSD.

## Databank searching

17.10 Databank searching involves comparing a crime scene profile to other profiles on the DNA databanks with the objective of finding a “match” that may identify a potential suspect.<sup>10</sup> Databank searching is predominantly used in investigations where there are no suspects. This includes priority crime cases where casework comparison has not identified a suspect and cases categorised as “volume crime”, which includes investigations of general theft, burglary or vehicle crime (unlawful taking of and theft from vehicles).

### *The Crime Sample Databank*

17.11 The CSD was established on the enactment of the CIBS Act to store crime scene profiles for the purpose of databank searching. However, not all crime scene profiles are stored on the CSD. As noted above, a crime scene profile will usually only be loaded to the CSD if casework comparison indicates that a suspect was not likely to be the source of the crime scene profile. As we note below, profiles are very rarely removed from the CSD.

17.12 Unlike the DNA Profile Databank (DPD) and the Temporary Databank, the CSD is not governed by the CIBS Act. Instead the CSD is maintained and administered by ESR on behalf of Police under the Services Agreement. The CSD currently holds over 45,000 crime scene profiles from both resolved and unresolved crimes.<sup>11</sup>

### *Quality threshold for loading profiles to the Crime Sample Databank*

17.13 DNA profiles are usually generated using short tandem repeat (STR) profiling. A “complete” DNA profile is one where DNA analysis has produced results for all alleles at all the analysed loci (locations on the genome where STRs are known to occur).<sup>12</sup>

17.14 However, often a crime scene sample will be degraded or of poor quality, and a complete DNA profile cannot be generated from analysis.<sup>13</sup> This is manageable in the context of casework comparisons as the quality of a DNA profile will be reflected in the likelihood ratio. However, if a partial profile is loaded to the CSD, this would increase the risk of a false or adventitious match to another profile or profiles on the databanks.<sup>14</sup> A partial profile with results at just a few alleles could result in matches to hundreds of

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<sup>10</sup> A “match” in the context of databank searching is described at [17.19] below.

<sup>11</sup> As at 8 October 2020, ESR advises that there are 45,180 STR profiles and 401 Y-STR profiles on the CSD.

<sup>12</sup> There are two alleles at each loci (one inherited from each biological parent). With the current kits used to analyse DNA samples, a complete crime scene profile would have STRs measured at 15 loci or 30 alleles, while a complete profile from a known person would have STRs measured at 21 loci or 42 alleles and the sex test results. STR profiling is discussed in greater detail in Chapter 6.

<sup>13</sup> Y-STR profiling (and other techniques discussed in Chapter 6) may also be used to generate a profile where DNA is too degraded for STR analysis to be conducted.

<sup>14</sup> An adventitious match occurs where there is an apparent match between two DNA profiles (such as a crime scene profile and a profile from a known person) but the two profiles are not from the same person. This is also known as a “false positive” and can occur within a sizeable databank, as well as within the general population. Adventitious matches can occur as analysis techniques such as STR profiling and Y-STR profiling only target certain loci for analysis (as opposed to analysing the whole genome). As the number of loci targeted for analysis has increased, the likelihood of adventitious matches has reduced. However, the risk increases when one of the profiles (usually a crime scene profile) is a partial profile.

profiles on the databanks. This information would probably be of little practical use to Police but, in a worst-case scenario, could contribute to a wrongful conviction.

- 17.15 To avoid these risks and ensure that meaningful comparisons can be made to other profiles on the databanks, ESR has a quality threshold that it recommends crime scene profiles should meet before being loaded to the CSD.<sup>15</sup> This quality threshold requires results at around half of the analysed loci. The successfully analysed loci must also have a sufficiently high degree of cross-over with the loci targeted by DNA analysis kits ESR has previously used to analyse DNA samples.<sup>16</sup> This ensures that recently analysed crime scene profiles can be effectively compared against profiles generated using older DNA technology.
- 17.16 From data provided to us by ESR, it is evident that the vast majority of profiles on the CSD meet the quality threshold.<sup>17</sup> However, while it is ESR's expectation that a profile that does not meet the quality threshold will instead be reanalysed or fixed 'biologically' to try and generate a better-quality profile,<sup>18</sup> it is the forensic scientist in charge of a case who decides, on a case-by-case basis, whether to load a profile to the CSD.<sup>19</sup>
- 17.17 ESR has advised that, in some situations, a crime scene profile that does not meet the quality threshold may be loaded to the CSD for a one-off 'speculative' search against the DNA databanks. Once the search is run, the profile is removed. We understand that this only occurs in priority crime cases after careful consideration of the merits of doing so, taking into account the quality of the profile and the circumstances of the case.<sup>20</sup>

#### ***Databank searches using the Crime Sample Databank***

- 17.18 If a decision is made to load a crime scene profile to the CSD and conduct a databank search, the crime scene profile is compared to profiles of people who have been involved in the case, such as ESR staff, police officers and other investigators, to

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<sup>15</sup> The *Forensic Science Services Agreement between the New Zealand Police and the Institute of Environmental Science and Research Limited 2018–2021* (2018) explains that, if a crime scene profile is not of sufficient quality to load to the Crime Sample Databank (CSD), ESR will send Police a "stop notification" report, signalling that a profile has been "stopped" from being loaded to the CSD. If the profile is of sufficient quality to load to the CSD, the Services Agreement gives authority to ESR to load profiles believed to be from offenders.

<sup>16</sup> With the current DNA analysis kit used for STR profiling, the guideline is that the crime scene profile must have results at a minimum of 15 alleles (out of a total of 30 alleles that make up a complete profile). Of these alleles, six must be the same as those targeted by the SGM kit that was used in the past, and a further four must have been targeted by either the SGMPlus kit or SGM kit. For Y-STR profiles (explained at [17.12]), the profile must usually have results at a minimum of 14 alleles, nine of which must be certain specified alleles targeted by the Yfiler Plus kit. The criteria for loading profiles from mixed samples is discussed below.

<sup>17</sup> For a breakdown of the quality of crime scene profiles on the CSD by DNA analysis kit used, see Table 1 in ch 10 of the Issues Paper.

<sup>18</sup> This is discussed in Chapter 6. This may mean using a different analysis kit or making a "composite" profile using different analysis kits (this is where results from different analysis kits are combined into one profile).

<sup>19</sup> This decision will be peer-reviewed. As we discuss in Chapter 7, ESR has many different quality assurance steps in place to ensure that scientists' work and decisions are being cross-checked.

<sup>20</sup> We are aware of one situation where a profile with results at only one allele was loaded onto the CSD and a speculative search conducted. Because the allele was very rare and not normally seen in the New Zealand population, it was considered worthwhile conducting such a search.

exclude the possibility of contamination.<sup>21</sup> If there is a match, the profile is not loaded to the CSD and remains on the case file.

- 17.19 Once a crime scene profile is loaded to the CSD, a databank search is conducted using ESR's database software. This software will generate an internal report of any preliminary matches.<sup>22</sup> A forensic scientist then assesses each preliminary match and assigns it one of the following codes:
- (a) **Confirmed match.** Both profiles must "match" — that is, have the same number of STRs at a minimum of two alleles (see paragraph 17.13). There must be no mismatches at any alleles, although one PBSM result is allowed (see below).
  - (b) **No match.** There will be no match if a mismatch is identified between two profiles, or in the case of a comparison between two different crime scene profiles, the alleles that the two profiles have in common are assessed as being of low evidential value.
  - (c) **Possible primer binding site mutation (PBSM).** A PBSM occurs where the STRs are almost identical but vary by one allele at one locus point. PBSM appears to be a technical difficulty that sometimes occurs when different DNA analysis kits have been used to generate the profiles being compared.
- 17.20 If a confirmed match relates to a partial profile, the result will be reviewed by the forensic scientist to consider its evidential value. This involves looking at the number of alleles shared and their frequency in the general population of Aotearoa New Zealand as well as other information on the ESR case file. If it is decided there is some evidential value, it will be coded as a confirmed match.
- 17.21 ESR will then generate a databank link report for the confirmed matches and PBSMs (with an explanation that the mismatch may be due to a PBSM). These are sent to the relevant Police district's forensic intelligence email address and to the police officer in charge of the investigation.<sup>23</sup> The link reports are then reviewed, and police officers may undertake further investigation where appropriate.

### **Removing profiles from the Crime Sample Databank**

- 17.22 Crime scene profiles uploaded to the CSD generally remain on the databank indefinitely, regardless of the outcome of the investigation. This means that, even if a case is resolved (including if a decision is made not to file charges), the crime scene profile will continue to be compared to new profiles loaded on the CSD, DPD and Temporary Databank.

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<sup>21</sup> ESR maintains its own databank of staff and visitors for this purpose. Police officers may provide profiles for the purposes of a particular case, or their profile may be held on the Police Criminal Investigators Elimination Database (CIED), which is administered by ESR. We discuss these elimination databases in Chapter 4.

<sup>22</sup> ESR's software is set to report a preliminary match if two profiles have the same number of STRs at a minimum of two alleles, with no more than one "mismatch" between the profiles. A mismatch is where there is a different number of STRs at an allele that the two profiles have in common. Allowing for one mismatch is accepted international best practice. If any more mismatches are allowed, this becomes what is referred to in some jurisdictions as a "partial match". Returning a partial match increases the likelihood of an adventitious match.

<sup>23</sup> Under the *Forensic Science Services Agreement between the New Zealand Police and the Institute of Environmental Science and Research Limited 2018–2021* (2018), these link reports must be provided to Police as soon as practicable within two working days. If there is no match, ESR sends Police a notification that confirms that a profile has been loaded to the CSD but no match has resulted.

17.23 This is subject to three exceptions. First, as explained at paragraph 17.17 above, ESR will remove a low-quality crime scene profile from the CSD immediately after conducting a one-off search. Second, ESR will remove a crime scene profile from the CSD if it discovers during a subsequent comparison or analysis that a profile is from a victim, third party or investigator. Third, it will remove a profile if requested by Police, although we understand that such requests are rare.

### *Using the results of a databank search*

17.24 Police and ESR treat a match obtained from a databank search as an ‘intelligence lead’ only, and it cannot be relied on as evidence in proceedings.<sup>24</sup> This is for several scientific reasons. A databank match is based on how many matching alleles the two profiles have (see 17.19 above). However, unlike a casework comparison, the match is based on how complete the profiles are. Therefore, if one of the profiles is a partial profile, there is a greater risk of an adventitious match, as described in paragraph 17.14. Although a forensic scientist will consider the evidential value before confirming a match involving a partial profile (see paragraph 17.20), nevertheless, unlike a casework comparison, a full likelihood ratio assessment is not conducted.

17.25 In addition, profiles held on the DNA databanks were loaded at different times and may have been generated using different DNA analysis kits. It is preferable for profiles to be compared under the same laboratory conditions. There is also a risk, however slight, that there was an error at some point in the sampling or processing of the known person sample. For example, a sample from a known person may have been misidentified or loaded to the databank under an incorrect name.<sup>25</sup>

17.26 There are also due process reasons why such matches should only be considered intelligence. Disclosing a databank match as evidence may indicate a person has a previous conviction that resulted in their DNA profile being stored on the DPD. This would be inconsistent with the established principle that evidence of a previous conviction is not admissible in criminal proceedings. In 2002, the Select Committee reporting back on amendments to the CIBS Act stated that “there is no basis for departing from [this] general principle in relation to DNA evidence”.<sup>26</sup>

17.27 The CIBS Act therefore states that no DNA profile on the DPD or the Temporary Databank is admissible in any criminal proceedings, except in proceedings relating to an application for a suspect compulsion order.<sup>27</sup> Any databank match would need to be followed up with a casework comparison, which can then be presented as evidence in court.

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<sup>24</sup> The *Forensic Science Services Agreement between the New Zealand Police and the Institute of Environmental Science and Research Limited 2018–2021* (2018) explains that, to progress a crime to person databank link report to criminal proceedings, an evidential or suspect reference sample is required from the individual named in the report.

<sup>25</sup> In the United Kingdom, the Forensic Information Databases (FIND) Strategy Board monitors and reports on errors identified in routine checks in the sampling and processing of DNA samples and the interpretation of generated DNA profiles: National DNA Database Strategy Board *Biennial Report 2018–2020* (Home Office, September 2020) at 33. In 2019–2020, 234 errors were identified, including 146 errors in police forces sample or record handling, 18 errors in forensic services provider sample or record handling, 69 errors in forensic services provider interpretation and one error in transcription or amendment relating to a crime scene profile on the National DNA Database: at 36.

<sup>26</sup> Criminal Investigations (Bodily Samples) Amendment Bill 2002 (221-2) (select committee report) at 5.

<sup>27</sup> Criminal Investigations (Bodily Samples) Act 1995, s 71.



## Mixed crime scene samples

- 17.28 As we explain in Chapter 6, ESR estimates that approximately half of all crime scene samples analysed by ESR contain DNA from more than one person or ‘contributor’ (mixed crime scene samples). If a mixed crime scene sample contains DNA from up to five contributors, ESR will use a software programme called STRmix to separate the mixture into individual profiles. Those individual profiles can then be used in a casework comparison and loaded to the CSD as a ‘single contributor’ profile for databank searching.
- 17.29 Some mixed crime scene samples cannot be fully resolved by STRmix into individual profiles. A mixed crime scene profile can still be used in a casework comparison, and in some cases, ESR may also upload a mixed crime scene profile to the CSD. STRmix then compares the mixed crime scene profile against each profile on the DPD and Temporary Databank (but not to other profiles on the CSD) and calculates how likely it is that each person was one of the contributors to the mixed profile. This results in a likelihood ratio, similar to casework comparison, but the outcome is only considered an intelligence lead. If the likelihood ratio is over 1:1,000,000 (providing extremely strong support for one of the profiles in the mixed profile being the DNA of a person whose profile is on the DPD or Temporary Databank), a link report is generated and sent to Police in the same way as link reports generated for single contributor DNA profiles.
- 17.30 Some mixed crime scene samples cannot be fully resolved by STRmix into individual profiles. A mixed crime scene profile can still be used in a casework comparison, and in some cases, ESR may also upload a mixed crime scene profile to the CSD. STRmix software is then used to compare each of the mixed crime scene profiles to each of the profiles on the DPD and Temporary Databank. STRmix calculates how likely it is that each person on the DPD and Temporary Databank was one of the contributors to each mixture. This results in a match likelihood ratio. If any match likelihood ratio between a known person and a mixture is over 1:1,000,000, a link report is generated and sent to Police in the same way as link reports generated for single contributor DNA profiles.
- 17.31 If a match likelihood ratio in any given case is less than 1:1,000,000, ESR may still decide to provide a link report.<sup>28</sup> This decision will depend on what the exact match likelihood ratio is and all the circumstances of the case. For these link reports, ESR will include a warning about the risk of an adventitious match.
- 17.32 ESR began uploading mixed crime scene profiles to the CSD in 2013. There are currently over 900 mixed profiles on the CSD.<sup>29</sup>

## Implications of the New Zealand Bill of Rights Act

- 17.33 Section 21 of the Bill of Rights Act protects against unreasonable search and seizure by the State. As we explain in Chapter 2, section 21 applies whenever there is an intrusion upon a “reasonable expectation of privacy”.<sup>30</sup> A person might not have a reasonable

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<sup>28</sup> ESR advises that only on one occasion has a result of less than 1:1,000,000 been reported to Police.

<sup>29</sup> As at 8 October 2020, ESR advises there are 939 mixed crime scene profiles on the CSD and of those, approximately 70 per cent relate to priority crime and 30 per cent relate to volume crime (these terms are explained above n 8).

<sup>30</sup> *R v Aisford* [2017] NZSC 42, [2017] 1 NZLR 710 at [63]–[64]; and *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305 at [160] and [163].

expectation of privacy in respect of the collection of a crime scene sample.<sup>31</sup> However, the search and seizure does not end at the moment a police officer takes possession of a sample. That is because the seizure is a continuing act,<sup>32</sup> and once a sample is collected, the State has in its possession biological material containing a person's genetic blueprint. That sample can then be analysed or searched to reveal any or all of a person's genetic information. We consider that a person has a reasonable expectation of privacy in relation to the State's use of their genetic information, whenever or however it is obtained.

- 17.34 Our view is that any analysis of crime scene samples and use of crime scene profiles must be reasonable and proportionate to the law enforcement value and public interest in the investigation and prosecution of criminal offending to avoid inconsistency with section 21.<sup>33</sup>

### Implications of the Privacy Act

- 17.35 The Privacy Act prescribes rules (the information privacy principles) around how personal information should be collected, stored, and disclosed. In Chapter 5, we recommend that all DNA samples obtained in the investigation and prosecution of offences should constitute personal information for the purposes of the Privacy Act. This would include any information generated from DNA samples, including DNA profiles.
- 17.36 The following information privacy principles are relevant to the use, storage and retention of crime scene profiles:<sup>34</sup>
- (a) Principle 8 states that an agency that holds personal information must not use or disclose that information without taking reasonable steps to ensure that the information is accurate, up to date, complete, relevant and not misleading.<sup>35</sup>
  - (b) Principle 9 states that an agency must not keep personal information for longer than is required for the purposes for which the information may lawfully be used.
  - (c) Principle 10 states that an agency that holds personal information that was obtained in connection with one purpose cannot use that information for any other purpose. This is subject to a number of exceptions, including where the agency believes, on reasonable grounds, that non-compliance is necessary to avoid prejudice to the maintenance of the law, including prejudice to the prevention, detection, investigation, prosecution and punishment of offences.<sup>36</sup>

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<sup>31</sup> See, for example, *R v W DC Manukau* CRI-2018-092-847, 29 October 2018 at [34] where the Court observed that “[t]aking and storing a DNA sample from a crime scene involves little legal or ethical controversy”. The collection of crime scene samples is addressed in Chapter 13.

<sup>32</sup> *Alwen Industries Ltd v Comptroller of Customs* (1993) 1 HRNZ 574 (HC) at 586.

<sup>33</sup> See discussion of these concepts in Chapter 2.

<sup>34</sup> Privacy Act 1993, s 6; and Privacy Act 2020, s 22.

<sup>35</sup> This reflects the language of s 22 of the Privacy Act 2020. The same principle in s 6 of the Privacy Act 1993 is similar but it applies only to the use of information rather than the use or disclosure of information.

<sup>36</sup> We discuss how the exception for avoiding prejudice to the maintenance of the law has been interpreted in Chapter 12.

## ISSUES

- 17.37 We have identified two broad issues relating to the way in which crime scene profiles are used, stored and retained. Specifically:
- (a) the management of crime scene profiles lacks transparency and accountability; and
  - (b) some current practices in relation to the CSD risk an unreasonable privacy intrusion.
- 17.38 We discuss these issues below. A related general issue that arises across the DNA regime concerns the extent to which the CIBS Act facilitates Māori oversight, including how the CSD impacts on Māori rights and interests, as required by te Tiriti o Waitangi | the Treaty of Waitangi (the Treaty) and applicable tikanga. We discuss this issue in Chapter 5.

### Lack of transparency and accountability

- 17.39 In Chapter 3, we identify that one of the most significant problems with the CIBS Act is that it fails to regulate key parts of the DNA regime. The management of crime scene profiles, including the operation of the CSD, is one of the most significant regulatory gaps. This fails to meet our objectives of fit for purpose and accessible legislation.
- 17.40 There is no regulation of when crime scene profiles should be used in casework comparison or loaded to the CSD for databank searching, the type of information these profiles can contain and when they should be removed. This is despite the significant privacy intrusions inherent in the use of DNA in criminal investigations (discussed in Chapter 2) and the risk of wrongful conviction in relation to adventitious matches. We are particularly concerned that crime scene profiles loaded to the CSD can remain indefinitely and be continually searched against other profiles on the DNA databanks.
- 17.41 Because the CSD is not provided for in the CIBS Act, there are no statutory reporting requirements. Those affected by its operation can therefore be unaware of the role the CSD plays and unable to question the practices, policies and procedures applied to its operation.<sup>37</sup> Occasionally, a court may scrutinise the CSD within the context of a particular case, such as in the cases of *Police v SJ* and *R v W*, discussed below.<sup>38</sup> However, such cases are rare.
- 17.42 In addition, while databank matches are only intended to be used for intelligence purposes and are generally inadmissible as evidence (see paragraphs 17.24–17.27 above), we understand that charges are often filed on the basis of a databank match and that defendants may enter guilty pleas as a result. While this is more cost-effective and efficient for Police than obtaining a suspect sample and undertaking a casework comparison before filing charges, the regular use of databank matches in this manner risks elevating their status beyond mere intelligence. Given the lack of transparency in relation to the databank searching and casework comparison processes discussed above, we are concerned that many defendants and lawyers may not appreciate the

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<sup>37</sup> ESR regularly discloses in its annual reports to Parliament certain information derived from the CSD, such as the “crime to person” and the “crime to crime” link rates. However, ESR does not provide broader information about the CSD on a regular basis, and this is not a statutory requirement.

<sup>38</sup> *Police v SJ* [2017] NZDC 17314, [2018] DCR 587; and *R v W* DC Manukau CRI-2018-092-847, 29 October 2018.

distinction between the two or understand that databank matches cannot be relied on in court.<sup>39</sup>

- 17.43 The lack of independent oversight of the DNA regime, including the lack of independent auditing of the operation of the DNA databanks, compounds the lack of transparency and accountability regarding the management of crime scene profiles.<sup>40</sup> We discuss oversight in Chapter 5.

### **Effect of scientific advances**

- 17.44 The need for transparency and accountability is greater now than in 1995, when analysis techniques were limited and it was believed that DNA profiles did not reveal any personal information about individuals. Now, however, the amount of information that can be derived from DNA has increased exponentially and, we expect, will continue to increase. In theory at least, whole genome sequencing of crime scene samples could occur, or they could be analysed to reveal certain genetic characteristics. As the Court of Appeal observed in 2017, DNA “contains a wealth of genetic information about a person with unlimited future utility”.<sup>41</sup>
- 17.45 Scientific advances have also significantly increased the possibility of finding a usable crime scene sample. Previously, a considerable amount of biological material was needed to generate a DNA sample, such as a blood stain about the size of an old 50c coin. Now, mere traces of DNA (such as skin cells from surfaces people have touched) may be collected and analysed to generate a DNA profile. It has also been discovered that DNA can be transferred from one surface or person to another and may persist in the environment for some time. Therefore, a person’s DNA may be found at a crime scene even if they were not there when the crime was committed and, possibly, even if they have never been to the crime scene.
- 17.46 These developments and the likelihood of future scientific advances increase the intrusive nature of crime scene sample analysis and may also increase the risk of loading crime scene profiles that are not from the potential offender but from a third party. It is, therefore, essential that there is transparency of and accountability for what the State does with DNA that comes into its possession.

### **Privacy implications**

- 17.47 We are concerned that some current practices in relation to the CSD may constitute an unreasonable intrusion on privacy, inconsistent with the privacy principles discussed at

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<sup>39</sup> Pursuant to the Criminal Investigations (Bodily Samples) Act 1995, s 71. Databank link reports generated by ESR do contain a warning to the effect that databank matches are intelligence only. However, this does not describe the different scientific techniques used in casework comparison and databank matching.

<sup>40</sup> Annual auditing provisions are included in *Forensic Science Services Agreement between the New Zealand Police and the Institute of Environmental Science and Research Limited 2018–2021* (2018), but these do not extend to the CSD. Similarly, as discussed in Chapter 7, while ESR’s forensic processes are overseen as part of its laboratory accreditation, this does not extend to the policies and procedures related to the operation and administration of the CSD.

<sup>41</sup> *R v Toki* [2017] NZCA 513, [2018] 2 NZLR 362 at [24].

paragraph 17.35 above and with the right to be secure against unreasonable search and seizure, affirmed in section 21 of the Bill of Rights Act.<sup>42</sup>

17.48 Current practices that raise privacy concerns relate to:

- (a) loading crime scene profiles from victims and third parties to the CSD;
- (b) indefinite retention of crimes scene profiles on the CSD; and
- (c) loading poor-quality partial profiles to the CSD.

17.49 We discuss our concerns with these practices below.

#### ***Loading profiles of victims or third parties to the CSD***

17.50 The source of any crime scene sample is unknown when it is collected. Some will be from victims or third parties. Police and ESR have a policy of not loading crime scene profiles to the CSD that are known to be from victims or third parties. However, in many cases, a crime scene profile will be loaded to the CSD and a databank search conducted without first checking whether a victim or third party is the source of the crime scene profile (or if their DNA is part of a mixed crime scene profile).<sup>43</sup>

17.51 It is also the policy of Police and ESR to remove crime scene profiles from the CSD if they are later found to match a victim's or third party's DNA profile. However, the fact a crime scene profile is from a victim or third party will not always be discovered. There is also the risk that this policy is not followed, as happened in *R v W*, discussed below.<sup>44</sup>

17.52 Loading a crime scene profile from a victim or third party to the CSD constitutes a significant privacy intrusion as their profile will continue to be searched against other profiles on the DNA databanks. If a databank search results in a match to another crime scene profile, the results of that databank search could be used implicate the victim or third party in offending unrelated to the investigation, as happened in the case of *R v W*.

17.53 In *R v W*, W had been a victim of a stabbing and had provided a DNA sample to Police. W's DNA profile was compared to a crime scene profile generated from blood collected from the handle of the knife used in the stabbing. The crime scene profile had already been loaded to the CSD. W's DNA profile matched the crime scene profile. However, the crime scene profile remained on the CSD for a further nine months. During that time, another crime scene profile (from a burglary) was loaded to the CSD. This matched the crime scene profile from the earlier offence (the stabbing), which had been identified as W's profile. Based on this match, Police obtained a suspect sample from W in relation to the burglary.

17.54 The District Court determined that W's profile had remained on the CSD when, in accordance with information privacy principle 9, it was no longer necessary as it had served its purpose of eliminating that crime scene profile as being that of the offender.<sup>45</sup> The Court also held that the match between the crime scene profiles from the stabbing

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<sup>42</sup> We have not identified any privacy concerns relating to the casework comparison process or the storage of crime scene samples and profiles on the case file (except the lack of transparency and accountability of these practices, discussed above).

<sup>43</sup> This is the case for volume crime cases, because crime scene samples from these cases are not submitted with reference samples from victims and third parties for comparison. Instead, crime scene profiles are loaded to the CSD for databank searching. ESR has also noted that it is not uncommon for reference samples from victims or third parties to only be provided to them for analysis and casework comparison just prior to a court hearing.

<sup>44</sup> *R v W* DC Manukau CRI-2018-092-847, 29 October 2018.

<sup>45</sup> At [42].

and the subsequent burglary had been improperly obtained, in breach of section 21 of the Bill of Rights Act.<sup>46</sup> The suspect sample Police had obtained in reliance on that match was therefore excluded as evidence.<sup>47</sup>

- 17.55 In our view, loading crime scene profiles of victims and third parties to the CSD and using the results of databank searching to implicate them in unrelated offending risks inconsistency with privacy principles 9 and 10 and risks breaching section 21 of the Bill of Rights Act. We are concerned that current practices are not robust enough to ensure that such privacy intrusions do not occur.

### *Indefinite retention of crime scene profiles on the CSD*

- 17.56 The policy of indefinite retention of crime scene profiles (except where it is established that a profile is from a victim or third party) raises privacy concerns in several situations, especially where the source of the crime scene profile is identified and:
- (a) Police determines no offence was committed or decides not to file charges;
  - (b) the defendant is acquitted or charges are withdrawn; or
  - (c) the defendant is convicted.

### *Retention where charges not filed*

- 17.57 Retention of a crime scene profile on the CSD when the source of that profile has been identified but Police determines that no offence has been committed or decides not to file charges raises the same concerns identified above in relation to victims and third parties.
- 17.58 In these circumstances, there is no longer a case-specific need to retain the profile on the CSD, and continuing to do so creates a risk that it will be used for a different purpose, such as to implicate the person in unrelated offending. This occurred in the case of *Police v SJ*.<sup>48</sup> In that case, SJ, a 15-year-old male, was accused of the rape of a 15-year-old female. A crime scene profile was generated following a medical examination of the complainant and was loaded to the CSD. The investigation was discontinued, but the crime scene profile was not removed from the CSD. A year later, a crime scene profile loaded to the CSD from a burglary matched the earlier crime scene profile. Because Police knew that the earlier crime scene profile was likely that of SJ, they approached him to provide a suspect sample in relation to the burglary investigation. SJ refused and Police sought a suspect compulsion order, in reliance on the databank match.

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<sup>46</sup> At [46].

<sup>47</sup> At [60]. As we discuss in Chapter 9, this case is complicated by the fact that the sample Police obtained from W was not an elimination sample (which is what W thought she was providing) but a databank consent sample under Part 3 of the CIBS Act. A DNA profile derived from a databank consent sample can be stored on the DNA Profile Databank (DPD) indefinitely. In this case, the crime scene profile from the burglary also linked to W's profile on the DPD. However, the Court was not satisfied that the defendant had provided the requisite informed consent to providing a databank consent sample and therefore found that the sample had been obtained improperly: at [31].

<sup>48</sup> *Police v SJ* [2017] NZDC 17314, [2018] DCR 587.

17.59 The District Court refused to grant the order. While accepting that there was good cause to suspect SJ had committed the burglary and that various factors weighed in favour of granting the application,<sup>49</sup> the Judge considered that:<sup>50</sup>

... there are aspects of the application which give rise to a real sense of unease. It is questionable whether [the DNA profile] has been reasonably or fairly retained by ESR on the CSD when it has been accepted that there is insufficient evidence to establish that any crime was committed. Is it unreasonable to grant an order that relies solely on information linking [SJ] to an alleged offence for which he has effectively been cleared?

17.60 The Judge observed that any collection of a person's bodily sample "is a significant intrusion upon the privacy rights of the individual".<sup>51</sup> The intrusion would have been even more significant in SJ's case because of his age and the fact that he had not given a bodily sample to Police "for regulated retention on the DPD".<sup>52</sup> The Judge concluded that compelling SJ to provide a bodily sample pursuant to a compulsory suspect order would amount to an unreasonable search and seizure under section 21 of the Bill of Rights Act.<sup>53</sup> It would also appear to be inconsistent with privacy principles 9 and 10.

#### Retention following acquittal or withdrawal of charges

17.61 Retaining crime scene profiles on the CSD in circumstances where the defendant is acquitted or charges are withdrawn is inconsistent with the strict requirements in the CIBS Act relating to the Temporary Databank and the DPD. If the defendant had been required to provide a DNA sample when arrested or intended to be charged, their profile must be removed from the Temporary Databank and destroyed following their acquittal or the withdrawal of charges.<sup>54</sup> Similarly, there is no ability to require a DNA sample for the DPD in the absence of a relevant conviction.<sup>55</sup>

17.62 Retaining a crime scene profile in these circumstances presents the same concerns identified above when charges are not filed. Unless there is a case-specific reason for retaining that profile on the CSD (for example, if the source of the profile is disputed),<sup>56</sup> this risks inconsistency with privacy principles 9 and 10 and with section 21 of the Bill of Rights Act.

#### Retaining profiles of convicted offenders on the CSD

17.63 The policy of not removing profiles from the CSD when the investigation is resolved by a conviction might also raise privacy concerns. In these situations, the crime scene

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<sup>49</sup> At [21] and [27]–[29]. Factors in favour of granting the application included that the offence was serious, that DNA evidence would provide reliable and compelling evidence to prove or disprove SJ's involvement and that there was no suggestion of bad faith or misconduct by the investigators.

<sup>50</sup> At [30].

<sup>51</sup> At [39].

<sup>52</sup> At [39].

<sup>53</sup> At [38].

<sup>54</sup> Criminal Investigations (Bodily Samples) Act 1995, s 60A.

<sup>55</sup> A person may, however, consent to provide a databank sample under Part 3 of the CIBS Act. We refer to these people as volunteers and address volunteer samples in Chapter 18.

<sup>56</sup> The defendant may dispute they are the source of the crime scene profile if the casework comparison results in a relatively low likelihood ratio that the profile is from the defendant. This might occur if the crime scene sample was of poor quality and only a partial profile could be generated. If a person is acquitted or charges are withdrawn in these circumstances, it may be appropriate to retain the crime scene profile on the CSD, as in time, it may provide a better match to a different suspect.

profile will have served its purpose, and continuing to retain it on the CSD will be inconsistent with privacy principle 9.

- 17.64 In most cases, if a person is convicted of an offence for which DNA evidence was relevant, Police will require their DNA profile to be retained on the DPD. There is, therefore, little utility in retaining a profile on the CSD. However, not all profiles are retained on the DPD indefinitely. As we explain in Chapters 20 and 21, some profiles will be removed after a period of 10 years provided the person has not reoffended, and some profiles of young people will be removed after a shorter period in recognition of their age and to align with the more rehabilitative approach of the youth justice system.<sup>57</sup>
- 17.65 Retaining a person's profile on the CSD when their profile has been removed from the DPD raises the same concerns identified at paragraph 17.62 above. Limitations on the retention of profiles on the DPD recognise the degree of privacy intrusion inherent in keeping a person's DNA on a databank indefinitely. Continuing to keep a person's profile on the CSD effectively circumvents that policy, undermines the rehabilitative approach taken with respect to young people and risks inconsistency with privacy principles 9 and 10 and with section 21 of the Bill of Rights Act.

### *Poor-quality partial profiles on the Crime Sample Databank*

- 17.66 As noted at paragraph 17.14 above, loading a poor-quality partial profile to the CSD, even for the purposes of a one-off search, increases the risk of a false or adventitious match.
- 17.67 This raises privacy concerns as it may result in the investigation and, in a worst-case scenario, contribute to the wrongful conviction of someone who is not the offender. The use of a partial profile must therefore be a reasonable and proportionate measure to avoid breaching section 21 of the Bill of Rights Act. This will depend on all the circumstances of the case, such as the quality of the crime scene profile, the nature and seriousness of the suspected offending, the stage of the investigation and what steps are taken to minimise the intrusion (for example, that the profile is removed immediately following a one-off search).
- 17.68 In addition, the use of a partial profile risks inconsistency with privacy principle 8 if reasonable steps are not taken to ensure that the crime scene profile is accurate, complete and not misleading.

## **OPTIONS FOR REFORM**

- 17.69 In the Issues Paper, we observed that the concerns around the lack of accessibility and transparency would be addressed by including provisions governing the CSD in new DNA legislation. However, we noted that there is considerable room for debate as to how prescriptive any provisions should be.<sup>58</sup> It could be counter-productive to enact highly prescriptive statutory rules as some flexibility is required to accommodate future scientific advances.<sup>59</sup>

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<sup>57</sup> Criminal Investigations (Bodily Samples) Act 1995, ss 26 and 26A.

<sup>58</sup> See discussion in the Issues Paper at [10.54]–[10.63].

<sup>59</sup> At [10.70].



- 17.70 With these considerations in mind, we identified several options for reform:<sup>60</sup>
- (a) Requiring Police and ESR to maintain publicly available policy statements on matters such as:
    - (i) the use of the CSD in cases involving minor volume crime cases;
    - (ii) the use of the CSD when the identity of the offender is known at the outset;
    - (iii) the quality threshold for uploading a profile to the CSD;
    - (iv) the nature of profiles uploaded to the CSD (that is, what DNA analysis techniques will be used to generate profiles); and
    - (v) when profiles should be removed from the CSD.
  - (b) Requiring Police and ESR to report on certain matters, including on consistency with the Bill of Rights Act and the Treaty and consideration of privacy and tikanga issues.
  - (c) Giving an oversight body overall responsibility for monitoring use of the CSD, which could include:
    - (i) approving policy statements developed by Police and ESR;
    - (ii) monitoring compliance with policy statements; and
    - (iii) approving one-off non-standard use of the CSD that falls outside the policy statements.
  - (d) Imposing statutory restrictions on the use of victim (and potentially third-party) profiles, such as a statutory duty to take all reasonable steps to ensure such profiles are not uploaded to the CSD or a statutory ban on using an internal match within the CSD to prosecute a victim or third party for unrelated offending.
  - (e) Setting a threshold for the level of seriousness of the offence before a crime scene profile can be uploaded to the CSD to ensure that the privacy intrusion inherent in using the CSD is proportionate to the public interest in resolving the investigation.
  - (f) Requiring the removal of profiles from the CSD once the person is identified and prohibiting police officers from acting upon an investigative lead if it was generated from a profile that should have been removed from the CSD. An oversight body could also be empowered to periodically audit the CSD to ensure that profiles are not retained for longer than is necessary.

## RESULTS OF CONSULTATION

17.71 We received 44 submissions from eight organisations and 36 individuals on the storage, use and retention of crime scene profiles on the CSD.

### Statutory regulation of the Crime Sample Databank

17.72 We received 12 submissions from eight organisations and four individuals on whether the CSD should be regulated in legislation. All submitters supported the CSD being expressly regulated in new DNA legislation to varying degrees.

17.73 The Auckland District Law Society Criminal Law Committee (ADLS) and Sue Petricevic submitted that legislation should outline the CSD's structure, access routes and use, the

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<sup>60</sup> At [10.70]–[10.77] and [14.119]–[14.120].

type of crime that triggers a profile being loaded to the CSD and the rules relating to retention. ADLS also stressed that safeguards ought to be implemented to ensure that the CSD does not include profiles of people who give elimination samples. Police submitted that new DNA legislation should include rules governing the retention of crime scene profiles after the closure of a case.

- 17.74 The New Zealand Law Society (NZLS) and the New Zealand Bar Association (endorsing NZLS's submission in its entirety) supported legislative safeguards to clarify the purpose of the CSD, when and for what purpose a profile can be loaded and the rules surrounding the use and retention of profiles on the CSD. It submitted it would be more flexible to have an oversight body promulgate guidelines to specify removal/deletion obligations and the distinct rules governing different categories of profile rather than these being set out in legislation.
- 17.75 Several submitters, including the Public Defence Service (PDS) and Associate Professor Nessa Lynch, recognised the need to incorporate the CSD into legislation in a way that balances the tension between prescribed rules and flexibility to accommodate scientific advances. Recognising this tension, PDS suggested a generic definition of a crime scene index (similar to the Irish model, discussed at paragraph 17.98 below), with details to be set out in regulations or guidelines issued by an oversight body.
- 17.76 Te Mana Raraunga | Māori Data Sovereignty Network emphasised the need for transparency of the CSD. It submitted that the CSD should be governed by an explicit statutory framework covering its management, use and relationship with other databanks. Te Mana Raraunga submitted that this framework ought to align with Māori data sovereignty principles.
- 17.77 The Privacy Commissioner also supported reform of the CSD and commented favourably on crime scene indices and prescribed matching rules adopted in other jurisdictions (discussed below), which help embed norms surrounding access to and use of DNA information. The Privacy Commissioner submitted that such an approach accords with the Privacy Act's "discipline and controls on data matching in the public sector more generally".
- 17.78 Submitters expressed mixed views on the type of offending that the CSD should aim to resolve. Approximately half of submitters, including Police, Professor Carole McCartney, Dr Aaron Amankwaa and Professor Dennis McNevin, thought that profiles should be loaded to the CSD in respect of any offence or any imprisonable offence, while the other half, including NZLS, ADLS, PDS, the Privacy Commissioner and Sue Petricevic, thought the CSD should be used for serious offending only.

### **Victim and third-party profiles**

- 17.79 We received 10 submissions on the use of crime scene profiles from victims and third parties. Of these, eight submitters, including ADLS, Sue Petricevic, NZLS, PDS, Nessa Lynch, the Privacy Commissioner and Te Mana Raraunga, expressed concerns about the potential for victim and third-party profiles to be loaded to the CSD and compared to other profiles on the DNA databanks. These submitters supported greater protections for victims and third parties.
- 17.80 PDS noted the risk of disincentivising victims and third parties from providing elimination samples "for fear of future consequences". To avoid this, PDS submitted that victim and third-party profiles should be stored separately and governed by clear rules in relation to inadvertent matches. PDS also supported an oversight body having responsibility in

this area. NZLS recognised that loading victim and third-party profiles to the CSD will sometimes be necessary, for example, if a suspect's defence seeks to implicate a third-party. NZLS considered that decisions whether to load a profile should be made on a case-by-case basis, subject to strict guidelines, and should be loaded to a separate index of the CSD. NZLS also observed that retaining victim and third party profiles for longer than the duration of the case elevates the likelihood of that information being used for an inappropriate secondary purpose, which engages privacy rights and would not be justified or proportionate to the need to prevent and detect crime.

- 17.81 Nessa Lynch submitted that the best approach to address the risks to victims and third parties lies not in legislation but in the functions of an appropriately expert oversight body.
- 17.82 Te Mana Raraunga submitted that profiles that are later identified as from victims or eliminated as suspects ought to be removed from the CSD unless explicit consent is given by those individuals for their data to be retained, with clear information provided to them about the potential risks of indefinite retention.
- 17.83 Two submitters, Police and ESR, expressed no concerns about victim and third-party profiles being loaded to the CSD. Police was confident that ESR's processes were sufficient to minimise the risk of this happening. ESR also believed it adequately minimises this risk through existing safeguards, including actively seeking elimination samples (where appropriate), screening profiles against ESR's elimination databases and immediately removing any profile from the CSD where it is found to match a victim.

### Low-quality crime scene profiles

- 17.84 We received nine submissions on low-quality crime scene profiles being loaded to the CSD, five of which expressed concerns with the current safeguards.
- 17.85 PDS stated that low-quality profiles can generate numerous misleading investigative leads and, if used frequently, could contribute to miscarriages of justice. It submitted that legislation could play an important role in governing what types of profiles can be loaded to the CSD and that an oversight body could monitor and make decisions in the event of any queries.
- 17.86 The Privacy Commissioner and NZLS noted that the use of low-quality profiles may be in tension with information privacy principle 8 (discussed at paragraph 17.36). The Privacy Commissioner suggested that:
- ... consideration be given to whether such samples must meet a certain quality threshold to be eligible for loading to the Crime Sample Databank or whether they should be tagged as being of low quality so that additional checks can be undertaken before such samples are used or relied on for investigative purposes.
- 17.87 However, NZLS recognised that it will not always be possible to generate a full profile. It submitted that, given the rapid rate of scientific advances, guidance documents should be issued to clarify the quality threshold rather than defining this in legislation. Nessa Lynch also submitted that a legislated definition was not the answer, but rather an oversight body should be responsible for issuing guidance that determines and describes the appropriate quality threshold governing profile loading to the CSD.
- 17.88 Four submitters, Police, ESR, ADLS and Sue Petricevic, expressed no concerns with the current safeguards. Police submitted that ESR's quality threshold is sufficient and that low-quality profiles are rarely loaded onto the CSD. Similarly, ESR submitted that:

... the vast majority of crime scene profiles meet a quality threshold. The loading of a lower quality crime scene profile is an extremely rare occurrence and is only carried out after careful consideration and in consultation with Police. Results reported from such comparisons are significantly caveated.

## Removing profiles

- 17.89 We received 13 submissions that considered the retention of profiles on the CSD.
- 17.90 Three submitters, ESR, ADLS and Sue Petricevic, expressed no concerns regarding the indefinite retention of profiles on the CSD. ESR submitted that there are “numerous examples of multiple crimes being linked through DNA where there is no link to a person on the known person databank”. ADLS suggested that, if only profiles associated with serious offending were retained and a fixed retention period was preferred, this could be justifiably set at 25 years or more.
- 17.91 Five submitters, including Police, NZLS and PDS, opposed the indefinite retention of profiles on the CSD. Police submitted that crime scene profiles should be retained until the offender is identified and convicted. Beyond this point, profiles should be stored and retained in line with Police’s Retention and Disposal Schedule, which would be 25 years for homicide-related profiles, would be 20 years serious sexual assault profiles, and five years for burglary profiles.
- 17.92 NZLS and PDS both considered that, once a match is identified, the purpose of loading the crime scene profile to the CSD has been served. NZLS submitted there were “compelling reasons” to remove crime scene profiles once the person responsible for the profile is identified and the associated investigation has resulted in conviction. NZLS also commented on whether legislation should prohibit the use of crime scene profiles that should have been deleted but concluded:
- ... that may be difficult to regulate in practice, and may be unnecessarily restrictive. It is therefore preferable for the courts to determine the admissibility of any evidence obtained by Police through use of a crime scene sample that should have been removed from the Crime Sample Databank. This would be consistent with the approach to other forms of improperly obtained evidence under the Evidence Act 2006.
- 17.93 Te Mana Raraunga also expressed concern regarding the indefinite retention of crime scene profiles, noting that this heightens the risk of harm to communities that are over-surveilled. It commented that “[t]his practice may reinforce racially discriminatory outcomes in the criminal justice system”. In its view, Māori should be consulted on how long samples and derived data should be retained and under what circumstances. Any new arrangements should be subject to systems of Māori governance and independent oversight.
- 17.94 Two submitters, the Privacy Commissioner and Nessa Lynch, expressed general views on how a limited retention policy might be managed. The Privacy Commissioner suggested that Police and ESR could generate a new protocol against which the CSD could be regularly audited to ensure compliance. Oversight bodies such as the Independent Police Conduct Authority or the Privacy Commissioner could receive the results of audits and consult with relevant stakeholders on trends or issues to be resolved. Nessa Lynch similarly submitted that independent oversight is one mechanism that could be used to ensure profiles are removed from the CSD at an appropriate time. Failure to do so could be taken into account under section 30 of the Evidence Act in determining whether the evidence ought to be admitted.

- 17.95 Two other submitters, Gavin English and Dennis McNevin, commented on issues of retention on the CSD. Gavin English submitted that profiles on the CSD should be stored in accordance with the Criminal Records (Clean Slate) Act 2004. For example, if a crime recorded in an individual's criminal history would have been subject to the clean slate scheme after seven years and therefore removed from their criminal record, the corresponding profile on the CSD should also be removed after seven years. Gavin English suggested that, at least, profiles on the CSD should be removed in accordance with the statute of limitations for the relevant offence. Dennis McNevin similarly submitted that profiles on the CSD should be retained according to a sliding scale, from short-term retention for minor imprisonable offences to long-term retention for serious imprisonable offences.
- 17.96 Another submitter also addressed retention on the CSD, suggesting that, if the individual that is the source of the profile on the CSD has not been convicted, the profile should be destroyed after a period of seven years.

### CRIME SCENE DATABANKS IN COMPARABLE JURISDICTIONS

- 17.97 England, Wales and Scotland established DNA databanks in 1995, around the same time as Aotearoa New Zealand. In these jurisdictions, legislation does not regulate the loading of crime scene profiles to a DNA databank.
- 17.98 In contrast, those jurisdictions that have established DNA databanks since 1995 (Australia, Ireland and Canada) all maintain a crime scene index as part of a statutory DNA databank. Of these jurisdictions, Ireland has the most recently established DNA databank, and its governing legislation states that the crime scene index:<sup>61</sup>
- ... shall comprise the DNA profiles of persons ... generated from samples of biological material found at, or recovered from, a crime scene whether before or after the commencement of this section ...
- 17.99 Similarly, in Canada, legislation governing the DNA databank states that:<sup>62</sup>
- The crime scene index shall contain DNA profiles derived from bodily substances that are found
- (a) at any place where a designated offence was committed;
- (b) on or within the body of the victim of a designated offence;
- (c) on anything worn or carried by the victim at the time when a designated offence was committed; or
- (d) on or within the body of any person or thing or at any place associated with the commission of a designated offence.
- 17.100 Australia has a similar definition of crime scene index.<sup>63</sup> Legislation in these jurisdictions also places strict rules around what matching is permissible within and between the indices. Table 6 in Appendix 4 summarises the different databank arrangements in comparable jurisdictions.

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<sup>61</sup> Criminal Justice (Forensic Evidence and DNA Database System) Act 2014 (Ireland), s 61(1)(a).

<sup>62</sup> DNA Identification Act SC 1998 c 37, s 5(3).

<sup>63</sup> Crimes Act 1914 (Cth), s 23YDAC.

## Loading victim and third-party profiles to the crime scene index

- 17.101 Some comparable jurisdictions have recognised the concerns identified above regarding the risk of misuse of crime scene profiles from victims and third parties.
- 17.102 In Australia, this was the focus of an inquiry conducted by the New South Wales Legislative Council in 2009.<sup>64</sup> The Council identified two conflicting imperatives: the desirability of encouraging victims to report offending and cooperate with police investigations by providing elimination samples and the desirability of supporting police to apprehend offenders. To recognise both imperatives, the Council recommended legislative protections to ensure that all reasonable steps are taken not to load victim profiles to the crime scene index of the DNA databank and to ensure that any such victim profiles are removed from the crime scene index as soon as they are identified.<sup>65</sup> It also recommended that there should be a statutory ban on prosecuting victims for unrelated offending based on an internal match within the crime scene index except in cases of serious offending. It appears that these recommendations have not yet been adopted.
- 17.103 In Canada, legislation governing the DNA databank includes specific rules that are intended to minimise the risk of victim or third-party profiles being used for a different purpose. In relation to victims, the DNA databank includes an index that is reserved purely for victim profiles, derived from samples obtained from victims for elimination purposes. Legislation states that a match between a profile in the victims index and any other profile on the databank can only be reported to investigators if it relates to the offence for which the profile was originally obtained.<sup>66</sup> This means that, if a victim submits a sample for elimination purposes, investigators will not be notified if that profile matches any other unrelated profiles on the crime scene index. In addition, legislation requires removing access to information on the crime scene index “without delay” if the information relates to a DNA profile that is discovered to be from a victim of the offence to which the investigation relates.<sup>67</sup>
- 17.104 In relation to third-party profiles, the legislation in Canada also requires removing access to information on the crime scene index without delay if that information is discovered to relate to a person who has been eliminated as a suspect in the relevant investigation (that is, a third party who had a legitimate reason to be at the crime scene).<sup>68</sup>

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<sup>64</sup> Standing Committee on Law and Justice *The use of victims' DNA* (New South Wales Legislative Council, Report 41, December 2009).

<sup>65</sup> A formal Victims Protocol in New South Wales, signed by the Minister of Health and the Attorney General in 2007, already contained this policy, but the Legislative Council considered that the Protocol should have legislative standing: at 55.

<sup>66</sup> DNA Identification Act SC 1998 c 37, s 6(1)(a).

<sup>67</sup> Section 8.1(1)(a).

<sup>68</sup> Section 8.1(1)(b).

## RECOMMENDATIONS

### Including a crime scene index in the proposed DNA databank

#### RECOMMENDATIONS

**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.

- 17.105 We recommend that the proposed DNA databank include a crime scene index to store crime scene profiles, consistent with the approach taken in Australia, Ireland and Canada.
- 17.106 The crime scene index should store profiles for both databank searching and casework comparison. Comparisons of one profile to another profile or to an index of profiles should only occur in accordance with the recommendations made throughout this Report and summarised in Table 7 set out in Appendix 5.
- 17.107 As we explain in Chapter 4, requiring all comparisons to occur on the proposed DNA databank will improve the transparency and accountability of the use of DNA in criminal investigations and will enable effective auditing of the use of crime scene profiles.
- 17.108 However, because we are recommending the crime scene index be used for two distinct purposes, it is important that clear rules are developed to ensure that samples obtained for casework comparison are not used inappropriately and to ensure that only crime scene profiles that meet the appropriate quality standards are available for databank searching. Some of these rules will have significant implications for the way in which personal information is used and should be prescribed in new DNA legislation. Other rules require flexibility to respond to scientific advances and are more operational in nature. We consider that these rules should be developed by Police and the forensic services provider, in consultation with the DNA Oversight Committee, and should be set out in a Crime Scene Index Protocol (Protocol). This should comprise relevant practice, policy and procedure relating to the crime scene index described below and should be publicly available, including available online.
- 17.109 We explain the detail of our recommendations in respect of the crime scene index below.

## Loading profiles to the crime scene index

### RECOMMENDATIONS

**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.

17.110 To reflect the two purposes of the crime scene index, we recommend that all profiles on the crime scene index should be classified as either “available for databank searching” or “limited to casework comparison”. This classification will then inform how a crime scene profile can be used, as we explain below.

17.111 A profile may be classified as being available for databank searching if it satisfies three requirements:

- (a) First, the crime scene profile must only contain the DNA of one person. Currently, mixed crime scene profiles are loaded to the CSD if they cannot be resolved into single contributor profiles. However, we do not think that mixed profiles should be routinely used for databank searching, given the higher risk of adventitious matches. Instead, mixed profiles might be able to be used for a one-off databank match, as we discuss at paragraph 17.119 below.
- (b) Second, it must be established that the crime scene profile does not match any profiles on the elimination index that relate to that investigation.<sup>69</sup> This is consistent

<sup>69</sup> Prior to loading a profile to the crime scene index, it should be compared against profiles obtained for elimination purposes from forensic services provider employees, police officers and others involved in the investigation, consistent with current practice. We do not recommend prescribing this as a requirement in new DNA legislation, as this comparison would occur outside the proposed DNA databank and we are not aware of the current arrangements creating problems in practice. If, however, the proposed DNA databank is to include a separate law enforcement



with ESR's current practice and will ensure that crime scene profiles from victims and third parties are not compared against crime scene profiles from unrelated offending. It also gives effect to our recommendations in Chapters 9 and 10 that the results of any analysis of elimination samples and mass screen samples should only be used for the criminal investigation for which they are obtained. This comparison to the elimination index should be undertaken when loading the crime scene profile and at any future point when further profiles are loaded to the elimination index that relate to that investigation. A future match would mean that the requirements for classifying a crime scene profile as being available for databank searching are no longer met.

- (c) Third, the crime scene profile must meet the relevant quality requirements prescribed in the Protocol, discussed at paragraph 17.137 below. This has the effect of elevating the status of the current quality threshold from guidance only to a mandatory standard. This will ensure only good quality profiles are used in databank searching to enable meaningful comparisons to be made to other profiles on the proposed DNA databank and to minimise the risk of false or adventitious matches. However, on occasion, it may be appropriate for a crime scene profile that does not meet the quality threshold to be used in a one-off databank search. The criteria for conducting one-off searches should also be prescribed in the Protocol, as we discuss below.

- 17.112 A crime scene profile that does not meet the requirements for classification as being available for databank searching should be classified as being limited to casework comparison. This recognises that crime scene profiles from victims, third parties and mass screen participants as well as poor-quality partial crime scene profiles still hold some investigative value and may be required for casework comparison.
- 17.113 In every case, the crime scene profile must relate to an investigation into the commission of an offence or suspected offence. This will ensure that profiles are not loaded to the crime scene index unnecessarily – that is, when Police has determined that no offence has occurred or when there is no intention to investigate the offence or suspected offence.
- 17.114 We also note that, in Chapter 6, we make recommendations relating to the analysis of DNA samples, including crime scene samples. In that chapter, we recommend that only approved analysis techniques may be used to generate DNA profiles for loading to the proposed DNA databank. These approved analysis techniques will be prescribed in regulations made under the new DNA legislation. Some analysis techniques may only be approved for the generation of DNA profiles for use in casework comparisons. This will ensure a crime scene profile has been generated using an analysis technique that is appropriate for its intended use.
- 17.115 We have not recommended that crime scene profiles should only be loaded if they relate to an offence or suspected offence of a certain level of seriousness. While this was an option canvassed in the Issues Paper, views of submitters were mixed (see paragraph 17.78), and we are satisfied that, in light of the additional safeguards proposed in this chapter, granting flexibility to Police and the forensic services provider in terms of the type of offending for which the crime scene index is used is reasonable

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index (discussed in Chapter 4), a requirement to first compare crime scene profiles against that index before undertaking databank searching should be prescribed in statute.

and proportionate to the law enforcement value and public interest in the investigation and prosecution of criminal offending. It is also consistent with our recommendations in Part B of this Report to continue to permit the collection of casework samples in respect of any imprisonable offence.

### Requiring efforts to obtain elimination samples

#### RECOMMENDATION

##### 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.

- 17.116 As we explained above, whenever a crime scene sample is collected, there will be a possibility that the sample is not from the offender but instead from a victim or third party. If a crime scene profile is loaded to the crime scene index for databank searching without ruling out this possibility, there is a risk that the victim or third party could be implicated in unrelated offending. In addition, if the investigation remains unresolved, that victim's or third party's profile could remain on the crime scene index and continue to be subject to databank searching. This would constitute a significant intrusion into their privacy.
- 17.117 We therefore recommend that police officers should make all reasonable attempts to obtain and analyse elimination samples from any victims or third parties involved in a case if their DNA might be found at the crime scene. Attempts to obtain elimination samples should be made prior to classifying a crime scene profile as available for databank searching. This would enable a comparison to be made against the elimination index (recommended at R122.b above) to rule out the possibility of the crime scene profile being of the victim or a third party.

## Searching the proposed DNA databank

### RECOMMENDATIONS

- R126** A databank search may be conducted between a crime scene profile classified as available for databank searching and:
- other profiles on the crime scene index that are classified as available for databank searching; and
  - 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 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
  - 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.

- 17.118 Databank searching should ordinarily only be conducted in respect of crime scene profiles that meet the criteria for classification as being available for databank searching in R122.
- 17.119 However, if those criteria cannot be satisfied, a one-off comparison should be able to be conducted provided it is approved by a senior police officer on the basis that it meets the relevant requirements set out in the Protocol. As we noted above, crime scene samples will often be of poor quality. In some circumstances, where the offending is serious and Police has no other investigative leads, it may be appropriate for a low-quality crime scene profile to be used in a one-off databank search. This largely reflects current practice, with the important difference being the requirement to set out a clear decision-making framework for approving a one-off search in a publicly available Protocol. This will promote transparency and accountability, as the Protocol will be developed in consultation with the DNA Oversight Committee, and decisions applying the Protocol will be subject to independent auditing. The matters that should be addressed in the Protocol are discussed at paragraph 17.138 below.

- 17.120 We have not recommended requiring a court order to conduct a one-off comparison using a low-quality crime scene profile because this does not involve the use of personal information for a different purpose and therefore does not raise the same privacy concerns that arise in relation to familial searching and one-off comparisons using a profile on the pre-conviction index (where we do recommend a court order be required).<sup>70</sup> The considerations here relate to the investigative value of any resulting intelligence leads and the risk of an adventitious match, which are largely scientific and operational in nature and, subject to a robust decision-making framework being in place, should be made by the forensic services provider and Police.
- 17.121 The results of a databank search should continue to be used for intelligence purposes only and must not be used as evidence in any proceedings, except in support of an application for a suspect compulsion order. This is for the scientific and due process reasons explained at paragraphs 17.24–17.27 above.
- 17.122 However, if a databank search implicates a person whose profile is on the elimination index in unrelated offending, the results of that search must not be used as evidence in support of an application for a suspect compulsion order. This addresses the risk that a databank search could result in a match between two crime scene profiles and the subsequent collection of an elimination sample in one of those investigations could implicate the person who provided the elimination sample in unrelated offending. Using the results of the databank search against a person who provides an elimination sample is not reasonable or proportionate and would be inconsistent with our recommendations in Chapters 9 and 10 that the results of any analysis of elimination samples and mass screen samples should only be used for the criminal investigation for which they are obtained.
- 17.123 We do not recommend a similar prohibition in respect of databank searches that implicate a suspect in unrelated offending. This might occur if a databank search results in a match between two crime scene profiles from different investigations and a casework comparison between one of those crime scene profiles and a suspect profile indicates the suspect is the offender. A suspect sample, like an elimination sample, is obtained for the purpose of casework comparison in relation to a particular investigation. However, to obtain a suspect sample, we recommend that there must be reasonable grounds to suspect that person of committing an imprisonable offence.<sup>71</sup> When a databank search indicates that suspect's involvement in unrelated offending, in our view, it is reasonable and proportionate to the public interest in the investigation and prosecution of offending to permit Police to rely on that match. In Chapter 18, we recommend restricting any wider use of profiles on the pre-conviction index (including suspect profiles and profiles of people who provide a sample when arrested or intended to be charged). With the exception of casework comparisons to suspect

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<sup>70</sup> A one-off search using a profile on the pre-conviction index of the proposed DNA databank involves comparing a suspect profile or a profile from a sample required on arrest or intention to charge against *all* profiles on the crime scene index to identify any links to unresolved offending. In Chapter 18, we recommend that profiles from known people on the proposed DNA databank should not usually be used for intelligence purposes until such time as a person is convicted and their profile is loaded to the offenders index. Profiles on the pre-conviction index (when a person has yet to be convicted of an offence) should only be used in a one-off search if that search is authorised by a court order. We discuss familial searching in Chapter 23.

<sup>71</sup> The criteria for obtaining a suspect sample is discussed in Chapter 8.

profiles, a profile on the pre-conviction index must not be compared against other profiles on the crime scene index unless a court order is obtained.

### Conducting casework comparisons

#### RECOMMENDATIONS

**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.

17.124 A casework comparison should be able to be conducted between any crime scene profile on the crime scene index and a profile from a known person that is generated from a DNA sample obtained for the purposes of that investigation (casework sample). This could be a suspect profile generated from a suspect sample or indirect sample and stored on the pre-conviction index or a profile generated from an elimination sample or a mass screen sample and stored on the elimination index. As we explain in Part B of this Report, casework samples can only be obtained with the appropriate consent or court order.

17.125 Because a casework comparison provides a true assessment of the likelihood of a person being the source of the crime scene profile, the results of a casework comparison should be admissible in proceedings.

### Removing profiles from the crime scene index

#### RECOMMENDATIONS

**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.

- 17.126 We recommend that the crime scene index should only store crime scene profiles from unresolved offending. We do not think it is reasonable or proportionate to continue to store crime scene profiles, which constitute personal information, on the crime scene index for longer than is required for the purpose for which they were obtained (that is, to assist in the resolution of the investigation). This risks inconsistency with the principles of the Privacy Act and constitutes a significant privacy intrusion, especially in circumstances where the source of the profile could be identified (such as in *R v W* and *Police v SJ*, discussed above) or where the criteria for retaining that person's profile on the other known person indices of the proposed DNA databank are not met.
- 17.127 Rather than relying on crime scene profiles from resolved investigations to provide intelligence, we consider it is more transparent to rely on the offenders index for intelligence leads in future offending. This will also ensure more accurate reporting on the crime scene index and on the effectiveness of the proposed DNA databank.<sup>72</sup>
- 17.128 In principle, once an investigation has been resolved, all relevant profiles should be removed from the crime scene index, including profiles believed to be from the offender, profiles believed to be from a victim or third party and any unidentified profiles. These profiles need not be destroyed, however. They may continue to be retained on a non-searchable electronic case file maintained by the forensic services provider. This will ensure that evidence remains available should an investigation be reopened or for exoneration purposes.
- 17.129 Consistent with this approach, the starting point should be that profiles should be removed from the crime scene index when:
- (a) it is subsequently determined that no offence has been committed or a decision is made not to file charges or to withdraw charges in relation to the offending; or
  - (b) a suspect is identified and is convicted of the offending; or
  - (c) a suspect is identified and is acquitted of the offending.
- 17.130 We recognise that, in some circumstances, it may be necessary for an investigation to retain the crime scene profiles on the crime scene index, even in the situations noted above. This might include cases involving multiple offenders or where charges are not filed because of a lack of evidence.

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<sup>72</sup> In the Issues Paper at [10.68] and [10.78], we observed that some matches that are reported by Police or that contribute to the "link rate" may be double counted. For instance, a match between two crime scene profiles could include a match to a crime scene profile that had already been previously linked to an offender and therefore this match does not provide any new intelligence for Police. However, it will form part of the raw data provided by ESR to Police. Similarly, if a crime scene profile has been uploaded to the CSD but a match to a suspect is found through casework comparison (outside of the databanks), if the suspect is subsequently convicted, their profile will be added to the DPD. Once uploaded, this will match to the original crime scene profile. Once again, this match does not provide any new intelligence for Police yet will form part of the raw data provided to Police by ESR and which Police may report as a "person to crime scene" match. Limiting the crime scene index to unresolved offending would mean that the number of profiles on that index would reflect the number of profiles obtained in relation to unresolved offending. We think this is a more meaningful reporting measure than what is possible with the current CSD, which operates with an indefinite retention policy.

- 17.131 We also recognise that there may sometimes be a need to retain a crime scene profile if a person is acquitted of the offending or if charges are withdrawn. For example, if there is some doubt as to the source of the crime scene profile (such as a low likelihood ratio that the profile is from the charged person), the profile might be retained on the crime scene index, given the possibility that a better match could be obtained to another person in future.
- 17.132 Given these complexities, we do not propose prescribing retention rules for crime scene index profiles in new DNA legislation as we do for profiles of known people on the proposed DNA databank. Instead, we recommend below that the Protocol should include guidance on when an investigation is “resolved” for the purposes of removing profiles from the crime scene index. This should recognise and provide for the complex situations identified above.
- 17.133 The Protocol should also include policy on reloading crime scene profiles from resolved investigations to the crime scene index. There will be occasions when it is appropriate to change the status of an investigation from “resolved” to “reopened” in order to store a crime scene profile on the crime scene index. A crime scene profile that is reloaded to the crime scene index would be subject to the same requirements as all other crime scene profiles described above.
- 17.134 If a crime scene profile was retained on or restored to the crime scene index in contravention of the Protocol or the general principle prescribed in new DNA legislation and that profile subsequently matched another profile on the databank, the admissibility of that match in an application for a suspect compulsion order could be challenged under the normal rules of evidence on the basis that it was improperly obtained.<sup>73</sup>

## Developing the Crime Scene Index Protocol

### RECOMMENDATION

#### 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.

<sup>73</sup> Pursuant to s 30 of the Evidence Act 2006. This was the outcome in *R v W* DC Manukau CRI-2018-092-847, 29 October 2018; and *Police v SJ* [2017] NZDC 17314, [2018] DCR 587.

- 17.135 We recommend the Protocol outlines policy, practice and procedure relevant to the crime scene index including several significant technical and operational aspects. These are matters that may have significant consequences for individuals but that we consider the forensic services provider and Police are best placed to develop in consultation with the DNA Oversight Committee. We consider this strikes the right balance between certainty and flexibility to respond to scientific advances.
- 17.136 There are several matters the Protocol should address.
- 17.137 First, the Protocol should set the minimum quality threshold that a crime scene profile must meet to be classified as available for databank searching. As noted at paragraph 17.111(c), the quality threshold should be set at the level necessary to enable meaningful comparisons to be made to other profiles on the proposed DNA databank and to minimise the risk of false or adventitious matches.
- 17.138 Second, the Protocol should prescribe requirements for conducting a one-off databank search in situations when a crime scene profile does not meet the minimum quality threshold for databank searching. As noted at paragraph 17.119 above, we recognise that sometimes there will be investigative value in conducting a one-off databank search. This must, however, take place within a clear and transparent decision-making framework. The Protocol should address the matters to be considered when deciding whether to conduct a one-off search, which should include:
- (a) the quality of the crime scene profile;
  - (b) the nature and seriousness of the suspected offending;
  - (c) the stage of the investigation and the availability of alternative investigative leads;  
and
  - (d) whether a one-off search is consistent with the purpose of the new DNA legislation.
- 17.139 Third, the Protocol must set the parameters for when a match will be reported by the forensic services provider to Police following a databank search.
- 17.140 Fourth, the Protocol must provide guidance on when an investigation is “resolved” for the purposes of removing profiles from the crime scene index and for reloading profiles in the event of an investigation being reopened. The matters that should be addressed are discussed at paragraphs 17.128–17.133.
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**CHAPTER 18**

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# Databank sampling

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**INTRODUCTION**

- 18.1 This chapter addresses the criteria for collecting DNA samples from adults for “databank purposes” — that is, for the purpose of storing a person’s DNA profile on the proposed DNA databank and comparing that profile against profiles on the crime scene index to identify potential suspects in unsolved crime.
- 18.2 The physical sampling process, including the available sampling methods and the use of reasonable force to take a databank sample, is addressed in Chapter 19. The management of databank samples and profiles is then addressed in Chapter 20, which includes how long DNA profiles should remain on the proposed DNA databank.
- 18.3 The collection of DNA samples from children and young people for databank purposes and the retention of their DNA profiles on the proposed DNA databank raises different issues, and these are addressed separately in Chapter 21.

**CURRENT LAW AND PRACTICE**

- 18.4 The CIBS Act establishes two DNA databanks of known people, the DNA Profile Databank (DPD) and the Temporary Databank. Profiles on these databanks are generally used in the same way.<sup>1</sup>
- 18.5 The purpose of amassing profiles in databanks is so they can be compared against profiles on the Crime Sample Databank (CSD) to identify potential suspects in unsolved crime. The process of databank searching is outlined in Chapter 17.
- 18.6 The CIBS Act is a code when it comes to obtaining DNA samples from known people for these databanks (databank samples). A databank sample may be:
- (a) required when a person is arrested or intended to be charged with a “qualifying offence” (described at paragraph 18.9 below);
  - (b) required following a conviction for a qualifying offence; or
  - (c) obtained with the person’s consent (we refer to these people as “volunteers”).
- 18.7 We discuss these means of populating the DNA databanks below.
- 18.8 In addition, if a DNA sample has been obtained from a suspect during an investigation into a qualifying offence and the suspect is subsequently convicted of that offence (or

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<sup>1</sup> The only difference is that the DNA Profile Databank can be used to assist other countries in criminal investigations, if a country requests assistance under the Mutual Assistance in Criminal Matters Act 1992, but the Temporary Databank can not. See ss 24R and 27 of the Criminal Investigations (Bodily Samples) Act 1995. Use of the proposed DNA databank to assist other countries is discussed in Chapter 23.

of a related qualifying offence), their profile can be transferred to the DPD.<sup>2</sup> We understand that this occurs automatically upon notification of a conviction for a qualifying offence.<sup>3</sup> The suspect sampling regime is discussed in Chapter 8.

### The offence threshold

18.9 A “qualifying offence” for databank purposes is an offence that meets the offence threshold prescribed in the CIBS Act. When the DPD was first established in 1995, only serious sexual and violent offences met the offence threshold, along with two further offences of burglary and entering with intent.<sup>4</sup> These further offences were considered precursors to more serious sexual and violent offending.<sup>5</sup> The objective was to create a databank of people:<sup>6</sup>

... who have committed, and may well commit again, the type of sexual or violent offence in respect of which a body sample could be left at the scene.

18.10 However, significant amendments to the CIBS Act in 2003 and then again in 2009 lowered the offence threshold and permitted databank sampling in relation to a broader range of offending.<sup>7</sup>

18.11 Currently, the offence threshold for adults includes all imprisonable offences and the non-imprisonable offence of peeping or peering into a dwellinghouse.<sup>8</sup> The offence threshold varies for young people, as we discuss in Chapter 21.

### Requiring samples on arrest or intention to charge

18.12 The power to require a DNA sample from a person arrested or intended to be charged with a qualifying offence was introduced in 2009 and is currently the main method of populating the databanks. Part 2B of the CIBS Act gives a police officer the power to require a DNA sample from an adult if:<sup>9</sup>

<sup>2</sup> Criminal Investigations (Bodily Samples) Act 1995, s 26(a). Section 2(2) explains that “[f]or the purposes of this Act, 2 offences are related to one another if the elements of the 2 offences comprise substantially the same act or omission”.

<sup>3</sup> Ngā Pirihimana o Aotearoa | New Zealand Police “DNA Sampling” in *Police Manual* at 28, and 52–53.

<sup>4</sup> As enacted, Part A of the Schedule to the Criminal Investigations (Blood Samples) Act 1995 listed 32 serious sexual or violent crimes for which DNA samples could be taken pursuant to a suspect compulsion order. A databank compulsion order could be obtained in relation to those offences and two further offences listed in Part B of the Schedule: burglary and entering with intent.

<sup>5</sup> The Committee of the Whole House was persuaded to add these two further offences to the Criminal Investigations (Blood Samples) Bill 1995 (54-3) by evidence showing that “of those people convicted of serious sexual and violent offending, 94 percent had previous convictions for burglary and entering with intent”: (12 October 1995) 551 NZPD 9722.

<sup>6</sup> (29 November 1994) 545 NZPD 5191.

<sup>7</sup> These amendments are discussed in Chapter 3 of this Report and in greater detail in the Issues Paper at [4.14]–[4.35].

<sup>8</sup> Criminal Investigations (Bodily Samples) Act 1995, ss 5(a), 24J(1) and 39. These provisions authorise collection of a DNA sample in relation to any imprisonable offence or any offence listed in Part 3 of Schedule 1. Notably, however, all but one of the offences listed in Part 3 are imprisonable. The single exception is the offence of peeping or peering into a dwellinghouse, which is an offence under s 30 of the Summary Offences Act 1981, punishable by a maximum fine of \$500. As we explain in Chapter 8, we understand that this offence was included as it was considered a precursor to more serious offending. However, recent statistics from Tāhū o te Ture | Ministry of Justice identify that just 1 per cent of people convicted of a violent or sexual offence in 2015 had a previous conviction for peeping and peering.

<sup>9</sup> Section 24J.

- (a) they are detained in Police custody for committing a qualifying offence; or
  - (b) a police officer “has good cause to suspect the person” of committing a qualifying offence and intends to charge them with that offence.
- 18.13 Unlike suspect sampling (discussed in Chapter 8), a police officer does not need to obtain a person’s informed consent before taking a sample on arrest or intention to charge, nor do they need an order from a court. A police officer can simply require a sample and use reasonable force if necessary to obtain that sample.<sup>10</sup> The use of reasonable force to obtain databank samples is addressed in Chapter 19.
- 18.14 DNA samples are not taken from every person Police arrests or intends to charge with a qualifying offence. A police officer must exercise discretion in deciding whether to require a sample. The CIBS Act provides no guidance on the factors that should be considered when exercising discretion, nor has this been considered by New Zealand’s senior courts. Police has developed its own internal guidance, outlined in the *Police Manual*. That explains that discretion “must be exercised appropriately with consideration given to each case on an individual basis which must be justifiable”.<sup>11</sup> The *Police Manual* advises that police officers must be satisfied of the following factors when deciding whether to collect a sample on arrest or intention to charge:<sup>12</sup>
- (a) The statutory criteria (described above) are met.
  - (b) There is no reason not to take the sample – that is, an appropriate sampling kit is available, taking a sample does not pose any health and safety risks to the alleged offender or anyone else, taking the sample is permitted by law and the person’s profile is not already on the DPD.
  - (c) There are particular circumstances relating to the offence or the suspect that give the officer reasonable grounds to suspect that the person has committed other offending of the type where DNA evidence would be relevant.
- 18.15 In relation to the last factor, the *Police Manual* advises that the officer should require a sample if the offence for which the person is arrested or intended to be charged with is:<sup>13</sup>
- (a) a serious violent offence, a sexual crime, a firearms offence, burglary or a Class A drugs offence; or
  - (b) a “relevant offence” under the CIBS Act<sup>14</sup> and the person has one or more of the following characteristics:
    - (i) aged under 20 years;
    - (ii) six or more previous convictions;

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<sup>10</sup> Section 54A. Before any sample is taken pursuant to Part 2B, the person must be handed a written notice in a prescribed form and informed of certain matters in a manner and in language that the person is likely to understand: ss 24M and 24N.

<sup>11</sup> Ngā Pirihimana o Aotearoa | New Zealand Police “DNA Sampling” in *Police Manual* at 16.

<sup>12</sup> At 16–17.

<sup>13</sup> At 17–18. The *Police Manual* uses the term “triggering offence”, which is used in Part 2B of the Criminal Investigations (Bodily Samples) Act 1995 and is defined in s 2 as “the particular offence that has triggered the authority to take a bodily sample under section 24J or, as the case may be, section 24K in a given case”.

<sup>14</sup> Criminal Investigations (Bodily Samples) Act 1995, s 2 definition of “relevant offence”. This definition includes the offences listed in Schedule 1 of the Act, offences punishable by seven years’ imprisonment or more as well as attempts and conspiracies to commit such offences.

- (iii) has been apprehended for threatening to kill or do grievous bodily harm, receiving or theft, fraud, or peeping and peering; or
  - (iv) has a medium-high frequency of previous convictions;<sup>15</sup> or
- (c) an imprisonable offence other than a “relevant offence” and the person has two or more of the following characteristics:
- (i) aged under 20 years;
  - (ii) two or more previous convictions;
  - (iii) on active charges for theft from a car/person/dwelling, possessing a knife in a public place or failure to answer District Court Bail; or
  - (iv) has a medium-high frequency of previous prosecutions.
- 18.16 The *Police Manual* also emphasises that, in deciding whether to require a sample on arrest or intention to charge, a police officer “must **never** be solely influenced” by:<sup>16</sup>
- the person’s race, ethnic or national origins
  - the person’s sexual orientation or marital status
  - the person’s ethical, religious or political beliefs
  - your own personal views (positive or negative) concerning the person
  - the possible effect that taking a sample may have on the personal or professional reputation of the person or of the officer.
- 18.17 DNA profiles from samples required on arrest or intention to charge may be stored on the Temporary Databank if the person is charged with the offence for which the sample was obtained or a related offence within two months of the sample being taken.<sup>17</sup> Profiles are only retained on the Temporary Databank until the charge is resolved.<sup>18</sup> However, if a person is convicted of the qualifying offence or a related offence, their profile is transferred to the DPD.<sup>19</sup>

### Requiring samples following conviction

- 18.18 If a person has been convicted of a qualifying offence, a police officer of or above the position of inspector may issue a databank compulsion notice requiring that person to provide a DNA sample for the purpose of storing their profile on the DPD.<sup>20</sup>

<sup>15</sup> “Medium-high frequency” of previous prosecutions is described as “approximately one prosecution per year if their criminal career is 3 years or more, or more than 2 prosecutions per year if their criminal career [is] 2 years or less”: Ngā Pirihiimana o Aotearoa | New Zealand Police “DNA Sampling” in *Police Manual* at 18.

<sup>16</sup> At 18 (emphasis in original). Immediately underneath this and still within the section on the exercise of discretion under Part 2B, the *Police Manual* goes on to note that “some considerations will never be legitimate or relevant, for example sampling on the basis of race ...” referring to the leading decision in *Tairi v New Zealand Police* HC Hamilton CIV-2006-419-1175, 21 December 2006 at [53]–[54], discussed at [18.23] below.

<sup>17</sup> Criminal Investigations (Bodily Samples) Act 1995, ss 24P(1)(a) and 60A(3)(a). The term “related offence” is defined in s 24P(2) to mean a related offence that meets the relevant offence threshold. Section 2(2) states that “[f]or the purposes of this Act, 2 offences are related to one another if the elements of the 2 offences comprise substantially the same act or omission”.

<sup>18</sup> Sections 24P(1)(b)(i) and 60A(3)(b).

<sup>19</sup> Sections 24P(1)(b)(ii) and 26(ab).

<sup>20</sup> Sections 29 and 39. The *Police Manual* also notes, however, that a databank compulsion notice cannot be obtained from a young person who receives “a s 282 order only”: Ngā Pirihiimana o Aotearoa | New Zealand Police “DNA Sampling” in *Police Manual* at 30. We understand this to mean that Police will not apply for a databank compulsion

- 18.19 Since 2015, police officers have also been able to issue databank compulsion notices to offenders returning to Aotearoa New Zealand if:<sup>21</sup>
- (a) a ground of the offender’s removal or deportation to Aotearoa New Zealand was the offender’s conviction in an overseas jurisdiction;
  - (b) that conviction was of an offence for conduct that constitutes an imprisonable offence in Aotearoa New Zealand; and
  - (c) that conviction would, if entered in a New Zealand court, be a conviction to which Part 3 of the CIBS Act applies — that is, it would satisfy the offence threshold for issuing a databank compulsion notice.<sup>22</sup>
- 18.20 A databank compulsion notice requires the person served with the notice to provide a DNA sample for the DPD at a specified date and place.<sup>23</sup> The date must be:<sup>24</sup>
- (a) within six months of the conviction being entered, if the person is not sentenced to a term of imprisonment or is sentenced to imprisonment but the term is six months or less; or
  - (b) before the person’s release date, if the person is sentenced to a term of imprisonment that is longer than six months.
- 18.21 If the person fails to attend to give a sample on the date specified in the notice or is unlikely to attend because they have absconded or are about to abscond, a judge of the appropriate court may direct the issue of a warrant to arrest and detain the person to whom the notice relates until a sample is taken.<sup>25</sup>
- 18.22 A databank compulsion notice can be contested if, before the date specified in the notice, the person makes a written request to a police officer to arrange a hearing

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notice where the Youth Court discharges the charge (or charges) under s 282 of the Oranga Tamariki Act 1989 or where the Youth Court makes a finding that a charge against a young person is proven but then discharges the charge under s 282 of the Oranga Tamariki Act 1989 and makes no further orders. This guidance in the *Police Manual* appears to have been inserted after a 2006 case, *Police v JL* [2006] DCR 404 (YC), where the Court held that a databank compulsion notice was of no effect where a charge had been proved but then discharged.

<sup>21</sup> Returning Offenders (Management and Information) Act 2015, s 14. Section 15 provides various modifications to Part 3 of the CIBS Act, including the timing of issuing the notice and that the appropriate court to deal with any hearing requested or other matters is the District Court.

<sup>22</sup> Section 14(1)(b) of the Returning Offenders (Management and Information) Act 2015 also requires that the conviction meet the requirements contained in s 4 of the Criminal Investigations (Bodily Samples) Act 1995. Section 4 creates timeframe restrictions governing the databank compulsion notice regime. Notices can typically only be issued to an offender where their conviction was entered after the CIBS Act came into force. However, s 4(2)(a) creates a narrow exception. It states that Part 3 of the CIBS Act also applies to convictions entered before the commencement of the Act if the person in relation to whom the conviction was entered is, on the date of commencement of s 7 of the Criminal Investigations (Bodily Samples) Amendment Act 2003, detained under a sentence of imprisonment in relation to that conviction.

<sup>23</sup> Criminal Investigations (Bodily Samples) Act 1995, s 39A(2)(b). The databank compulsion notice must be in a prescribed form and must be served on the relevant person as soon as is reasonably practicable after the conviction is entered and, where the person is under 18, served on the parent as well: ss 39–39B. Section 2 defines “parent” to include a guardian, step-parent and, in certain circumstances, a person who is acting in the place of a parent.

<sup>24</sup> Section 39C(3) and (4).

<sup>25</sup> Section 45. Section 45(3) specifies that the “appropriate court”, in relation to a databank compulsion notice, is the court before which the person was sentenced or is due to appear for sentence for the offence in relation to which the notice has been issued.

before a judge of the appropriate court.<sup>26</sup> However, the grounds for requesting a hearing (and for a judge to quash or vary a databank compulsion notice) are very narrow and are focused primarily on procedural irregularities.<sup>27</sup> A judge at a databank compulsion notice hearing “has no power to address any of the factors involved in the exercise of the discretion to issue any such notice”.<sup>28</sup> The decision to issue a databank compulsion notice is, however, an exercise of a statutory power of decision and is amenable to judicial review.<sup>29</sup>

- 18.23 While the *Police Manual* contains guidance on deciding whether to require samples on arrest or intention to charge (outlined above), it does not contain any guidance on the factors that an officer should consider when deciding whether to issue a databank compulsion notice.<sup>30</sup> However, in *Tairi v New Zealand Police*, the High Court provided some guidance on what are relevant (and irrelevant) considerations to this exercise of discretion.<sup>31</sup> The Court observed that:<sup>32</sup>

Certainly the rights of the individual would require that this discretion be exercised in a careful and considered manner. Some considerations will never be legitimate or relevant, for example sampling on the basis of race. The nature of the relevant offence is, of course, a relevant consideration – the more minor the offence, the less likely it is that the offender will re-offend or have offended seriously prior to the inclusion of a bodily sample in the DNA database.

Similarly, I consider that the previous criminal history of an offender convicted of a relevant offence must be a relevant consideration. This may show the offending in a different light, and suggest that even though minor, the offending was part of a broader trend or pattern of offending or risk of future re-offending. A recidivist offender will no doubt be considered more likely to commit a crime in the future. Hence, the value of holding his or her DNA on the database would be greater than that of a first offender.

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<sup>26</sup> Sections 41(1) and 41A. Section 41(4) specifies that the “appropriate court” to deal with a hearing of a databank compulsion notice is:

... the court before which the person to whom the databank compulsion notice relates was sentenced for the offence, or is due to appear for sentence for the offence, in relation to which the notice has been issued.

<sup>27</sup> Sections 41(2) and 42. Grounds contained in s 41(2) include that the offence does not meet the offence threshold, the offence was quashed, that taking a bodily sample would cause serious harm to the person’s health on the date specified in the notice and that the notice does not comply with the statutory timeframes or the requirements for service were not met.

<sup>28</sup> *Down v Van de Wetering* [1999] 2 NZLR 631 (HC) as cited in *Tairi v New Zealand Police* HC Hamilton CIV-2006-419-1175, 21 December 2006 at [39].

<sup>29</sup> *Tairi v New Zealand Police* HC Hamilton CIV-2006-419-1175, 21 December 2006 at [47].

<sup>30</sup> Instead, the *Police Manual* simply recounts the statutory criteria for issuing a databank compulsion notice: Ngā Pirihimana o Aotearoa | New Zealand Police “DNA Sampling” in *Police Manual* at 30.

<sup>31</sup> *Tairi v New Zealand Police* HC Hamilton CIV-2006-419-1175, 21 December 2006. That case was a judicial review of a decision to issue a databank compulsion notice for a conviction of theft relating to shoplifting groceries totalling \$11.90. The application failed on the basis that the applicant had not satisfied the Court that the police officer had taken into account irrelevant considerations (by considering prior convictions or the prospect that the applicant’s DNA would match with a serious crime) or had failed to give due weight to relevant considerations, including the minor nature of the offending. The officer concerned gave evidence, noted at [48], that:

[Tairi] was on the cusp of being passed over for a sample request, but I considered there was sufficient in his previous history of convictions to warrant a sample being taken.

<sup>32</sup> At [53]–[54].

- 18.24 The Court further noted that the nature of the relevant offence and the circumstances of the offending itself will be a factor to be considered and that, even if the offending is of a minor nature, “there may be other circumstances personal to that offender that make it desirable that the Police seek to require a bodily sample”.<sup>33</sup>
- 18.25 DNA profiles derived from samples obtained following conviction are stored on the DPD.<sup>34</sup> The storage and retention of databank samples and profiles is addressed in Chapter 20.

### Volunteer sampling

- 18.26 Part 3 of the CIBS Act provides that a police officer may ask any adult to provide a DNA sample for the purposes of including that person’s DNA profile on the DPD.<sup>35</sup> That person does not need to be a suspect or to have been convicted of any offence. However, the CIBS Act provides for a police officer to request a volunteer sample at the same time as requesting a suspect sample,<sup>36</sup> and the *Police Manual* encourages police officers to do so.<sup>37</sup> Obtaining a volunteer sample from a suspect then enables the suspect’s profile to be stored on the DPD and immediately compared against the CSD regardless of whether they are subsequently convicted of the offence for which the suspect sample is obtained.
- 18.27 The *Police Manual* provides guidance on how a police officer should exercise their discretion to request a volunteer sample, and this makes it clear that the volunteer sampling provisions are used to target people who Police believes may have committed or will go on to commit offences:<sup>38</sup>

#### Who you should consider requesting a voluntary sample from

Exercise discretion before requesting a voluntary sample to ensure that:

- The right type of active criminal or potential offender is targeted
- quality intelligence is gathered for the databank, and
- the sample can subsequently be used to obtain admissible evidence to resolve crime.

The general criteria are that the person does not already have a profile on the databank and:

- is an active criminal or recidivist offender, or is specially targeted
- has been arrested for or has committed an imprisonable offence or offence against any of the provisions listed in Part 3 of the Schedule
- has committed an imprisonable offence or offence against any of the provisions listed in Part 3 of the Schedule in the past, not previously provided a sample and shows positive signs of future offending

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<sup>33</sup> At [57]–[59].

<sup>34</sup> Criminal Investigations (Bodily Samples) Act 1995, s 26(b).

<sup>35</sup> Section 29(a)(i).

<sup>36</sup> Section 33.

<sup>37</sup> The *Police Manual* provides that, when asking an adult for a suspect sample, a police officer should also ask for a databank consent sample at the same time: Ngā Pirihimana o Aotearoa | New Zealand Police “DNA Sampling” in *Police Manual* at 36.

<sup>38</sup> At 29.

- is a suspect for an imprisonable offence or offence against any of the provisions listed in Part 3 of the Schedule and agrees to a dual sample being taken (Note that dual sample donor must be of or over 18 years)
- Police do not intend to charge the individual with an imprisonable or offence against any of the provisions listed in Part 3 of the Schedule (adult) or a relevant offence (young person).

18.28 While a volunteer can, in theory, withdraw their consent, Police does not have to remove a volunteer's profile from the DPD if they have since been convicted of a qualifying offence.<sup>39</sup> In practice, we understand that few people withdraw consent.<sup>40</sup>

### Current sampling practice

18.29 Table 2 in Appendix 3 sets out Police practice in relation to databank sampling. It illustrates that, up until the introduction of Part 2B of the CIBS Act in 2009, volunteer sampling was the main method of populating the databank. Since 2009, however, far fewer volunteer samples are obtained (291 in the year ended 30 June 2019, compared to 9,982 in the year ended 30 June 2009). Now, most samples are required on arrest or intention to charge, under Part 2B of the CIBS Act (13,056 in the year ended 30 June 2019). Far fewer samples are required following conviction (599 in the year ended 30 June 2019).

18.30 However, the historical reliance on volunteer sampling continues to be reflected in the overall composition of the DPD, which, as of 30 June 2019, was as follows:<sup>41</sup>

- 49 per cent (94,871 profiles) from samples obtained by consent (either as a volunteer sample or a suspect consent sample).
- 37 per cent (72,581 profiles) from samples obtained on arrest or intention to charge.
- 14 per cent (26,548 profiles) from samples obtained pursuant to a databank compulsion notice.
- 0.1 per cent (269 profiles) from samples obtained pursuant to a suspect compulsion order.

## ISSUES WITH THE DATABANK SAMPLING REGIME

18.31 One of the most challenging issues with DNA databanks is determining whose profiles should be stored on the databank and used to identify suspects in unresolved offending.<sup>42</sup> This is because databank sampling is inherently intrusive. It constitutes a

<sup>39</sup> Criminal Investigations (Bodily Samples) Act 1995, s 36(2).

<sup>40</sup> Police does not report on this but has provided additional data showing that, in the reporting years 2010–2011 to 2013–2014, it received between 15 and 45 requests each year for removal.

<sup>41</sup> Ngā Pirihimana o Aotearoa | New Zealand Police *Annual Report 2018–2019* (November 2019) at 168. The percentages reported here do not add up to 100 due to rounding.

<sup>42</sup> It is noted elsewhere that “the most controversial policy issue in the creation of these databases is the question of coverage: Whose DNA profiles should be stored in them?”: David H Kaye and Michael E Smith “DNA Identification Databases: Legality, Legitimacy, and the Case for Population-wide Coverage” [2003] Wis L R 413 at 414 as cited in Law Reform Commission of Ireland *The Establishment of a DNA Database* (LRC 78, 2005) at [2.18], n 14.



substantial and ongoing intrusion into the privacy of an individual as it “enables the state to conduct ongoing surveillance ... with molecular precision”.<sup>43</sup>

- 18.32 The ability of DNA to reveal information about family and whānau members and whakapapa also raises wider privacy concerns and particular considerations according to tikanga Māori. In some cases, databank samples may be taken against a person’s will, thereby intruding on an individual’s bodily integrity and tikanga associated with personal tapu and mana.<sup>44</sup> We discuss sampling procedures in Chapter 19.
- 18.33 However, these intrusions must be considered against the law enforcement value and public interest in maintaining DNA databanks. It is widely accepted that maintaining a DNA databank of (at least some) known people is broadly justified because databanks assist in the identification of suspects in unresolved offending. It is, however, difficult to quantify with any precision the effectiveness of the DNA databanks maintained under the CIBS Act, for the reasons outlined in Chapter 4. Furthermore, DNA evidence is only relevant to a small proportion of criminal offending, limiting the law enforcement value of DNA databanks.
- 18.34 Ultimately, the question is whether the intrusions inherent in databank sampling identified above are reasonable and proportionate to the law enforcement value and public interest in maintaining DNA databanks.
- 18.35 Applying this framework, we have identified several aspects of the databank sampling regime that raise concerns:
- (a) **The lack of judicial oversight.** The power to require a sample for databank purposes (on arrest or intention to charge or following conviction) can be exercised without any judicial oversight.<sup>45</sup> This contrasts with the power to require a sample from a suspect, which can only be exercised pursuant to a suspect compulsion order issued by a court. There is, therefore, no independent check on the reasonableness of a decision to require a sample for databank purposes. Given the degree of intrusion that flows from any decision to obtain a databank sample, the lack of judicial oversight risks inconsistency with the fundamental constitutional principle of the rule of law (which provides that certain decisions must be made by an independent, impartial judiciary, as explained in Chapter 2).
  - (b) **The power to take and use samples prior to conviction.** A sample required on arrest or intention to charge can be used to conduct a “speculative search” of the CSD before that person is found guilty of any offence and without reasonable grounds to suspect that person of committing other offences in relation to which DNA evidence may be relevant. Without such safeguards, we are not satisfied that this intrusive power is justified. The power can also be used to circumvent the suspect sampling regime, discussed in Chapter 8,<sup>46</sup> and in doing so significantly

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<sup>43</sup> *R v Toki* [2017] NZCA 513, [2018] 2 NZLR 362 at [15] and [23]. See also *R v T* [1999] 2 NZLR 602 (CA) at 613; and *R v Shaheed* [2002] 2 NZLR 377 (CA) at [166]. As the Court of Appeal noted in *R v Williams* [2007] NZCA 52, [2007] 3 NZLR 207 at [113], “the highest expectation of privacy relates to searches of the person and particularly intimate searches ... or invasive procedures, such as DNA testing”.

<sup>44</sup> See Chapter 2 for a discussion of the range of human rights values and values and practices in tikanga Māori that are engaged by the collection and use of DNA in criminal investigations.

<sup>45</sup> While a databank compulsion notice hearing can be requested in certain circumstances, the grounds for requesting a hearing are very narrow as discussed at [18.22] above.

<sup>46</sup> *New Zealand Police v FG* [2020] NZYC 328 is a case where a sample was required under Part 2B of the CIBS Act to compare FG’s profile against a crime scene profile. The decision records at [29] that:

undermine the safeguards of that regime. For example, a suspect sample can only be required if a court is satisfied that this is reasonable in all the circumstances, and even if a suspect compulsion order is granted, speculative searches against the CSD are not permitted until such time as that person is convicted. We understand that the use of samples prior to conviction (rather than waiting until a person is convicted) was anticipated to increase efficiencies in enabling multiple charges to be dealt with in one trial. However, we do not know if such benefits have eventuated, as this information is not captured by Police.

- (c) **The low offence threshold.** The offence threshold for databank sampling captures a broad range of offences including relatively minor offending and offending that may not provide any indication that an offender has or will commit other offences of the type where DNA evidence is relevant.<sup>47</sup> In 2009, when the offence threshold was lowered to capture all imprisonable offences, Treasury raised concerns regarding the “lack of clarity around the nature of the problems with the current DNA testing regime along with evidence (anecdotal or empirical) to support these” as well as the “limited analysis of the impacts of the options”.<sup>48</sup> Evidence of the utility of the reduced offence threshold has not emerged since then. The rate of growth of the DPD was not significantly affected by the 2009 amendments – only the manner of collection has changed.<sup>49</sup> As we observe in Chapter 4, the number of databank matches each year varies significantly year on year and, as a proportion of the total number of profiles on the DPD, has dropped since 2009.<sup>50</sup> There is, therefore, little evidence that storing DNA profiles from people convicted of lower-level offending on the DPD has improved the resolution of more serious offending.
- (d) **The broad discretion with which Police can exercise its powers.** Police officers do not have to take samples from every person arrested or intended to be charged or every person convicted of a qualifying offence, nor must Police transfer all suspect profiles to the DPD on conviction. These are discretionary powers. Yet the CIBS Act provides no guidance on how these powers should be exercised, despite the significant privacy implications for the individual concerned and, in the advent of familial searching, their whānau and family members. While the *Police Manual* contains guidance on requiring samples on arrest or intention to charge and requesting samples from volunteers, it does not provide guidance on the factors that police officers should consider when issuing databank compulsion notices. In

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[Constable 3] explained to [HG] and [FG] that the reason for taking his DNA was that blood had been located at the burglary scene. It was therefore an “intention to charge” sample that was to be taken.

Following analysis that confirmed FG’s DNA profile matched the crime scene profile, a suspect sample was requested for evidential purposes: at [51]–[54].

<sup>47</sup> In the Issues Paper, we observed that a review of databank sampling practice across a small window in time (April–June 2016) revealed that some samples were obtained for comparatively minor offending such as trespass and offences under the Summary Offences Act 1981 (wilful damage, common assault and resisting police) and offences where, on the face of it, DNA does not appear to be relevant to offending, such as fraud, driving with excess breath alcohol and other driving-related offences: Issues Paper at [11.67].

<sup>48</sup> Regulatory Impact Statement attached to the Criminal Investigations (Bodily Samples) Amendment Bill 2009 (14-1) (explanatory note) at 13–14. Treasury concluded that, while it had not had sufficient time to assess whether the regulatory impact analysis for the proposal was adequate, the Regulatory Impact Statement accompanying the Bill was inadequate because it did not contain the relevant information or level of analysis “required for a proposal of this magnitude”: at 14.

<sup>49</sup> See Table 1 of Appendix 3.

<sup>50</sup> See Table 5 of Appendix 3.

any event, the information is not readily accessible to the public. This broad discretion risks decision making that takes into account irrelevant considerations, fails to take account of relevant considerations or results in discriminatory or inconsistent treatment of people in similar circumstances. The risk of inconsistent treatment is exacerbated in relation to lower-level offending, where Police's pre-charge warning regime may operate. This could see two people charged with similar offending being treated very differently – one receiving a pre-charge warning and the other being convicted and having their DNA profile stored on the DPD indefinitely.<sup>51</sup> There is also a risk of discrimination in relation to Māori, as discussed below.

- (e) **The power to ask any adult to volunteer a sample.** We are concerned that volunteer sampling is not reasonable or necessary for law enforcement purposes given the other available methods of populating the DNA databank.<sup>52</sup> It is clear from the *Police Manual* that volunteer sampling is used to target people who Police believes may have committed or will go on to commit offences.<sup>53</sup> However, in the absence of a relevant conviction or individualised suspicion that a person has committed a qualifying offence, we do not think it is reasonable to obtain a person's DNA for the sole purpose of running a "speculative search" against crime scene profiles from unresolved offending. We also have concerns about relying on informed consent to obtain DNA samples for databank purposes. As we explore in Chapter 8, a person under suspicion may not always be able to provide "free and informed consent" because of the inherent power imbalance between the suspect and the requesting police officer, the volume and complexity of the information a suspect must be given and the difficulty in obtaining legal advice. Further, the suspect may experience brain and behaviour issues that are likely to affect their ability to quickly process and comprehend information in written or oral form.<sup>54</sup> The fact that few volunteers withdraw their consent reinforces our concern that volunteers may not truly appreciate the ongoing significance of providing a sample<sup>55</sup> or be aware of the process by which they can withdraw their consent.

18.36 In light of these concerns, our view is that the databank sampling regime, as a whole, lacks the proportionality that is expected in a democratic society. Accordingly, the

<sup>51</sup> Police's pre-charge warning regime is discussed in detail in the Issues Paper at [11.111]–[11.117]. From the three months of data provided to us by Police (see [11.69]), we were able to determine that there were a number of offences where a person was charged under Part 2B and DNA was obtained but that were also offences for which pre-charge warnings may be given (see [11.118]). The numbers and offences were as follows: disorderly behaviour (22); being unlawfully in an enclosed yard or building (35); cannabis charges (258) (it is not clear how many of these would have been eligible for a pre-charge warning); resisting or obstructing Police (23); trespass (31); shoplift under \$500 (102); theft under \$500 (53); and receiving under \$500 (16). We were unable to determine which of the assault charges (if any) may have been filed under the Summary Offences Act 1981.

<sup>52</sup> Concerns were raised after the Criminal Investigations (Blood Samples) Bill 1994 (54-1) was introduced into Parliament by the Privacy Commissioner, who said, in *Te Mana Mātāpono Matatapu | Office of the Privacy Commissioner Report by the Privacy Commissioner to the Minister of Justice on the Criminal Investigations (Blood Samples) Bill* (20 February 1995) at [4.3]:

By granting the power to add samples by consent the reasonable databank proposal could, without any legal impediment, become a wide-scale population genetic databank over the years.

<sup>53</sup> Ngā Pirihimana o Aotearoa | New Zealand Police "DNA Sampling" in *Police Manual* at 29.

<sup>54</sup> Ian Lambie *What were they thinking? A discussion paper on brain and behaviour in relation to the justice system in New Zealand* (Office of the Prime Minister's Chief Science Advisor, 29 January 2020) at 5.

<sup>55</sup> This was the case in *R v W* DC Manukau CRI-2018-092-847, 29 October 2018, where a volunteer sample was obtained from a victim of a stabbing. The Court accepted W's evidence that W thought the sample was for the sole purpose of assisting Police with the investigation and not to be held indefinitely for use in future investigations: at [28].

regime risks inconsistency with the right to be secure against unreasonable search and seizure, affirmed in section 21 of the New Zealand Bill of Rights Act 1990 (Bill of Rights Act). It also risks discriminatory treatment, particularly in relation to Māori and young people. We explore these issues below.

### Inconsistency with the right against unreasonable search and seizure

18.37 Section 21 of the Bill of Rights Act guarantees the right of everyone “to be secure against unreasonable search and seizure”. It applies whenever there is an intrusion upon a “reasonable expectation of privacy”, as we explain in Chapter 2.<sup>56</sup>

18.38 In 2009, when the CIBS Act was amended to lower the offence threshold and introduce the power to require samples on arrest or intention to charge, the Attorney-General reported to Parliament that the proposed amendments appeared to be inconsistent with section 21.<sup>57</sup> His view was that section 21 requires “a specific and sufficient basis” for taking a DNA sample and, absent emergency or other special circumstances, prior independent approval.<sup>58</sup> Without these safeguards, the Attorney-General did not consider the proposed amendments were justified or reasonable in terms of section 21, concluding that:<sup>59</sup>

... noting that many comparable jurisdictions operate DNA databank schemes within these safeguards and the lack of any special circumstances in New Zealand to justify a different approach, it is not possible to conclude that there is a sufficient rationale for their omission here. Further, and given the lack of any statutory constraint, I do not consider that the proposal that Police develop internal guidelines for the exercise of these powers or the possibility that the powers will be interpreted restrictively by the courts provides a sufficiently clear or reliable substitute for statutory safeguards.

18.39 The Select Committee considering the 2009 Bill noted the “considerable opposition” to the Bill because it did not provide for independent judicial oversight to the taking of samples on arrest or intention to charge.<sup>60</sup> The Committee understood that the Bill lacked judicial oversight because requiring prior judicial approval would create judicial inconvenience, as many arrests are made outside of standard court hours.<sup>61</sup> The Committee also noted that:<sup>62</sup>

... safeguards regarding the rights of individuals in the New Zealand Bill of Rights Act and to be included in the Police Operational Guidelines would render judicial oversight prior to taking the sample unnecessary.

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<sup>56</sup> *R v Alford* [2017] NZSC 42, [2017] 1 NZLR 710 at [63]–[64]; and *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305 at [160] and [163]. The concept of “reasonable expectations of privacy” also informed the Law Commission’s recommendations on search and surveillance powers, which were largely adopted in the Search and Surveillance Act 2012. See *Te Aka Matua o te Ture | Law Commission Search and Surveillance Powers* (NZLC R97, 2007) at [2.46]–[2.49]; and Search and Surveillance Bill 2009 (45-1) (explanatory note) at 1.

<sup>57</sup> Christopher Finlayson *Report of the Attorney-General under the New Zealand Bill of Rights Act 1990 on the Criminal Investigations (Bodily Samples) Amendment Bill* (10 February 2009) at [21].

<sup>58</sup> At [2.2].

<sup>59</sup> At [2.5].

<sup>60</sup> Criminal Investigations (Bodily Samples) Amendment Bill 2009 (14-2) (select committee report) at 2.

<sup>61</sup> At 2.

<sup>62</sup> At 2.

- 18.40 In 2015, when the databank compulsion notice regime was extended to returning offenders, the Attorney-General issued similar advice:<sup>63</sup>
- In 2009 I brought the amendment bill that expanded the scope of [the databank compulsion notice] regime to persons convicted of any imprisonable offence to the attention of this House because I found it to be inconsistent with s 21. My report to the House focussed on the absence of any judicial oversight or other safeguards of the kind that are found for such schemes in most comparable jurisdictions.
- For the same reasons I gave in my report to this House on the Criminal Investigations (Bodily Samples) Amendment Bill, clauses 14 and 15 of the present Bill are inconsistent with the right to be secure against unreasonable search or seizure.
- 18.41 In our view, events since 2009, most notably the development of guidance for police officers in the *Police Manual*, have failed to remedy the risk of inconsistency with section 21 identified by the Attorney-General. The guidance in the *Police Manual* is not accessible and is subject to change. It is unclear how often the guidance is relied on by police officers in practice. We are also concerned about some aspects of that guidance as it relates to young people, as we discuss in Chapter 21. Overall, we do not consider that this guidance is adequate to address the broader concerns with the databank sampling regime identified at paragraph 18.35 above.
- 18.42 There was a suggestion in 2009 that the exercise of discretion to require samples on arrest or intention to charge may be interpreted restrictively by the courts.<sup>64</sup> To date, this has not eventuated. To our knowledge, only one case, decided in 2020, has considered a challenge to a sample required on arrest or intention to charge.<sup>65</sup> In that case, the Youth Court held that the sample was improperly obtained because there had been a failure to inform the person of the relevant information in a manner and in language they were likely to understand.<sup>66</sup> However, that case concerned a sample taken from a 14-year-old, and his rights under the United Nations Convention on the Rights of the Child were central to the Court's consideration.<sup>67</sup> It is unclear what, if any, impact that case has on adult sampling.
- 18.43 The lack of judicial challenges should not be interpreted as suggesting that police officers are exercising their powers reasonably at all times (on 13,056 occasions in the year ended 30 June 2019). It is more likely the lack of challenge reflects the coercive nature of Police's collection powers under the CIBS Act, the lack of any rights of appeal, the complexity of the legislation and the absence of statutory grounds on which police officers must exercise their discretion.

### Disproportionate impact on Māori

- 18.44 Māori are significantly over-represented in the collection of samples on arrest or intention to charge and on the DPD. This may reflect, in part, the recognised bias in

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<sup>63</sup> Christopher Finlayson *Report of the Attorney-General under the New Zealand Bill of Rights Act 1990 on the Returning Offenders (Management and Information) Bill* (2015) at [35]–[36].

<sup>64</sup> Christopher Finlayson *Report of the Attorney-General under the New Zealand Bill of Rights Act 1990 on the Criminal Investigations (Bodily Samples) Amendment Bill* (10 February 2009) at [2.5].

<sup>65</sup> *New Zealand Police v FG* [2020] NZYC 328.

<sup>66</sup> At [179]–[181].

<sup>67</sup> We discuss this case in detail in Chapter 21, where we note the Court's comment that the CIBS Act does not conform with young people's rights under the United Nations Convention on the Rights of the Child and that there can be no solution short of legislative change: *New Zealand Police v FG* [2020] NZYC 328 at [184].

policing in Aotearoa New Zealand. This issue is discussed in Chapter 3. In relation to databank sampling, we note that the *Police Manual* states that a police officer “must never be *solely* influenced by ... the person’s race, ethnic or national origins”.<sup>68</sup> We question whether this is an adequate safeguard to prevent unjustified discrimination on the grounds of ethnicity, which is prohibited by the Bill of Rights Act. In the case of *Tairi v NZ Police*, discussed above, the Court put the point more definitively: “Some considerations will never be legitimate or relevant, for example sampling on the basis of race.”<sup>69</sup>

- 18.45 Failing to address these inequities and actively promote more equitable outcomes is inconsistent with te Tiriti o Waitangi | the Treaty of Waitangi (the Treaty) and the principles of partnership and equity explored in Chapters 2 and 3. This is part of a larger problem in the criminal justice system, but in our view, the broad coercive powers to require DNA and the inadequate controls on the exercise of discretion risk perpetuating this problem.

## DATABANK SAMPLING IN COMPARABLE JURISDICTIONS

- 18.46 The comparable jurisdictions reviewed in this Report (Australia, England and Wales, Scotland, Ireland and Canada) all maintain DNA databanks but adopt varying approaches to databank sampling. These are summarised below.

### Databank samples from offenders

- 18.47 Most jurisdictions provide for the collection of databank samples from people convicted of an offence that satisfies the prescribed offence threshold (see paragraph 18.49).<sup>70</sup> Usually, a police officer can require an offender to provide a sample.<sup>71</sup> Some jurisdictions also permit the collection of offender samples by consent.<sup>72</sup> However, the Australian Law Reform Commission in 2003 recommended removing consent as a method of collection, noting that orders of a judicial officer or authorised police officer would “better reflect the inherently coercive nature of the procedures in these circumstances” and would remove potential arguments that consent given was not a valid informed consent.<sup>73</sup>

<sup>68</sup> Ngā Pirihimana o Aotearoa | New Zealand Police “DNA Sampling” in *Police Manual* at 18 (emphasis added).

<sup>69</sup> *Tairi v New Zealand Police* HC Hamilton CIV-2006-419-1175, 21 December 2006 at [53].

<sup>70</sup> The only jurisdiction we have reviewed that does not prescribe a regime for the collection of samples from offenders is the Northern Territory. Legislation only permits collection of samples from suspects, people in lawful custody or people who consent to provide a sample: *Police Administration Act 1978 (NT)*, ss 145A–145B.

<sup>71</sup> See *Crimes Act 1914 (Cth)*, s 23XWK; *Crimes (Forensic Procedures) Act 2000 (NSW)*, s 70; *Crimes Act 1958 (Vic)*, s 464ZFAC; *Crimes (Forensic Procedures) Act 2000 (ACT)*, s 73; *Criminal Investigation (Identifying People) Act 2002 (WA)*, s 52E; *Forensic Procedures Act 2000 (Tas)*, s 25; *Criminal Law (Forensic Procedures) Act 2007 (SA)*, s 20; *Police and Criminal Evidence Act 1984 (UK)*, s 63(3BB); *Criminal Justice (Forensic Evidence and DNA Database System) Act 2014 (Ireland)*, s 31; and *Criminal Procedure (Scotland) Act 1995*, ss 19–19A.

<sup>72</sup> See *Crimes Act 1914 (Cth)*, s 23XWH; *Crimes (Forensic Procedures) Act 2000 (NSW)*, s 68; *Crimes (Forensic Procedures) Act 2000 (ACT)*, s 70; *Police Powers and Responsibilities Act 2000 (Qld)*, s 447; and *Criminal Investigation (Identifying People) Act 2002 (WA)*, s 52C.

<sup>73</sup> Australian Law Reform Commission *Essentially Yours: The Protection of Human Genetic Information in Australia* (ALRC R96, 2003) at 51. Similar recommendations were also made in New South Wales. See NSW Ombudsman *The Forensic DNA Sampling of Serious Indictable Offenders under Part 7 of the Crimes (Forensic Procedures) Act 2000* (August 2004) at 125 and Recommendation 21; and Standing Committee on Law and Justice *Review of the Crimes*

- 18.48 Canada is the only jurisdiction that requires a court order to authorise the collection of a sample from an offender. However, in 2010, the Canadian Standing Senate Committee on Legal and Constitutional Affairs recommended amending the legislation to allow for the immediate and automatic collection of DNA samples from offenders on conviction of a designated offence.<sup>74</sup> This was in response to concerns that the requirement for a court order was “administratively cumbersome”.<sup>75</sup> That recommendation has not, to date, been adopted.
- 18.49 The offence threshold for offender sampling in comparable jurisdictions varies. Canada, Ireland, the Australian Commonwealth and New South Wales only authorise collection of databank samples from offenders in respect of offences punishable by five years’ imprisonment or more. Other jurisdictions adopt lower thresholds. Some Australian states adopt a threshold of any indictable offence<sup>76</sup> or any offence punishable by 12 months’ imprisonment or more.<sup>77</sup> An independent review of the Australian Commonwealth regime in 2010 recommended a uniform standard for offenders convicted of an indictable offence punishable by at least two years’ imprisonment.<sup>78</sup> Another review conducted in Victoria recommended increasing the threshold to indictable offences punishable by a maximum sentence of five years or life imprisonment.<sup>79</sup> It was considered that this would be likely to “provide a greater return on the forensic investment than an expanded program for the sampling of the very large number of persons found guilty of relatively minor offences”.<sup>80</sup> In England and Wales, the threshold is any imprisonable offence, and in Scotland, the threshold is “any offence”.<sup>81</sup>
- 18.50 In addition to satisfying the offence threshold, many jurisdictions also impose limitations on the exercise of discretion to obtain a databank sample from an offender. Some Australian jurisdictions require collection to be “justified in all the circumstances”.<sup>82</sup> In England and Wales, collection must be “necessary to assist in the prevention or detection of crime”.<sup>83</sup> Legislation in Canada goes further, prescribing different criteria for

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*(Forensic Procedures) Act 2000* (New South Wales Legislative Council, Report 18, February 2002) at 107, Recommendation 25. These recommendations have not, to date, been adopted.

<sup>74</sup> Standing Senate Committee on Legal and Constitutional Affairs *Public Protection, Privacy and the Search for Balance: A Statutory Review of the DNA Identification Act – Final Report* (Canadian Senate, June 2010) at 27–28 and 35.

<sup>75</sup> At 27–28 and 35.

<sup>76</sup> Victoria, Queensland, Tasmania and South Australia. However, in Tasmania, an offender sample can only be collected from a person who is sentenced to a period of imprisonment. An indictable offence is a serious offence for which the accused is entitled to trial by jury.

<sup>77</sup> Australian Capital Territory and Western Australia.

<sup>78</sup> Peter Ford and others *DNA Forensic Procedures: Further Independent Review of Part 1D of the Crimes Act 1914* (30 June 2010) at Recommendation 26.

<sup>79</sup> Victorian Parliament Law Reform Committee *Forensic Sampling and DNA Databases in Criminal Investigations* (2004) at Recommendation 5.2.

<sup>80</sup> At xxxv.

<sup>81</sup> In addition to setting a blanket threshold, several jurisdictions also prescribe specific offences that also qualify for profile retention on the databank – for example, Canada, Ireland and England and Wales.

<sup>82</sup> Crimes Act 1914 (Cth), s 23XWL; and Crimes (Forensic Procedures) Act 2000 (ACT), s 74. See also Crimes (Forensic Procedures) Act 2000 (NSW), s 74(5); and Crimes Act 1958 (Vic), s 464ZF(8), where the requirement that taking the sample be “justified in all the circumstances” applies only when a court order is required.

<sup>83</sup> Police and Criminal Evidence Act 1984 (UK), s 63(3BC).

collection depending on the seriousness of the offending.<sup>84</sup> For more serious offending, collection must be ordered by the court unless the offender has established that:<sup>85</sup>

... the impact of such an order on their privacy and security of the person would be grossly disproportionate to the public interest in the protection of society and the proper administration of justice, to be achieved through the early detection, arrest and conviction of offenders.

- 18.51 For other offending that meets the offence threshold, a Canadian court may order collection if it is satisfied that it is “in the best interests of the administration of justice”.<sup>86</sup> In deciding whether to make an order, the court must consider the offender’s criminal record, the nature of the offence, the circumstances surrounding its commission and the impact such an order would have on the person’s privacy and security of the person. The court must also give reasons for its decision.<sup>87</sup>
- 18.52 Some jurisdictions have special rules that apply to obtaining offender samples from adults who lack capacity. Often, samples can only be taken by court order.<sup>88</sup>

### Databank sampling prior to conviction

- 18.53 Comparable jurisdictions adopt a range of different approaches to the collection and use of databank samples from suspects and people arrested or charged with an offence.
- 18.54 In Canada, suspect samples can be used only in the course of the investigation for which the sample was obtained, and profiles cannot be uploaded to the databank in order to be compared against other crime scene profiles.<sup>89</sup> There is no separate regime for the collection of samples from a person on arrest or intention to charge. A Senate Committee review in 2010 concluded that extending the regime to individuals in lawful custody that are charged with indictable offences would be inappropriate, noting the “deep intrusion of an individual’s privacy”, that it seemed possible a court would conclude that sampling violated sections 7 and 8 of the Canadian Charter of Rights and Freedoms and that it would create administrative and resourcing problems and might have a disproportionate impact on those who are over-represented in the justice system (that is, aboriginal offenders and other minority groups) because their profiles would end up in the databank with greater frequency than other individuals.<sup>90</sup>
- 18.55 Other jurisdictions, including England and Wales, Scotland, Ireland and several Australian jurisdictions,<sup>91</sup> authorise the collection of samples on arrest or once charges are laid or a person is issued with a summons (arrestee samples). In most of these jurisdictions, the

<sup>84</sup> In addition, if a person is convicted of certain prescribed serious offences, the court *shall* make an order authorising collection, removing the courts’ ability to exercise discretion altogether: Criminal Code RSC 1985 c C-46, s 487.051(1).

<sup>85</sup> Section 487.051(2).

<sup>86</sup> Section 487.051(3).

<sup>87</sup> Section 487.051(3).

<sup>88</sup> For the following jurisdictions, samples from a child, young person or incapable person can only be taken by court order: Crimes Act 1914 (Cth), s 23XWO(2); Crimes (Forensic Procedures) Act 2000 (NSW), ss 23, 80 and 81F; Crimes Act 1958 (Vic), ss 464U and 464T; and Crimes (Forensic Procedures) Act 2000 (ACT), s 65(2).

<sup>89</sup> Criminal Code RSC 1985 c C-46, s 487.08(1)–(2).

<sup>90</sup> Standing Senate Committee on Legal and Constitutional Affairs *Public Protection, Privacy and the Search for Balance: A Statutory Review of the DNA Identification Act – Final Report* (Canadian Senate, June 2010) at 32–33.

<sup>91</sup> Victoria, Queensland, Western Australia, Tasmania and the Northern Territory.



approval of a senior police officer must be obtained prior to the taking of the sample.<sup>92</sup> Profiles derived from arrestee samples can then be stored on the databank and compared with crime scene profiles before the charges against them have been resolved. Some jurisdictions impose limits on the exercise of discretion to obtain arrestee samples, and some restrict or prohibit the taking of arrestee samples from adults lacking capacity.<sup>93</sup>

- 18.56 Other Australian jurisdictions, including the Australian Commonwealth, Australian Capital Territory, New South Wales and South Australia, do not permit the collection or use of arrestee samples. However, all Australian jurisdictions and Ireland permit the matching of suspect profiles against their crime scene index. If a person is suspected of committing an offence and a crime scene profile is available for comparison in relation to that offence, a suspect sample may be collected and a suspect profile can then be compared against all crime scene profiles on the databank.
- 18.57 The offence threshold for collecting suspect and arrestee samples is generally the same as the threshold for collecting offender samples. The exception is the Australian Commonwealth and New South Wales, which adopt high thresholds for offender sampling (five years' imprisonment or more) and low thresholds for suspect sampling (any offence/any indictable offence).

### Volunteer sampling

- 18.58 Comparable jurisdictions all provide for volunteer sampling. There is, however, significant variation in how a volunteer is defined and how their profile can be used. Volunteer sampling does not appear to be widely used to target people who law enforcement suspect may have committed or will go on to commit offences.
- 18.59 Most Australian jurisdictions distinguish between “limited purpose” volunteers and “unlimited purpose” volunteers. A “limited purpose” volunteer profile can only be used for the purpose for which it was obtained. We understand that limited purpose volunteers will typically be people who have provided a sample for elimination purposes in the context of a specific investigation. An “unlimited purpose” volunteer profile, in contrast, can be compared against other indices of the databank, including the crime scene index. In practice, it appears that most volunteer samples are provided for elimination purposes and are not used for unlimited purposes.<sup>94</sup>

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<sup>92</sup> In England and Wales, a police officer of the position of inspector or higher must authorise the taking of a non-intimate sample from a person held in custody: Police and Criminal Evidence Act 1984 (UK), s 63(3BB). In Ireland, a sample may only be taken from a person lawfully detained if authorised by a member of the Garda Síochána not below the rank of sergeant: Criminal Justice (Forensic Evidence and DNA Database System) Act 2014 (Ireland), s 11. In Victoria, a senior police officer (of or above the rank of senior sergeant) who is not involved in the investigation must authorise the taking of any sample from a person under lawful arrest: Crimes Act 1958 (Vic), s 464SE(1). In the Northern Territory, conducting a non-intimate procedure on a person in custody must be approved by a police officer of the rank of senior sergeant or higher: Police Administration Act 1978 (NT), s 145A. The position in Ireland and Victoria is discussed below.

<sup>93</sup> For example, in Victoria, arrestee samples cannot be required from children aged 14 or under or from adults lacking capacity and can only be taken from young people aged between 15 and 18 in relation to a prescribed list of serious offences: Crimes Act 1958 (Vic), ss 464SE and 464U. Similarly, in Tasmania, arrestee samples can only be required by order of a magistrate if the person is aged between 10 and 15: Forensic Procedures Act 2000 (Tas), s 8(3). In Ireland, arrestee samples cannot be taken from a person under 14 or an adult lacking capacity: Criminal Justice (Forensic Evidence and DNA Database System) Act 2014 (Ireland), s 11(4).

<sup>94</sup> One investigation by the New South Wales Ombudsman found that it was very rare for volunteer samples to be used for different purposes in that jurisdiction: NSW Ombudsman *DNA sampling and other forensic procedures conducted on suspects and volunteers under the Crimes (Forensic Procedures) Act 2000* (October 2006) at 75. Another review

18.60 In some other jurisdictions, volunteer sampling is used for limited case-specific purposes only. In Canada, volunteer profiles can only be stored on the databank “where their profile may be relevant to an investigation of a designated offence” and must be removed without delay if comparison “will not assist in the investigation with respect to which the profile was obtained”.<sup>95</sup> Similarly, in Ireland, volunteer samples can only be requested from a person who is not a suspect or an offender and only in relation to the investigation of a particular offence or incident.<sup>96</sup>

## OPTIONS FOR REFORM

18.61 In the Issues Paper, we identified two broad reform options to address the issues with databank sampling identified above:<sup>97</sup>

- (a) establishing a universal DNA databank to fully utilise the law enforcement value of DNA databanks and avoid the risk of discriminatory treatment or the need for controversial analysis techniques such as familial searching and forensic DNA phenotyping; or
- (b) reforming the databank sampling criteria to ensure intrusions on privacy, bodily integrity and applicable tikanga Māori are reasonable and proportionate to the law enforcement value and public interest in maintaining DNA databanks.

18.62 In relation to (b), we identified a variety of different options for reform including:<sup>98</sup>

- (a) raising the offence threshold and basing it on either a maximum penalty, a prescribed list of qualifying offences or the sentence a person receives;
- (b) removing or constraining Police discretion to collect samples for databank purposes;
- (c) restricting databank sampling to convicted offenders only and improving the offender sampling process so that sampling on arrest or intention to charge and volunteer sampling would no longer be needed;
- (d) retaining the power to require samples on arrest or intention to charge but only permitting the use of such samples after a conviction is entered or, prior to conviction, with a court order; and
- (e) increasing independent oversight, such as by requiring a court to authorise databank sampling in advance or by providing for an oversight body to audit and monitor sampling decisions made by Police.

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in Victoria commented that the “main use” of the voluntary sampling provisions had been to obtain the samples of victims, complainants and relatives of missing persons. That review recommended limiting the volunteer regime to use in an investigation into the commission of a specified indictable offence where crime scene evidence exists against which the volunteer’s DNA profile can be compared and limiting the use of volunteers’ DNA to the investigation for which the DNA was collected. See Victorian Parliament Law Reform Committee *Forensic Sampling and DNA Databases in Criminal Investigations* (2004) at xxxviii, 257–258 and 265–269.

<sup>95</sup> DNA Identification Act SC 1998 c 37, s 5(4.5) and 8.1(2).

<sup>96</sup> Criminal Justice (Forensic Evidence and DNA Database System) Act 2014 (Ireland), s 27(1).

<sup>97</sup> Issues Paper at [11.173]–[11.192].

<sup>98</sup> At [11.193]–[11.213].

## RESULTS OF CONSULTATION

18.63 We received 60 submissions that commented on databank sampling, including 12 submissions from organisations and 48 submissions from individuals. We also received comments from the Judges of the District Court. We summarise these submissions and comments below.

### Support for a limited DNA databank

18.64 Submitters generally supported or accepted the notion that a DNA databank should include DNA profiles of at least some offenders. Associate Professor Nessa Lynch observed that conviction represents a principled foundation for the collection and retention of DNA. Just two submissions, both from individuals, did not support a DNA databank in any form, both arguing that people should have the right to maintain control over their own DNA.

18.65 Just five submitters, all individuals, supported a universal databank. However, the Sensible Sentencing Trust submitted that it would encourage the establishment of a universal databank if at some stage in the future it becomes economically viable to collect and store DNA profiles from everyone in Aotearoa New Zealand.

18.66 A universal databank was expressly rejected by 33 individuals. Reasons given for opposing a universal databank included the perceived lack of utility (as only DNA from a small group of people will ever resolve crimes and most crimes do not involve DNA evidence that has probative value), the economic cost of establishment (to the detriment of other equally (or more) important public spending), the risk that DNA data could be misused or mishandled leading to false convictions and the likely lack of public acceptance, unjustified infringement on human rights and other privacy and ethical issues that would arise. Some submitters also noted it could never be a truly universal databank as it would not include foreign citizens visiting Aotearoa New Zealand.

### Who should be sampled

18.67 Few submitters supported databank sampling of people who have *not* been convicted of a qualifying offence, including suspects and people arrested or intended to be charged with an offence. The New Zealand Law Society (NZLS) and the New Zealand Bar Association (endorsing NZLS's submission in its entirety) as well as the Public Defence Service (PDS), considered that DNA profiles from suspects obtained in the course of a specific investigation should not be added to the databank until such time as that person is convicted of a qualifying offence. To treat a suspect differently from an ordinary citizen, PDS considered, offends against the presumption of innocence. Te Mana Raraunga | Māori Data Sovereignty Network made a similar submission, noting that requiring individuals to provide DNA information for an offence for which they have not yet been (or may never be) charged is in contrast to the rights of an individual to control what oral information they provide in an investigation. Professor Carole McCartney and Dr Aaron Amankwaa also noted that the presumption of innocence would normally preclude the retention of DNA from individuals not convicted of imprisonable offences. In contrast, the Sensible Sentencing Trust supported requiring all suspects and arrestees to provide a DNA sample for databank purposes.

- 18.68 In relation to volunteers, the Privacy Commissioner submitted that there is a real question about whether the discretionary power to collect samples from volunteers is too broad to protect individuals from the risk of inadvertent bias or discriminatory targeting. The Commissioner noted the concern that the current discretion to sample volunteers may be wider than necessary to meet the law enforcement objectives of the DNA databanks. Given few samples are now taken from volunteers, the Commissioner considered it is timely to review whether this method of collection should be retained. The Auckland District Law Society Criminal Law Committee (ADLS) and Sue Petricevic raised concerns about volunteer profiles obtained in the early days of the regime. At that point, familial searching would not have been anticipated, and volunteers would not have been made aware that their profiles could be used, not only to incriminate themselves but also to potentially incriminate their family members. Familial searching is discussed in Chapter 23.
- 18.69 Police, in contrast, submitted largely in favour of maintaining the existing databank sampling regime, which it considers is working well. However, Police supported reform to enable police officers to obtain a sample on arrest or intention to charge that could also be used for evidential purposes instead of having to also obtain a suspect sample. In relation to volunteers, Police noted that voluntary databank sampling is complex and that, since the introduction of Part 2B of the CIBS Act, Police has focused on sampling individuals who are being charged with qualifying offences, which has led to a significant decrease in voluntary databank sampling.

### Collecting samples from offenders

- 18.70 Several submitters commented on the collection of samples from offenders. Some submitters suggested relevant considerations should include the circumstances of the offending and the risk of reoffending. One individual submitted that decisions to obtain a sample should only be made by a court.
- 18.71 NZLS submitted that the most appropriate time to collect samples from offenders was directly following conviction at the courthouse. NZLS noted the court has the power to detain offenders for up to two hours to sign a bail bond or be served with papers and that this power could be used to obtain a DNA sample. Court security staff could be empowered to collect samples, given the ease with which a buccal sample can now be taken. The benefit of such an approach, NZLS said, is that a high percentage of defendants charged with imprisonable offences are represented at court by a lawyer. In contrast, few people are legally represented at the time of arrest or intention to charge, and some may be under the effects of alcohol or drugs. NZLS also noted that there are already a number of compulsory steps that must be taken on arrest such as photographing and fingerprinting, which makes this a very stressful process. NZLS submitted that the stress is likely to be increased by adding another invasive measure. NZLS also considered that taking a sample on arrest may give the person the wrong impression that sampling is conditional upon arrest, not conviction. NZLS also considered that it seems more administratively complicated for DNA samples to be taken from arrestees but to only add the profiles to the databank in the event of conviction.

18.72 Similarly, PDS did not favour the idea of taking samples on arrest and ‘quarantining’ them, but if that process is adopted, PDS said there would need to be strict controls and oversight of such samples, and perhaps moving a sample out of quarantine should require an order by the judge upon conviction or sentence. Nessa Lynch also noted that it may be less intrusive overall for collection to take place directly after a conviction is entered rather than bringing the person back separately.

### Offence threshold

18.73 Submitters expressed different views on the offence threshold:

- (a) A higher offence threshold capturing serious offending only was supported by 24 submitters, including the Privacy Commissioner, NZLS, PDS, Te Mana Raraunga, Nessa Lynch, Carole McCartney and Aaron Amankwaa and 17 other individuals.
- (b) An offence threshold that includes all imprisonable offences (similar to the current law) was supported by 14 submitters, including the Sensible Sentencing Trust, Police (which supports the status quo), Professor Dennis McNevin and 11 other individuals.
- (c) A lower offence threshold that captures all offending was supported by five individuals.

18.74 Submitters who supported a higher offence threshold had different views on how the offence threshold should be determined. NZLS favoured a threshold of offences carrying a maximum penalty of two years’ imprisonment or more, consistent with the level of offending for which trial by jury is available. NZLS considered this would strike an appropriate balance between the privacy intrusion inherent in retaining an individual’s DNA after their conviction and the need to provide investigators with resources to prevent and detect serious crime. NZLS preferred a threshold based on maximum penalty rather than actual sentence imposed on the basis this would be transparent, easy to understand and clear.

18.75 PDS recommended a threshold of offences carrying a maximum penalty of seven years’ imprisonment or more, which would capture all serious violence, sexual and property offending.<sup>99</sup> PDS submitted that including offences that fall below this threshold should require evidence that DNA provides significant and necessary assistance in identifying offenders and proving crimes of that type. PDS observed that a high threshold does present a risk of overcharging if a police officer has a particular interest in having an offender’s DNA on the databank and that this is an issue that an independent oversight body, if created, should be aware of and audit.

18.76 The Privacy Commissioner also considered that the offence threshold should be set at an appropriate level of seriousness, noting that the breadth of the current threshold does not appear to be proportionate. Similarly, Nessa Lynch questioned whether the existing offence threshold is warranted in the public interest. She observed that the *Police Manual* gives weight to the idea that there is little justification for a statutory power to acquire DNA samples in respect of minor and non-violent offending. These guidelines and the collection of samples in practice suggest that DNA sampling is only warranted for a smaller subset of persistent offenders.

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<sup>99</sup> Burglary, PDS submitted, should be limited to residential burglaries.

18.77 Carole McCartney and Aaron Amankwaa submitted that a blanket approach such as “any imprisonable offence” is not the most effective or cost-efficient model and can be challenged on the grounds of proportionality and the legitimacy of the DNA regime. They suggested that, if the DNA regime is expanded to include all offenders, it becomes a default extra punishment and an infringement on civil liberties and may diminish the presumption of innocence. There is also a risk that the regime becomes an administrative tool and simply a step in the processing of every individual who comes into contact with law enforcement. Carole McCartney and Aaron Amankwaa submitted that a more pragmatic approach may be to have a rule for a specific group of offenders where there is statistical evidence of a high chance of resolving public security goals — crime detection, investigation, prevention and prosecution. This group are more likely to be serious offenders, individuals arrested for serious offences, repeat offenders and “recurrent” arrestees. Others should be dealt with on a case-by-case basis.

### Impact of databank sampling on Māori

- 18.78 Several submitters, including Te Mana Raraunga and Karaitiana Taiuru, commented on the need to recognise the over-representation of Māori in the collection of databank samples and in the wider criminal justice system. Given the proportion of crime to known person matches each year (discussed in Appendix 3), Te Mana Raraunga submitted that the risks of the DPD for Māori versus its potential benefits in criminal investigations need to be seriously considered. These submitters also commented on the need for new DNA legislation to explicitly recognise Māori customary rights and interests, including Māori rights to govern the collection, use and storage of DNA profiles, and the Crown’s obligations to Māori under the Treaty.
- 18.79 Te Mana Raraunga and Karaitiana Taiuru submitted that collection of databank samples should be consistent with tikanga Māori. Te Mana Raraunga submitted that free, prior and informed consent should be the underpinning principle and preferred approach to the collection and use of Māori data. When consent is not given, there needs to be strong governance and ethical provisions in place, including judicial oversight. Karaitiana Taiuru submitted that removing profiles of innocent people would protect the tapu of the person from whom the DNA was taken and reduce the risk of discrimination.
- 18.80 The Judges of the District Court also commented that the courts would be materially assisted if new legislation was made appropriately and demonstrably cognisant of and consistent with the ongoing Treaty partnership and tikanga Māori. The Judges observed that the District Court is acutely aware of the over-representation of Māori both in Aotearoa New Zealand’s prison population and amongst people who daily interact with the criminal justice system. The Judges accepted that this ongoing imbalance requires addressing and reducing, and that it is also reflected in the consequential over-representation of Māori in the DNA databanks.
- 18.81 Other submitters, including the Human Rights Commission, the Office of the Children’s Commissioner and YouthLaw Aotearoa, expressed concerns regarding the impact of databank sampling on young Māori. We discuss these submissions in Chapter 21.

## RECOMMENDATIONS

### Continuing a limited DNA databank of offenders

#### RECOMMENDATIONS

**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.

18.82 While databank sampling is inherently intrusive, there is a clear public interest in maintaining a DNA databank if it contributes to the identification of suspects and the resolution of criminal investigations. We agree with Nessa Lynch that conviction represents a principled foundation for the collection and use of DNA for databank purposes. A person who is convicted of a serious offence can be regarded as having a diminished expectation of privacy in identifying information derived from DNA sampling, and those privacy expectations are outweighed by the State's interest in the effective identification of suspects in unresolved offending.<sup>100</sup> We therefore recommend that the proposed DNA databank include an offenders index and that profiles stored on that

<sup>100</sup> See, for example, *R v Rodgers* 2006 SCC 15, [2006] 1 SCR 554 at 556–557.

index should be able to be compared against profiles on the crime scene index at any time.

- 18.83 We firmly reject the alternative option of a universal DNA databank. While this might generate more investigative leads, avoid the risks associated with exercising discretion to obtain a databank sample and negate the need for controversial forensic analysis techniques,<sup>101</sup> we are not satisfied that establishing a universal databank for criminal investigations could ever constitute a reasonable and proportionate infringement on human rights values. It would represent a fundamental shift away from democratic principles, particularly the principle of limited State intervention.<sup>102</sup> Furthermore, a universal databank is not a panacea. It would not resolve bias in the criminal justice system, as there would still be room for discretion in terms of the type of offending that Police focuses on and how individuals are treated.<sup>103</sup> There is also only limited evidence that a universal databank would have significant law enforcement benefits (noting that DNA evidence is only relevant to a small proportion of criminal offending) or would have a deterrent effect.<sup>104</sup> Finally, we consider the costs of establishing and administering such a regime would be prohibitive.
- 18.84 We recommend that Police should continue to be able to require a DNA sample from an adult convicted of a qualifying offence (adult offender) similar to the databank compulsion notice procedure currently prescribed in the CIBS Act but subject to several modifications:
- (a) First, to promote certainty and transparency, the grounds for issuing a databank compulsion notice should be prescribed in legislation. The grounds for issuing a databank compulsion notice should be based on the existing requirements confirmed in *Tairi v NZ Police*<sup>105</sup> – that is, the decision to require a sample must be reasonable in all the circumstances, having specific regard to the nature and

<sup>101</sup> Such as forensic DNA phenotyping (discussed in Chapter 14), familial searching (discussed in Chapter 23) and the use of other, non-law enforcement databases to generate investigative leads (discussed in Chapter 15).

<sup>102</sup> Liz Campbell “A rights-based analysis of DNA retention: ‘non-conviction’ databases and the liberal state” (2010) 12 Crim L R 889 at 905; Nuffield Council on Bioethics *The forensic use of bioinformation: ethical issues* (September 2007) at [4.76]; and Joe Purshouse “Article 8 and the retention of non-conviction DNA and fingerprint data in England and Wales” (2017) 4 Crim L R 253 at 263.

<sup>103</sup> Troy Duster “Behavior Genetics and Explanations of the Link Between Crime, Violence, and Race” in Erik Parens, Audrey R Chapman and Nancy Press (eds) *Wrestling with Behavioral Genetics: Science, Ethics and Public Conversation* (John Hopkins University Press, Baltimore, 2006) 150 at 168 as cited in Mark A Rothstein and Meghan K Talbott “The Expanding Use of DNA in Law Enforcement: What Role for Privacy?” (2006) 34 J L Med and Ethics 153 at 155.

<sup>104</sup> Arguments based purely on deterrence theory have well known limitations: for instance, a criminal’s DNA may be entered at the end of their “criminal career”, and offenders often have impulsive natures and do not weigh up the costs of committing crime: Nessa Lynch and Liz Campbell “‘To Have and To Have Not’: The Retention of DNA for Criminal Justice Purposes in New Zealand” [2016] 2 NZ L Rev 319 at 328–329. An interview with volunteer prisoners revealed that, while they believed DNA forensics was effective, it did not deter them from committing a crime: Carlos Jordi “Diminished Returns: The Exorbitance of Collecting DNA from all Arrestees” (2015) 26 St Thomas L Rev 346 at 368. On a more general level, statistical analysis of the Danish Central DNA Database found that expanding the database led to some deterrence of future criminal activity, especially among first-time offenders, but also led to a higher likelihood of offenders being detected. The deterrence effect of the database could be upwardly biased if not separated from the detection effect: Anne Sofie Tegner Anker, Jennifer L Doleac and Rasmus Landersø “The Effects of DNA Databases on the Deterrence and Detection of Offenders” (1 April 2020) Social Science Research Network <www.ssrn.com> at 32–33. The authors added that “we currently know very little about precisely how much deterrence we achieve for any given increase in the likelihood that an offender is apprehended”: at 3.

<sup>105</sup> *Tairi v New Zealand Police* HC Hamilton CIV-2006-419-1175, 21 December 2006 at [53]–[54].



seriousness of the offence for which the person was convicted and any history of prior offending.

- (b) Second, the period for issuing a databank compulsion notice should be extended to one year following conviction. Police has advised that the current requirement to obtain a sample pursuant to a databank compulsion notice within six months of conviction has presented some difficulties in obtaining samples. We think that this timeframe is unnecessarily short and undermines the utility of the databank compulsion notice procedure. For example, there will be situations where it may be difficult to locate an adult offender within the six-month period in order to obtain a DNA sample.
- (c) Third, the grounds for challenging a databank compulsion notice should reflect judicial review rights confirmed in *Tairi v NZ Police*<sup>106</sup> — that is, an adult offender should be able to request a databank compulsion notice hearing on the ground that the decision to issue the databank compulsion notice was not reasonable in all the circumstances. This does not significantly alter existing appeal rights, given such decisions are already amenable to judicial review on this ground, but it would clarify the rights adult offenders have to challenge such decisions. This would promote certainty and transparency and increase judicial oversight without needing to rely on judicial review.

### Raising the offence threshold

#### RECOMMENDATION

R141

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

18.85 We recommend increasing the offence threshold for obtaining samples for databank purposes from the existing low threshold of any imprisonable offence and the non-imprisonable offence of peeping and peering to any offence punishable by two or more years' imprisonment. We consider that the proposed, higher offence threshold would:

- (a) ensure a more reasonable and proportionate approach to the collection and use of DNA samples for databank purposes noting the concerns raised in 2009 around the lack of evidence to support the existing low offence threshold (see paragraph 18.35(c) above);
- (b) provide a clear and simple benchmark for determining what constitutes a qualifying offence compared to the alternative options of prescribing a specific list of offences or of adopting a threshold of offending that is based on the sentence an offender receives;
- (c) align with the Criminal Procedure Act 2011 classification of offending, as it would include all offences described as category 3 or category 4 offences for which the jury trial procedure is available;

<sup>106</sup> At [53]–[54].

- (d) promote consistency with the approach in comparable jurisdictions, as the proposed offence threshold falls within the mid-range of thresholds in comparable jurisdictions (see paragraph 18.49 above); and
  - (e) future-proof the new DNA legislation, as an offence threshold based on maximum penalty does not require reconsideration or revision as new criminal offences are enacted or repealed.
- 18.86 The recommended offence threshold was supported by NZLS and is broadly consistent with the preference expressed by many other submitters (including PDS and the Privacy Commissioner) for a higher offence threshold that captures serious offending only.
- 18.87 We recognise that a higher offence threshold, of 3, 4 or 5 years could also be adopted and note that the Criminal Procedure Act threshold for jury trials has itself been subject to criticism.<sup>107</sup> However, in the interests of clarity and simplicity we favour an approach that aligns with current criminal procedure. Other recommendations we make in this chapter will ensure reasonable limitations on Police powers to obtain databank samples.
- 18.88 We note that this offence threshold is higher than the offence threshold recommended for the use of DNA in criminal casework, discussed in Chapter 8. We consider that a lower offence threshold in the casework context is appropriate, as in some cases of low-level offending, DNA evidence may be relevant and it may be reasonable in all the circumstances to obtain a suspect sample. The case for a similarly low offence threshold for databank purposes is much weaker, given the significant and ongoing privacy intrusion that databank sampling poses compared to suspect sampling and the reduced public interest in retaining DNA profiles from people convicted of less serious offending.

### Restricting collection of samples on arrest or intention to charge

#### RECOMMENDATIONS

- 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).

<sup>107</sup> Criminal Procedure (Reform and Modernisation) Bill 2010 (243-2) (select committee report) at 13–14.

- 18.89 We recommend more restricted powers to collect and use DNA samples on arrest or intention to charge. In our view, the current broad powers to take and use samples from a person before they are convicted of a qualifying offence are not reasonable or proportionate to the law enforcement value and public interest in maintaining DNA databanks. As we noted at paragraph 18.35(b) above, this power undermines the safeguards of the suspect sampling regime, particularly the requirement for judicial authorisation in the form of a suspect compulsion order and the restriction on the use of suspect samples prior to conviction. While the question of inconsistency with section 21 of the Bill of Rights Act has not been tested in court, we agree with the view of the Attorney-General in 2009 and again in 2015 that the broad power to require samples on arrest or intention to charge risks inconsistency with the right to be secure against unreasonable search and seizure (see paragraphs 18.37–18.42 above).
- 18.90 The least intrusive and most principled approach would be to only permit databank sampling to occur after a person has been convicted of a qualifying offence. This would be consistent with the approach taken in Canada and several Australian jurisdictions. This would limit intrusions on bodily integrity, privacy and applicable tikanga Māori to situations where the criteria for retention of a person's DNA profile on the offenders index have been met. However, this is out of step with more recent approaches in other comparable jurisdictions,<sup>108</sup> would require a significant change in Police practice and will likely increase the cost and administrative burden of operating the databanks. Currently, collection on arrest or intention to charge is by far the most common sampling method, accounting for 89 per cent of all samples taken in the year ended 30 June 2019. Collection following conviction is significantly more resource intensive than taking a sample from a person if they are lawfully detained in Police custody on arrest or intention to charge. To collect a sample following conviction, a police officer must locate the offender in order to serve them with a databank compulsion notice, wait the required minimum period of 14 days before taking the sample and then follow up that notice if the offender fails to attend to provide a sample. In some cases, Police may not be able to locate the offender in order to serve the notice or take the sample.
- 18.91 We have considered the alternative suggested by NZLS and Nessa Lynch (see paragraphs 18.71–18.72 above) that databank samples could be taken immediately following conviction at the courthouse. However, we do not favour this option as it risks blurring the separation of powers of the executive and judicial branches of government. We consider that the exercise of Police powers to undertake or oversee a physically intrusive DNA sampling procedure for crime detection purposes should be distanced, both physically and in time, from the role of the judiciary in the criminal justice process. We are also concerned that requiring the collection of all samples in a narrow window of time post-conviction would risk collection becoming a pro-forma processing exercise without any considered exercise of discretion. Further, there would be administrative and cost implications in training court security staff to collect samples on behalf of Police.

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<sup>108</sup> In Victoria, legislation was amended in 2019 to permit databank sampling on arrest. See Crimes Act 1958 (Vic), s 464SE, which was introduced by the Justice Legislation Amendment (Police and Other Matters) Act 2019 (Vic). Legislation introduced in 2014 in Ireland also permits databank sampling on arrest: Criminal Justice (Forensic Evidence and DNA Database System) Act 2014 (Ireland), s 11.

18.92 Our preference is therefore to recommend that Police continue to be able to collect DNA samples from adults on arrest or intention to charge but subject to the following restrictions:

- (a) First, any decision to require a sample on arrest or intention to charge should be authorised by a senior police officer (of or above the position of inspector). This is consistent with other decision-making powers exercised under the CIBS Act, including the power to issue databank compulsion notices and to apply to court for a suspect compulsion order.<sup>109</sup> It is also consistent with the approach in comparable jurisdictions (see paragraph 18.55).
- (b) Second, to promote certainty and transparency, the grounds for requiring a sample on arrest or intention to charge should be prescribed in legislation. We propose grounds based on the existing requirements for issuing a databank compulsion notice confirmed in *Tairi v NZ Police* — that is, the decision to require a sample must be reasonable in all the circumstances, having specific regard to the nature and seriousness of the suspected offending and any history of prior offending.<sup>110</sup>
- (c) Third, samples should not be required from people who lack the ability to understand the general nature and effect of providing a DNA sample. This aligns with our approach in relation to casework sampling discussed in Chapter 8 and recognises that people who are vulnerable due to their lack of capacity should be entitled to special protections.

18.93 These recommendations represent a more proportionate and less intrusive approach to databank sampling, while retaining the procedural benefits and efficiencies in sampling people on arrest or intention to charge.<sup>111</sup>

18.94 In addition, below we recommend restricting the use of samples obtained on arrest or intention to charge to more closely align to the safeguards in the suspect sampling regime and the post-conviction sampling regime.

18.95 We recognise that this would be more restrictive than the fingerprinting regime, under which police officers can take fingerprints, palmprints and footprints from any person who is in lawful custody.<sup>112</sup> We are satisfied, however, that a more restrictive approach to DNA sampling as proposed above is appropriate, given that DNA sampling intrudes significantly on privacy, bodily integrity and applicable tikanga Māori.

18.96 DNA sampling has the potential to reveal significantly more information about a person than fingerprinting, particularly in light of familial searching and emerging DNA analysis techniques such as forensic DNA phenotyping.<sup>113</sup> The unique risks associated with DNA (including the sensitivity of DNA analysis combined with the possibility of transfer) increase the risk of an adventitious match that could contribute to wrongful conviction.

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<sup>109</sup> Criminal Investigations (Bodily Samples) Act 1995, ss 13 and 39.

<sup>110</sup> *Tairi v New Zealand Police* HC Hamilton CIV-2006-419-1175, 21 December 2006 at [53]–[54].

<sup>111</sup> A person who is detained in Police custody also has the right to access the Police Detention Legal Assistance service, and in practice, people who are arrested or subject to questioning where there is sufficient evidence to charge are also afforded access to this service, whether they are detained or not. See Tāhū o te Ture | Ministry of Justice *Police Detention Legal Assistance Service: Operational Policy* (April 2018) at 4; and Chief Justice Sian Elias “Practice Note on Police Questioning (s 30(6) Evidence Act 2006)” (16 July 2007) at [2].

<sup>112</sup> Policing Act 2008, s 32.

<sup>113</sup> We discuss familial searching in Chapter 23 and forensic DNA phenotyping in Chapter 14.

These factors, along with the weight given to DNA evidence in criminal proceedings, warrant a more cautious and rights-focused approach.

### Restricting use of profiles on the pre-conviction index

#### RECOMMENDATION

**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.

18.97 We recommend a consistent approach to the use of DNA samples obtained prior to a person's conviction that minimises intrusions on privacy and applicable tikanga Māori. DNA profiles generated from suspect samples and indirect samples (discussed in Chapters 8 and 12) and samples required on arrest or intention to charge should be stored on a pre-conviction index of the proposed DNA databank pending the resolution of the charge and should not be compared with profiles on the crime scene index during that time.

18.98 This should be subject to two exceptions. First, a one-off comparison of a DNA profile on the pre-conviction index that was generated from a suspect sample or a sample required on arrest or intention to charge with all profiles on the crime scene index should be permitted if authorised by a High Court or District Court Judge.<sup>114</sup> The Judge must be satisfied that there are reasonable grounds to suspect that the person has committed other offences and reasonable grounds to believe that a comparison may result in a match and that a one-off comparison is reasonable in all the circumstances. The second exception provides for one-to-one comparisons in casework to be conducted on the proposed DNA databank, which, as we explain in Chapter 4, will improve transparency and accountability of the DNA regime.

<sup>114</sup> Because issuing of a one-off search order involves balancing significant competing public and private interests, we consider that such orders should only be made by a High Court or District Court Judge rather than a magistrate or other court officer. This is consistent with the requirements in relation to the issuance of surveillance device warrants under s 53 of the Search and Surveillance Act 2012.

18.99 While the restrictions on the use of profiles on the pre-conviction index might delay the identification of any databank matches until after a person is convicted, we do not consider that this will significantly impact on the overall effectiveness of the proposed DNA databank. As noted at paragraph 18.35(b) above, there is no evidence to suggest that identifying databank matches prior to conviction has generated any significant efficiencies in enabling multiple charges to be dealt with in one trial. Overall, we are satisfied that these restrictions present a more reasonable and less intrusive approach, while still providing Police with an avenue to apply for a one-off comparison in appropriate circumstances.

### Notifying offenders of decision to transfer profile to offenders index

#### RECOMMENDATIONS

**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.

18.100 We recommend a new requirement to notify an adult when a decision is made, following their conviction for a qualifying offence (or a related qualifying offence),<sup>115</sup> to retain their DNA profile on the offenders index of the proposed DNA databank. This will ensure that people who provide a DNA sample prior to conviction (either under the suspect sampling regime, discussed in Chapter 8, or on arrest or intention to charge) have the same legal rights as people who provide a DNA sample after conviction. A person's DNA profile constitutes significant personal information and, as explained above, retention of that profile on the DNA databank enables Police to link that person as well as close genetic relatives of that person to future unresolved offending. Therefore, the power to transfer a profile from the pre-conviction index to the

<sup>115</sup> Here, we adopt the explanation in s 2(2) of the Criminal Investigations (Bodily Samples) Act 1995 that "[f]or the purposes of this Act, 2 offences are related to one another if the elements of the 2 offences comprise substantially the same act or omission".

offenders index should be an exercise of discretion rather than occurring automatically upon conviction. It should also be transparent.

- 18.101 Requiring Police to notify an adult of a decision to transfer their profile to the offenders index will ensure that person is informed of a decision that has significant implications for the continued use and retention of their personal information and will provide that person with an opportunity to challenge that decision, thereby aligning their rights with those of people issued with a databank compulsion notice. We do not consider this will be administratively difficult given a databank transfer notice could be served on a person at the time of sentencing, for example. We do not see service of a notice on sentencing as presenting the same constitutional and practical issues as taking samples at the time of sentencing, as discussed at paragraph 18.91 above.
- 18.102 We have not preferred the alternative option of requiring a court order issued at the time of sentencing for a qualifying offence to authorise the collection of a DNA sample for the offenders index (or the transfer of a profile from the pre-conviction index to the offenders index). This would be similar to the approach in Canada. However, we are concerned that such an approach would significantly increase the administrative workload of the courts and may result in inconsistent decision making across Aotearoa New Zealand. We note that similar problems have been identified in Canada, which has led to calls for reform (see paragraph 18.48 above). We are satisfied, therefore, that Police should continue to have authority to decide whether to transfer a profile to the offenders index or to obtain a DNA sample for that purpose, subject to the enhanced procedural protections recommended above.

### Removing the ability to obtain databank samples from volunteers

#### RECOMMENDATION

R149

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

- 18.103 Police should no longer be able to collect DNA samples for databank purposes from volunteers. We do not think that volunteer sampling is reasonable or necessary for law enforcement purposes for the reasons given at paragraph 18.35(d) above. The fact that a person must consent to provide a DNA sample for databank purposes and that they may withdraw their consent at any time (unless they are subsequently convicted of an imprisonable offence) does not, in our view, justify the ongoing privacy intrusion that databank sampling poses for volunteers. Furthermore, the use of volunteer sampling to target people who Police believes may have committed or will go on to commit offences appears to be out of step with the approach taken in many comparable jurisdictions (see paragraph 18.58 above) and was not supported in consultation (see paragraphs 18.68–18.69 above).
- 18.104 Removing Police's ability to obtain volunteer samples will not significantly affect existing Police practice, as few volunteer samples are obtained currently (291 in 2019, compared to 9,982 in 2009). Dispensing with volunteer sampling does, however, raise some important transitional issues, which we explore below.

## Requiring Police to develop and publish policy on databank sampling

### RECOMMENDATION

#### 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).

- 18.105 We recommend that Police develop, in consultation with the DNA Oversight Committee, policy on databank sampling. This policy should cover the collection of samples on arrest or intention to charge and issuing databank transfer notices and databank compulsion notices. Its objective should be to ensure that databank sampling is carried out in a manner that is consistent with the purpose of the new DNA legislation, described in Chapter 3 — that is, databank sampling should be carried out in a way that minimises intrusions on privacy, bodily integrity and applicable tikanga Māori.
- 18.106 The policy should include guidance to minimise the risk of powers being exercised in a way that might discriminate against any particular group and should outline factors that are relevant to the exercise of discretion beyond those identified in the legislation. It should also include guidance on how to consider any cultural, religious or spiritual beliefs made known to Police and how to approach people who experience brain and behaviour issues. As we explain in Chapter 8, people experiencing brain and behaviour issues are over-represented in the criminal justice system.
- 18.107 The policy should be published online to ensure it is publicly accessible, particularly to those affected.

## Transitioning profiles from the DPD to the offenders index

### RECOMMENDATION

#### R151

A profile on the DPD should be 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.

- 18.108 We recommend that DNA profiles on the DPD that were generated from DNA samples obtained in relation to a qualifying offence (that is, an offence punishable by two or more years' imprisonment) should be transferred to the offenders index of the proposed DNA databank.



- 18.109 Our recommendations outlined above raise two transitional issues. First, there will be profiles on the DPD that were obtained under the CIBS Act in relation to offending that does not meet our recommended offence threshold of two or more years' imprisonment. Second, there will be a significant number of profiles on the DPD that were obtained from volunteers rather than in relation to any specific offence. The question is what should happen to these profiles on the DPD.
- 18.110 Our view is that it is only justifiable to retain those profiles on the DPD that were obtained in relation to an offence punishable by two or more years' imprisonment. This includes volunteer profiles, even though their collection was lawful at the time. Retention of a person's profile on a DNA databank constitutes a significant and ongoing intrusion on privacy and applicable tikanga, as we explained above. We are not satisfied that people whose DNA profiles are retained under the existing regime should be entitled to fewer safeguards than people who may have their DNA taken under the proposed new DNA legislation.
- 18.111 We do, however, propose making an exception for people who have been convicted as an adult of a qualifying offence between the time when their profile was loaded to the DPD and when any new DNA legislation comes into force. This should include volunteers who are subsequently convicted of a qualifying offence. In our view, Police should be able to retain these profiles and load them to the offenders index of the proposed DNA databank on the basis that, had that person's profile not already been on the DPD, Police may well have sought it in relation to that subsequent qualifying offence. All profiles transferred from the DPD to the offenders index should then be subject to the proposed retention rules that apply to profiles on the offenders index under the new DNA legislation. These rules are addressed in Chapter 20.
- 18.112 These recommendations will have a significant administrative impact on Police. As of 30 June 2019, there were 186,019 profiles stored on the DPD.<sup>116</sup> To determine what profiles can be transferred to the offenders index, we understand that Police would have to review its records in relation to each profile. However, we are satisfied that this task does not present an unjustifiable administrative burden. A larger exercise had to be undertaken in the United Kingdom following the decision of the European Court of Human Rights in *S and Marper v The United Kingdom*.<sup>117</sup> That decision resulted in significant restrictions to the databank sampling regime, and as a result, a total of 1,766,000 DNA profiles were deleted from the National DNA Database over the course of nine months.<sup>118</sup> To do this, a comparison had to be made between the conviction status of a record held on the Police National Computer and a corresponding subject profile held on the National DNA Database.<sup>119</sup>

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<sup>116</sup> Ngā Pirihimana o Aotearoa | New Zealand Police *Annual Report 2018–2019* (November 2019) at 168.

<sup>117</sup> *S and Marper v The United Kingdom* [2008] 5 ECHR 167 (Grand Chamber). The Court held at [125]–[126] that the United Kingdom's blanket and indiscriminate policy of retaining DNA samples and profiles from people not convicted of an offence violated Article 8 of the European Convention on Human Rights.

<sup>118</sup> National DNA Database Strategy Board *Annual Report 2012–2013* (Home Office, 24 October 2013) at 23–24.

<sup>119</sup> National DNA Database *Annual Report 2011–2012* (Home Office, 20 May 2013) at 26. The Annual Report also explains at 26 that:

A new Police National Computer process is being developed in order to fulfil the requirements of the Protection of Freedoms Act which, in addition to enabling compliance with the provisions for retention of DNA samples and profiles in future, will also enable the retrospective identification and deletion of DNA subject profiles of unconvicted individuals held on the National DNA Database.

See also National DNA Database Strategy Board *Annual Report 2012–2013* (Home Office, 24 October 2013) at 21–22.

18.113 We address the transition of profiles taken from children and young people who have not been subsequently convicted as an adult of a qualifying offence in Chapter 21.

### Consequential amendments: returning offenders and military convictions

#### RECOMMENDATIONS

**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.

18.114 We recommend consequential amendments in two areas relating to returning offenders and military convictions.

#### *Returning offenders*

18.115 The Returning Offenders (Management and Information) Act should be amended to align the regime for requiring DNA samples from returning offenders with the regime for collecting samples following conviction under new DNA legislation. Specifically, a databank compulsion notice should be able to be issued to a returning offender so that their DNA profile can be loaded to the offenders index of the proposed DNA databank but only if their conviction would, if entered in a New Zealand court, meet the new offence threshold.

18.116 We also recommend amending section 14 of the Returning Offenders (Management and Information) Act to clarify that the databank compulsion procedure can apply in respect of any “returning offender” as defined in that Act. A “returning offender” is defined as a person who has been convicted in an overseas jurisdiction of an offence for conduct that constitutes an imprisonable offence in Aotearoa New Zealand “and, being liable for deportation or removal as a result of that conviction, has returned to New Zealand”.<sup>120</sup> It is clear from the parliamentary debates that this definition was intended to capture people who return to Aotearoa New Zealand voluntarily before they are formally deported or removed.<sup>121</sup> However, a databank compulsion notice can only be issued to a

<sup>120</sup> Returning Offenders (Management and Information) Act 2015, s 7.

<sup>121</sup> During the Committee of the Whole House, the Minister of Justice, Hon Amy Adams, explained the proposed meaning of the term “returning offender” as follows:

returning offender if “a ground of the offender’s removal or deportation to Aotearoa New Zealand was the offender’s conviction”.<sup>122</sup> This appears to require a formal removal or deportation and would not capture a returning offender who returns to Aotearoa New Zealand voluntarily. This requirement does not apply elsewhere in the legislation (including in relation to Police’s powers to require other information from returning offenders such as biographical details, fingerprints and visual images) and appears to be an oversight. We can identify no good reason why a returning offender who returns voluntarily rather than via formal deportation or removal procedures should not be captured under the returning offenders regime, provided they meet all other criteria for issuing a databank compulsion notice.

- 18.117 These amendments will ensure the consistent treatment of offenders, regardless of whether they are convicted in Aotearoa New Zealand or in an overseas jurisdiction.

### *Military convictions*

- 18.118 We also recommend clarifying the application of the databank compulsion notice procedure in respect of military convictions. In the Issues Paper, we explained that the New Zealand Defence Force (NZDF) considers that a databank compulsion notice cannot be issued by a police officer in relation to a military conviction.<sup>123</sup> Military convictions can include convictions for criminal offences under the ordinary laws of New Zealand.<sup>124</sup> If a person is convicted of an imprisonable offence in the military justice system, they are usually dismissed from the Armed Forces and return to the civilian world.<sup>125</sup> In our view, there is no basis for distinguishing these offenders from others convicted of similar offences in the civilian criminal justice system.
- 18.119 We therefore recommend that new DNA legislation clarifies that a databank compulsion notice can be issued in respect of any military conviction entered by the Court Martial that would constitute a conviction for a qualifying offence if entered in the District Court or High Court. This would exclude “service offences”, which are limited to the Armed Forces and are not criminal offences under ordinary laws of New Zealand. It would also exclude military convictions that are dealt with summarily rather than by Court Martial. Summary proceedings are typically used for less serious offending and involve fewer procedural protections. Convictions entered by the Court Martial involve a formal court process in which the accused is afforded procedural protections comparable to those afforded in civilian criminal procedure.<sup>126</sup> If a databank compulsion notice hearing is

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[Returning offenders] can be liable for removal, you can have had your visa cancelled, you can be going through a review process, or you may just have decided you are not going to fight it and you are going to go back voluntarily. So what we did want to make sure we captured is, where these offenders whom we are looking to capture are being returned to New Zealand, that the legislation covers them, whether or not they voluntarily elect to waive their rights and get on a plane once that process has started, or whether they fight it all the way and get deported under operation of law.

See (17 November 2015) 710 NZPD 8099.

<sup>122</sup> Returning Offenders (Management and Information) Act 2015, s 14(1)(a).

<sup>123</sup> Issues Paper at [11.123]–[11.125]. This is because of the definition of “conviction” in s 2 of the Criminal Investigations (Bodily Samples) Act 1995. That definition is inclusive rather than exclusive, and as we observed in the Issues Paper at [11.124], n 118 a conviction in the military justice system could theoretically be covered, but this is far from clear.

<sup>124</sup> The military justice system deals with two categories of military offences. “Service offences” are unique to the military, and “civil offences” are offences against the ordinary laws of New Zealand but committed by a member of the Armed Forces. See the Armed Forces Discipline Act 1971, pt 2 and s 74.

<sup>125</sup> The “Armed Forces” means the Navy, the Army and the Airforce collectively: Armed Forces Discipline Act 1971, s 2.

<sup>126</sup> The Court Martial of New Zealand is a permanent court of record with jurisdiction to try any charge against a person subject to the Armed Forces Discipline Act 1971. See the Court Martial Act 2007, s 8; and Armed Forces Discipline Act 1971, s 78. Trials in the Court Martial are presided over by Judges, and the ordinary rules of evidence apply: Court

requested in relation to a military conviction, the hearing should be conducted by the Court Martial rather than a High Court or District Court Judge. This is consistent with the current requirement that hearings be heard by a Judge of the court before which a person is sentenced.<sup>127</sup> We consider the Court Martial will be in the best position to assess the reasonableness of the databank compulsion notice in all the circumstances, given the military context of the offending and given its access to the information that was before the Court Martial at sentencing.<sup>128</sup>

- 18.120 Implementing these recommendations will require information to be shared between NZDF and Police to enable decisions to be made as to whether to issue a databank compulsion notice, to issue and serve such notices and to record the necessary information for reporting purposes under new DNA legislation.
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Martial Act, ss 70–74. In contrast, summary proceedings are presided over by a disciplinary officer, and the accused is not represented by a lawyer: Armed Forces Discipline Act 1971, pt 5.

<sup>127</sup> Criminal Investigations (Bodily Samples) Act 1995, s 41(1) and (4).

<sup>128</sup> If, however, it would be too administratively difficult to reconvene the Court Martial to conduct a databank compulsion notice hearing, an alternative option would be for new DNA legislation to authorise the Court Martial to make an order for the collection of a DNA sample from the offender for databank purposes at the time of sentencing, similar to our recommendation in Chapter 21 in relation to children and young people. Our concerns noted at [18.102] above regarding the administrative burden this option presents in the civilian criminal justice system are unlikely to equally apply in the military justice system.

**CHAPTER 19**

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# Databank sampling procedures

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**INTRODUCTION**

- 19.1 In Chapter 18, we consider the criteria for collecting DNA samples from adults for databank purposes (databank samples).<sup>1</sup> In this chapter, we address the procedure for collecting databank samples, including what sampling methods should be available and whether the use of reasonable force to obtain databank samples should be permitted.<sup>2</sup>
- 19.2 This chapter addresses the procedure for collecting databank samples:
- (a) when arrested or intended to be charged with a qualifying offence;<sup>3</sup> and
  - (b) following conviction for a qualifying offence.
- 19.3 We do not address the current procedures for collecting databank samples from volunteers, given our recommendation in Chapter 18 that there should no longer be any power to obtain databank samples from volunteers.

**CURRENT LAW AND PRACTICE****Databank sampling procedures**

- 19.4 The CIBS Act prescribes three different methods for providing a DNA sample: buccal sampling, fingerprick sampling or venous sampling. However, not all sampling methods are always available to a person providing a databank sample (the donor).
- 19.5 If a sample is required from an adult or young person (between 14 and 18 years of age) on arrest or intention to charge, the donor can only elect to provide either a buccal sample or a fingerprick sample.<sup>4</sup> However, if a sample is required from a person who is

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<sup>1</sup> In Chapter 18, we explain that samples obtained from known people for “databank purposes” means for the purpose of storing a person’s DNA profile on the proposed DNA databank for comparison against profiles on the crime scene index to identify potential suspects in unresolved offending.

<sup>2</sup> Sampling procedures for casework are discussed in Chapter 11.

<sup>3</sup> In Chapter 18, we recommend that a “qualifying offence” for databank purposes should be defined as any offence punishable by two or more years’ imprisonment (see R141).

<sup>4</sup> Criminal Investigations (Bodily Samples) Act 1995, s 48A(1)–(2). Fingerprick samples can only be taken by a suitably qualified person: s 49. If a buccal sample is being taken, a person may elect to take a buccal sample themselves under the supervision of a constable or have the buccal sample taken by a suitably qualified person: s 49A(1). A young person (aged between 14 and 18) also has the ability to elect to have the buccal sample taken by an independent adult under the supervision of a constable: s 49A(3). If a person is unable to take a buccal sample themselves due to disability or injury, it must be taken by a suitably qualified person: s 49A(5).

convicted of a qualifying offence (an offender),<sup>5</sup> they can elect to provide a buccal sample, fingerprick sample or a venous sample unless a judge has specified the sampling method to be used.<sup>6</sup>

- 19.6 All donors are entitled to reasonable privacy during the sampling process, and the CIBS Act restricts who shall be present when the sample is taken.<sup>7</sup> Offenders are entitled to have a lawyer or another person of their choice present when the sample is taken.<sup>8</sup> If the offender is under the age of 18 years, they can also have present a parent or other person who has their care.<sup>9</sup> These entitlements do not, however, extend to donors who provide a sample on arrest or intention to charge, unless the donor is a young person.<sup>10</sup>
- 19.7 Once the sample has been taken, the donor is given an opportunity to elect to have part of the sample (if a venous sample is taken) or provide a second sample (if a fingerprick or buccal sample is taken) in order to have that sample analysed on their behalf.<sup>11</sup>
- 19.8 A copy of any record of analysis of the databank sample shall be made available, as soon as practicable, to the donor or to their lawyer.<sup>12</sup>

### Use of reasonable force

- 19.9 A police officer may use or cause to be used reasonable force to take a sample from a donor if they refuse to provide a sample.<sup>13</sup> Samples taken using reasonable force must be taken by way of fingerprick sample unless a judge has specified a different sampling method in relation to an offender because of the state of their health.<sup>14</sup>
- 19.10 Any use of reasonable force to take a sample from an offender must be reported to the Commissioner of Police within three days.<sup>15</sup> No equivalent reporting requirement applies in respect of the use of force to take a sample on arrest or intention to charge. However, Police must report annually on all occasions where reasonable force is used.<sup>16</sup> These reported figures demonstrate that it is rare for Police to use reasonable force to obtain samples from offenders (there have been no reported occasions in the last three

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<sup>5</sup> Samples can only be taken from a person convicted of a qualifying offence pursuant to the databank compulsion notice procedure prescribed in Part 3 of the CIBS Act. This procedure is addressed in Chapter 18.

<sup>6</sup> Section 48(2) and 48(4)–(5). A judge might specify the sampling method following a successful databank compulsion notice hearing (s 42(2)(b)(iii)) or when a judge authorises the issuing of a further databank compulsion notice in relation to a person for the same conviction: s 44B(1).

<sup>7</sup> Sections 52–53.

<sup>8</sup> Section 50(1)(a).

<sup>9</sup> Section 50(1)(b).

<sup>10</sup> Sections 50A–50D.

<sup>11</sup> Section 55 (provides for part of a venous sample to be provided to the donor), s 56 (provides for a second fingerprick to be taken) and s 56A (provides for a second buccal sample to be taken).

<sup>12</sup> Section 59.

<sup>13</sup> See ss 48A(5) and 54A(2) (use of reasonable force to take a sample on arrest or intention to charge) and 48(4)(b) and 54 (use of reasonable force to take a sample from an offender).

<sup>14</sup> Sections 48(5)(b)(i) and 54(2)(b).

<sup>15</sup> Section 54(4).

<sup>16</sup> Section 76(1)(e) and (ef).

reporting years).<sup>17</sup> It is more common to use reasonable force to obtain samples on arrest or intention to charge (11 occasions in 2018–2019, 19 occasions in 2017–2018 and 14 occasions in 2016–2017).<sup>18</sup>

## ISSUES WITH DATABANK SAMPLING PROCEDURES

- 19.11 We have identified two issues with the databank sampling procedures:
- (a) First, donors who are required to provide a sample on arrest or intention to charge have fewer rights and protections.
  - (b) Second, the use of reasonable force lacks appropriate safeguards.
- 19.12 We discuss these issues below. In Chapter 11, we also consider the physically intrusive nature of the available sampling methods. This discussion is in the context of casework sampling, but it applies equally to databank sampling. In that chapter, we conclude that the existing sampling methods should be retained in new DNA legislation, recognising the need to retain the more physically intrusive fingerprick and venous sampling methods both for medical reasons and to enable the donor to retain a degree of autonomy by being able to elect a sampling method.

### Fewer protections if providing a sample when arrested or intended to be charged

- 19.13 Donors who are required to provide a sample on arrest or intention to charge have fewer rights and protections than offenders (and suspects required to provide a sample pursuant to a compulsion order, discussed in Chapter 8). As explained above, compared to offenders, donors who provide a sample on arrest or intention to charge:
- (a) have fewer sampling options available to them;
  - (b) are not entitled to have a lawyer or any other person of their choosing present during the sampling process unless they are under the age of 18; and
  - (c) have no opportunity to challenge a police officer's decision to require a sample before that sample is taken, including on the grounds that providing a sample would cause serious harm to their health.
- 19.14 In addition, the requirement to report on the use of force to the Commissioner of Police within three days does not apply to the use of reasonable force when taking a sample on arrest or intention to charge.
- 19.15 We do not think these lesser rights and protections are justified, given that all forms of databank sampling constitute a significant intrusion on privacy, bodily integrity and applicable tikanga Māori, including tikanga associated with personal tapu, mana and whakapapa.<sup>19</sup> While a sample obtained on arrest or intention to charge must be destroyed if the donor is acquitted or the charges against them are withdrawn, until that time, the sample can be used to derive a DNA profile that can then be stored on the Temporary Databank and compared to crime scene profiles from unresolved offending. If that person is convicted of the offence for which the sample is obtained, their DNA

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<sup>17</sup> Ngā Pirihimana o Aotearoa | New Zealand Police *Annual Report 2018–2019* (November 2019) at 168; and Ngā Pirihimana o Aotearoa | New Zealand Police *Annual Report 2017–2018* (October 2018) at 147.

<sup>18</sup> Ngā Pirihimana o Aotearoa | New Zealand Police *Annual Report 2018–2019* (November 2019) at 168; and Ngā Pirihimana o Aotearoa | New Zealand Police *Annual Report 2017–2018* (October 2018) at 147.

<sup>19</sup> The intrusive nature of databank sampling is discussed in detail in Chapter 18.

profile is retained on the DNA Profile Databank in the same way as DNA profiles derived from samples required from offenders.

- 19.16 For these reasons, we do not consider that donors who provide samples on arrest or intention to charge should be given fewer procedural rights and protections than offenders. In fact, a case could be made for stronger protections given that, at the point when a sample is obtained from a person on arrest or intention to charge, the relevant charge against them has not yet been proved.

### Use of reasonable force lacks appropriate safeguards

- 19.17 The second issue we have identified concerns the use of reasonable force to obtain databank samples. Under the CIBS Act, any police officer can use or cause to be used reasonable force to assist the collection of a sample from an offender or from a person on arrest or intention to charge if they refuse to give a sample. Unlike suspect sampling, there is no requirement for prior judicial authorisation either of the decision to obtain a sample or of the use of reasonable force to take the sample. As we observe in Chapter 11, the use of force, even reasonable force, is a grave physical intrusion on an individual's bodily integrity and on personal tapu.
- 19.18 We are particularly concerned by the use of reasonable force to obtain samples on arrest or intention to charge, given that the person is, at that point, only suspected of having committed a qualifying offence and given there is no opportunity to take time to seek legal advice in relation to a requirement to provide a sample, or to challenge the process, as noted above.<sup>20</sup> In 2009, when the amendments that introduced the power to require a sample on arrest or intention to charge were being considered by Parliament, it was noted by the Select Committee that prior judicial approval was not provided for because many arrests are made outside of standard court hours and to require prior judicial oversight would "create judicial inconvenience".<sup>21</sup> While that may be so, in our view, the CIBS Act fails to adequately compensate for the lack of judicial oversight through the use of other safeguards in relation to the use of reasonable force, particularly when compared to the approaches in comparable jurisdictions, discussed below.

### USE OF REASONABLE FORCE IN COMPARABLE JURISDICTIONS

- 19.19 As we explain in Chapter 18, comparable jurisdictions adopt a range of different approaches to the collection and use of databank samples from people arrested or intended to be charged with an offence. Those jurisdictions that do permit databank sampling on arrest or intention to charge allow for the use of reasonable force without prior judicial approval.<sup>22</sup> However, in most of these jurisdictions, the approval of a senior

<sup>20</sup> Under s 41 of the Criminal Investigations (Bodily Samples) Act 1995, a person served with a databank compulsion notice may request a databank compulsion hearing before a Judge on limited procedural grounds or on the ground that taking a sample will cause serious harm to the person's health.

<sup>21</sup> Criminal Investigations (Bodily Samples) Amendment Bill 2009 (14-2) (select committee report) at 2.

<sup>22</sup> England and Wales, Scotland, Ireland, Victoria, Queensland, Western Australia, Tasmania and the Northern Territory. See Police and Criminal Evidence Act 1984 (UK), s 117; Criminal Procedure (Scotland) Act 1995, s 19B(2); Criminal Justice (Forensic Evidence and DNA Database System) Act 2014 (Ireland), s 24; Crimes Act 1958 (Vic), s 464ZA; Police Powers and Responsibilities Act 2000 (Qld), s 615; Criminal Investigation (Identifying People) Act 2002 (WA), s 51; Forensic Procedures Act 2000 (Tas), s 36; and Police Administration Act 1978 (NT), s 145A(4).



police officer must be obtained, either to the taking of the sample or the use of reasonable force.<sup>23</sup> The approaches taken in the two most recent statutory regimes (Victoria and Ireland) are discussed below.

19.20 In Victoria, the power to require DNA samples on arrest was introduced in 2019.<sup>24</sup> While legislation authorises the use of reasonable force, there are a range of safeguards in place including the following:

- (a) A senior police officer (of or above the rank of senior sergeant) who is not involved in the investigation must authorise the taking of any sample from a person under lawful arrest.<sup>25</sup>
- (b) Samples cannot be required on arrest if a person is not capable of giving informed consent by reason of mental impairment.<sup>26</sup>
- (c) Before a senior police officer authorises the taking of a sample on arrest, a police officer must first seek the consent of the person arrested and, if that person is under the age of 18, a parent or guardian. Only if consent is refused can the use of force be authorised.<sup>27</sup>
- (d) The senior police officer can only authorise the taking of a sample if satisfied that requiring a sample is justified in all the circumstances.<sup>28</sup>
- (e) If practicable, the police officer exercising reasonable force must be of the same sex as the person from whom the sample is to be taken and must not be involved in investigating the offence for which the procedure is required.<sup>29</sup>

19.21 In Ireland, the legislation governing databank sampling was introduced in 2014 and contains a prescriptive regime for using reasonable force to obtain samples on arrest or intention to charge:<sup>30</sup>

- (a) Reasonable force cannot be used against a person under the age of 18.
- (b) Any use of reasonable force against an adult must be authorised by a member of the Garda Síochána (Ireland's national police service) not below the rank of superintendent.
- (c) The person against whom reasonable force is authorised must be informed of the intention to use reasonable force against them and that an authorisation to do so has been given.
- (d) A sample taken using reasonable force must be taken in the presence of a member of the Garda Síochána not below the position of inspector.

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<sup>23</sup> In England and Wales, a police officer of the position of inspector or higher must authorise the taking of a non-intimate sample from a person held in custody: Police and Criminal Evidence Act 1984 (UK), s 63(3)(b). In Scotland, the use of reasonable force to take a saliva sample must be authorised by an officer of a rank no lower than inspector: Criminal Procedure (Scotland) Act 1995, s 19B(2). In the Northern Territory, conducting a non-intimate procedure on a person in custody must be approved by a police officer of the rank of senior sergeant or higher: Police Administration Act 1978 (NT), s 145A. The position in Ireland and Victoria is discussed below.

<sup>24</sup> Pursuant to the Justice Legislation Amendment (Police and Other Matters) Act 2019 (Vic).

<sup>25</sup> Crimes Act 1958 (Vic), s 464SE(1).

<sup>26</sup> Section 464SE(1)(b).

<sup>27</sup> Section 464SE(1)(c)–(d).

<sup>28</sup> Section 464SE(1)(g).

<sup>29</sup> Section 464ZA(2).

<sup>30</sup> Criminal Justice (Forensic Evidence and DNA Database System) Act 2014 (Ireland), s 24.

(e) If reasonable force is to be used in relation to a person who lacks capacity,<sup>31</sup> a parent, guardian or another responsible adult must be present, or if that is not possible, another adult who is not a member of the Garda Síochána who is nominated by the member in charge of the Garda Síochána station must be present. This person must, by reason of their training or experience with people who have physical or mental disabilities or both, be considered suitable for that purpose. This requirement does not apply if the person who lacks capacity indicates that they do not wish to have the person present.

(f) The taking of a sample shall be recorded by electronic or similar means.

19.22 Comparable jurisdictions also provide for the use of reasonable force to obtain samples from people convicted of a qualifying offence.<sup>32</sup> In Chapter 18, we explain that, in most jurisdictions, a police officer can require an offender to provide a sample. Canada is the only jurisdiction that requires a court order to authorise the collection of offender samples.

## OPTIONS FOR REFORM

19.23 We did not identify any options for reform or seek feedback on the issues with databank sampling procedures identified above.<sup>33</sup> However, we did identify several alternatives to the use of reasonable force in the context of suspect sampling procedures, including:<sup>34</sup>

- (a) making it an offence to refuse to comply with a requirement to provide a sample;
- (b) permitting the court to draw an adverse inference from a refusal to comply; or
- (c) permitting Police to collect a sample by indirect means (indirect sampling is discussed in Chapter 12).

19.24 The results of consultation on these alternatives are summarised in Chapter 11.

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<sup>31</sup> The Criminal Justice (Forensic Evidence and DNA Database System) Act 2014 (Ireland) uses the term “protected person”, which is defined as follows in s 2:

“protected person” means, subject to subsection (2), a person (including a child) who, by reason of a mental or physical disability—

(a) lacks the capacity to understand the general nature and effect of the taking of a sample from him or her, or

(b) lacks the capacity to indicate (by speech, sign language or any other means of communication) whether or not he or she consents to a sample being taken from him or her ...

Subs (2) states that the definition of “protected person”:

... shall be construed as not including a reference to the person being under the intoxicating influence of any alcoholic drink, drug, solvent or any other substance or combination of substances.

<sup>32</sup> See Crimes Act 1914 (Cth), s 23XWE; Crimes (Forensic Procedures) Act 2000 (NSW), s 47; Crimes Act 1958 (Vic), s 464ZA; Crimes (Forensic Procedures) Act 2000 (ACT), s 67; Police Powers and Responsibilities Act 2000 (Qld), s 615; Criminal Investigation (Identifying People) Act 2002 (WA), s 14; Forensic Procedures Act 2000 (Tas), s 36; Criminal Law (Forensic Procedures) Act 2007 (SA), s 31; Police and Criminal Evidence Act 1984 (UK), s 117; Criminal Procedure (Scotland) Act 1995, s 19B; Criminal Justice (Forensic Evidence and DNA Database System) Act 2014 (Ireland), s 36; and Criminal Code RSC 1985 c C-46, s 487.07.

<sup>33</sup> This is because the Issues Paper was primarily focused on the broader question of whether Police should continue to be able to require samples on arrest or intention to charge rather than the procedural requirements. We address this broader question in Chapter 18.

<sup>34</sup> Issues Paper at [8.54]–[8.61].

## RECOMMENDATIONS

### Adopting consistent sampling processes and policies

- 19.25 In Chapter 11, we make several recommendations that we consider should apply to sampling procedures under the new DNA legislation, including databank sampling. There, we recommend:
- (a) the development of policy in consultation with the DNA Oversight Committee to ensure that sampling procedures under the new DNA legislation are consistent with the proposed purpose of the new legislation (R80);
  - (b) that the existing sampling methods should continue to be prescribed under the new DNA legislation (R81);
  - (c) that any person who provides a DNA sample under the new DNA legislation should be given the opportunity to elect one of the prescribed sampling methods (R82) and to have a lawyer or another adult present during the sampling procedure (R83); and
  - (d) that any person under the age of 18 and any person aged 18 or over who lacks the ability to understand the general nature and effect of the sampling procedure should also be able to have a parent or guardian or a welfare guardian or principal caregiver present during the sampling procedure (R83).
- 19.26 These recommendations recognise that sampling procedures under the new DNA legislation will intrude on bodily integrity and personal tapu and aim to ensure that clear, simple and consistent sampling procedures and safeguards are applied regardless of the purpose for which the sample is obtained.
- 19.27 These recommendations address our concern identified above that donors who provide samples on arrest or intention to charge have fewer rights and protections than offenders and suspects.

### Using reasonable force to obtain databank samples

#### RECOMMENDATIONS

##### 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.

19.28 We have concluded that the use of reasonable force should continue to be available when obtaining databank samples but that there should be strict safeguards to ensure that the use of reasonable force is exercised a manner that is reasonable and proportionate to the law enforcement value and public interest in maintaining DNA databanks.<sup>35</sup>

19.29 We recognise the significant intrusions on bodily integrity and personal tapu involved in the use of force to obtain databank samples. However, we are not satisfied that any of the alternatives would achieve law enforcement objectives. One alternative is to make it an offence to refuse to comply with a requirement to provide a databank sample. However, as we note in Chapter 11, a person may be incentivised to refuse to provide a sample in circumstances where they know their DNA will implicate them in offending that carries a more serious punishment than the offence for non-compliance. Another alternative is to rely on indirect sampling methods (discussed in Chapter 12). However, we are not satisfied that indirect sampling provides the necessary degree of confidence that the DNA profile generated from an indirect sample is of the person that is required to provide a databank sample.

19.30 In Chapter 21, we recommend that a databank sample should only be taken from a child or young person with prior judicial authorisation. In our view, the principles of the youth justice system warrant enhanced procedural protections for children and young people under new DNA legislation.

<sup>35</sup> See discussion in Chapter 11. If the use of force to obtain a sample is not reasonable or proportionate, it will risk constituting an unreasonable search and seizure under s 21 of the New Zealand Bill of Rights Act 1990.

- 19.31 We do not recommend a requirement for prior judicial authorisation of the use of reasonable force to take a sample from an adult. When a sample is required on arrest or intention to charge, the administrative challenges identified at paragraph 19.18 above suggest this is an impractical option. It would require almost immediate access to a Judge at all hours, and the unavailability of a Judge might prolong the period that a person is detained in police custody. When a sample is taken pursuant to a databank compulsion notice, the offender has already been convicted of a qualifying offence, has been served in advance with a notice requiring them to provide a sample and has accordingly had an opportunity to seek legal advice and to challenge that notice by requesting a databank compulsion notice hearing, including on the grounds that taking a sample will cause serious harm to the person's health or that issuing the notice is not reasonable (see our recommendations in Chapter 18). Requiring prior judicial authorisation would also be out of step with the approach taken in comparable jurisdictions, identified above, and with police powers to use reasonable force to obtain other identifying particulars such as fingerprints from a person in custody.<sup>36</sup>
- 19.32 We therefore recommend that the use of reasonable force to take a sample from an adult be subject to other safeguards. When a sample is required on arrest or intention to charge, any use of reasonable force should be authorised by a senior police officer (of or above the position of inspector), similar to the approach in comparable jurisdictions. The authorising officer must be satisfied that the person who has refused to give a sample has been given a reasonable opportunity to consult privately with a lawyer. This is consistent with our recommendation in Chapter 8 that a suspect who is asked to provide a suspect sample must have the opportunity to consult with a lawyer before consent is given (or refused). The authorising officer must also be satisfied that it has been explained to the person that reasonable force may be used if they refuse to provide a sample. Finally, the authorising officer must be satisfied that the use of reasonable force does not pose a serious risk to the health and safety of the person and is reasonable in all the circumstances. These requirements align with the grounds for challenging a databank compulsion notice under our recommendations in Chapter 18. We note that the *Police Manual* already provides that a police officer should be satisfied that taking a sample does not pose any health and safety risks.<sup>37</sup>
- 19.33 In addition to these safeguards, we also make several recommendations in Chapter 18 that will have the effect of restricting the collection of samples from adults on arrest or intention to charge (and, therefore restricting the potential use of reasonable force to obtain a sample). Relevant recommendations include increasing the offence threshold for requiring a sample and prohibiting the collection of samples from people who lack the ability to understand the general nature and effect of providing a DNA sample.
- 19.34 Other safeguards should apply whenever reasonable force is used (including where reasonable force is used to obtain a suspect sample). There must be another person present during the procedure. This should be either a lawyer or other person nominated by the donor. If the donor does not nominate a person to be present, a person who is

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<sup>36</sup> Policing Act 2008, s 32. However, as we explain in Chapter 11, obtaining a DNA sample involves a far greater intrusion on privacy than obtaining a person's fingerprints, as DNA contains a wealth of information about a person. It also presents a greater intrusion on bodily integrity and personal tapu.

<sup>37</sup> Ngā Pirihimana o Aotearoa | New Zealand Police "DNA Sampling" in *Police Manual* at 16–17. This guidance is set out in Chapter 18.

not a Police employee should be present. The taking of the sample must also be recorded on video record to ensure an accurate record of the procedure is available.

- 19.35 Police should continue to report annually on the use of reasonable force. This reporting should identify whether the donor was a child, young person or adult and the ethnicity of the donor. This, along with the proposed oversight roles of the DNA Oversight Committee and the Independent Police Conduct Authority discussed in Chapter 5, should ensure appropriate oversight of the use of force.
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## CHAPTER 20

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# Storage and retention of databank samples and profiles

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## INTRODUCTION

- 20.1 In this chapter, we address:
- (a) the storage and retention of all DNA samples obtained from known people for the purpose of databank searching (databank samples); and
  - (b) how long DNA profiles derived from databank samples obtained from adults (databank profiles) should remain on the proposed DNA databank.
- 20.2 This chapter considers the rules that should apply to the storage and retention of databank samples and related profiles that are obtained when a person is arrested or intended to be charged with a qualifying offence or following conviction for a qualifying offence.<sup>1</sup>
- 20.3 This chapter does not consider the current rules in relation to databank samples obtained from volunteers under the CIBS Act, because in Chapter 18, we recommend that there should no longer be any power to obtain a DNA sample for databank purposes from a volunteer. We do, however, consider the retention of profiles from volunteers who are subsequently convicted of a qualifying offence.
- 20.4 The retention of DNA profiles generated from DNA samples obtained from children and young people is addressed in Chapter 21.

## STORAGE AND RETENTION OF DATABANK SAMPLES

### Current law and practice

- 20.5 Databank samples are sent to ESR (Police's forensic services provider) for analysis, storage and destruction.<sup>2</sup> However, it is Police practice to only send samples taken on arrest or intention to charge to ESR once a charge has been filed in respect of that offence. ESR stores the samples, related material and information (including DNA

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<sup>1</sup> In Chapter 18, we recommend that a "qualifying offence" for databank purposes should be defined as any offence punishable by two or more years' imprisonment (see R141).

<sup>2</sup> The process following the collection of a DNA sample is described in greater detail in Chapter 16.

profiles on the databanks) until disposal is required following the expiry of the relevant retention period prescribed in the CIBS Act.

- 20.6 Databank samples required on arrest or intention to charge must be destroyed “as soon as practicable after a DNA profile is obtained from the sample”.<sup>3</sup> Similarly, databank samples from offenders must be retained “only for as long as is necessary to enable a DNA profile to be obtained from the sample” and must then be destroyed.<sup>4</sup> ESR has advised that its practice is to destroy samples after three months. When a databank sample is required to be destroyed under the CIBS Act, any material extracted from that sample must also be destroyed, but not the DNA profile.<sup>5</sup>
- 20.7 The destruction process for databank samples is the same as for casework samples and is discussed in Chapter 16.

## Issues

- 20.8 In Chapter 16, we identify two broad issues with the storage, retention and destruction of casework samples and profiles:<sup>6</sup>
- (a) The lack of recognition and provision for human rights values and applicable tikanga Māori as well as cultural and spiritual values that may be engaged by the storage, retention and destruction of human tissue and related information.
  - (b) The lack of transparency and accountability in the storage, retention and destruction of human tissue and related information.
- 20.9 These concerns also arise with respect to the storage and destruction of databank samples. The retention of databank samples, however, does not raise the same concerns as it does casework samples, given the clear retention rules described at paragraph 20.6. above.

## Options for reform

- 20.10 In the Issues Paper, we identified several options for reform to address the issues identified above, including:<sup>7</sup>
- (a) giving a donor some input into what happens to their sample when retention is no longer required;
  - (b) developing policies on the retention and disposal of samples that recognise and provide for tikanga Māori; and
  - (c) providing for independent oversight of the retention and destruction of samples.
- 20.11 The results of consultation on these issues and options for reform are discussed in Chapter 16 in the context of casework samples. Independent oversight of the DNA regime is discussed further in Chapter 5.

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<sup>3</sup> Criminal Investigations (Bodily Samples) Act 1995, s 60A(2).

<sup>4</sup> Section 62(2). A sample taken pursuant to a databank compulsion notice must also be destroyed, along with related records, if that conviction is subsequently quashed: s 62(4). A sample might also be destroyed earlier if the volunteer validly withdraws their consent: s 36(1).

<sup>5</sup> Section 63.

<sup>6</sup> See also the discussion of common issues in respect of DNA samples in the Issues Paper at [14.16]–[14.51].

<sup>7</sup> At [14.23]–[14.26], [14.30]–[14.35] and [14.40]–[14.42].



## RECOMMENDATIONS

### RECOMMENDATION

**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.

- 20.12 We recommend a standard rule that applies to all databank samples, regardless of whether a sample is required on arrest or intention to charge or following conviction for a qualifying offence. This should also apply to samples obtained from children and young people (discussed in Chapter 21). All databank samples should be destroyed as soon as practicable after a DNA profile has been obtained from that sample. This is consistent with the current requirements. However, we recommend there be a fixed upper limit on retention of a period of three months from the date the sample was taken. This is consistent with our recommendations relating to casework samples, discussed in Chapter 16. A clear, defined retention period will be easier to apply and audit for compliance compared to the more subjective “as soon as practicable” requirement. We understand that this is consistent with ESR’s current practice relating to samples taken on arrest or intention to charge.<sup>8</sup>
- 20.13 In Chapter 16, we also make recommendations relating to:
- (a) the development of procedures to govern the storage and destruction of DNA samples and related information (R104); and
  - (b) the rights of donors to elect to have certain types of DNA samples returned or to be notified when their DNA sample has been destroyed (R113 and R114).
- 20.14 We framed these recommendations broadly so that they apply to all DNA samples obtained under the new DNA legislation, including databank samples. This is because the issues identified at paragraph 20.8 above and discussed in greater detail in Chapter 16 arise in relation to all DNA samples, regardless of the purpose for which they are obtained.

## RETENTION OF DATABANK PROFILES ON THE PROPOSED DNA DATABANK

### Current law

- 20.15 As explained in Chapter 18, the CIBS Act establishes two DNA databanks — the Temporary Databank and the DNA Profile Databank (DPD).

### *Retention of profiles on the Temporary Databank*

- 20.16 DNA profiles from samples required on arrest or intention to charge can only be stored on the Temporary Databank and only if the person is charged with the offence in respect of which the sample was taken or a related offence.<sup>9</sup> If a charge is not filed

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<sup>8</sup> ESR advises that it requires possession of a sample for four weeks in order to conduct analysis, reworks and the destruction process.

<sup>9</sup> Criminal Investigations (Bodily Samples) Act 1995, s 24P(1)(a).

within two months, the DNA profile and other records related to the DNA sample must be destroyed.<sup>10</sup> In practice, Police only sends a sample to ESR for analysis once charges have been filed.<sup>11</sup>

- 20.17 DNA profiles are only stored on the Temporary Databank pending the resolution of the charge. If a charge is withdrawn or the person is acquitted, their DNA profile must be removed from the Temporary Databank and destroyed as soon as practicable, along with any related records.<sup>12</sup> If a person is convicted of the offence for which the sample was taken or a related offence, their DNA profile is transferred from the Temporary Databank to the DPD and is retained on the DPD pursuant to the retention rules described below.<sup>13</sup>

### Retention of profiles on the DPD

- 20.18 The rules regarding the retention of adult offender profiles on the DPD are described in Table 2 below.<sup>14</sup> The retention rules that apply in relation to the profiles of children and young people are described in Chapter 21.

TABLE 2: RETENTION OF ADULT OFFENDER PROFILES ON THE DNA PROFILE DATABANK (DPD)

Method of sample collection	Retention policy	Exceptions to retention policy <sup>15</sup>
Suspect sample (transferred to DPD following conviction)	Indefinite retention (s 26A(5)(c))	A profile must be removed no later than 10 years after the end of a sentence of imprisonment or, in any other case, no later than 10 years after the date of conviction if (s 26A(6)): <ul style="list-style-type: none"> <li>the conviction was for an offence that was <i>not</i> a “relevant offence”; and</li> <li>the person has not been convicted of a qualifying offence since their conviction.</li> </ul>
Sample required from a person arrested or intended to be charged (transferred to DPD following conviction)	Indefinite retention (s 26A(5)(c))	Same exceptions as for suspect profile transfers (s 26A(6)).
Sample required for DPD following conviction	Indefinite retention (s 26A(5)(c))	N/A
Sample provided by volunteer (retained on DPD following conviction for a qualifying offence pursuant to s 36(2))	Indefinite retention (s 26A(5)(c))	N/A

<sup>10</sup> Section 60A(3)(a). This two-month period can be extended by a High Court or District Court Judge under s 61 if satisfied that the circumstances referred to in s 61(3A) exist.

<sup>11</sup> Ngā Pirihimana o Aotearoa | New Zealand Police “DNA Sampling” in *Police Manual* at 16 and 22.

<sup>12</sup> Criminal Investigations (Bodily Samples) Act 1995, ss 24Q, 60A(3)(b) and 63.

<sup>13</sup> Sections 24Q and 26(ab)–(ac).

<sup>14</sup> As we explain in Chapter 18, the DPD contains profiles from offenders and volunteers. However, in that chapter, we recommend that the proposed DNA databank no longer include profiles from volunteers. Therefore, here we only address the current law as it relates to the retention of offender profiles.

<sup>15</sup> The CIBS Act also requires removal of a profile from the DNA Profile Databank if the relevant conviction is quashed: ss 26(a)(i) and (ab)(i), 36(2), 40 and 62(4).

20.19 As Table 2 illustrates, in most cases, profiles of adults convicted of a qualifying offence are retained indefinitely. However, the rules vary depending on the way in which a sample was obtained, the seriousness of the offending and whether the person has offended since providing a sample.

### Issues

20.20 We have two broad concerns regarding the retention of profiles on the DPD:

(a) The policy of indefinite retention of offender profiles may not be reasonable or proportionate to the law enforcement value and public interest in maintaining DNA databanks.

(b) The application of the exception to indefinite retention is inconsistently applied.

20.21 We discuss these issues below. The retention rules in respect of profiles from people who have been charged but not convicted on the Temporary Databank are relatively straightforward and do not present any issues. However, the use of profiles on the Temporary Databank before a person is convicted is a significant concern, and this is addressed in Chapter 19.

### *Is indefinite retention reasonable and proportionate?*

20.22 As we explain in Chapter 19, retaining a person's DNA profile on a DNA databank for ongoing use in criminal investigations constitutes a substantial and ongoing intrusion into the privacy of that individual. The use of databanks to conduct familial searching also raises wider privacy and tikanga concerns, as we explain in Chapter 23. Given the intrusive nature of databank sampling, it is important that the length of time a profile remains on a DNA databank is reasonable and proportionate to the law enforcement value and public interest in maintaining DNA databanks. However, the CIBS Act provides for databank profiles from adults to be retained indefinitely on the DPD subject to limited exceptions, as illustrated in Table 2, and with no grounds for review.

20.23 Indefinite retention also means that DNA profiles can be retained on a DNA databank after that person's death. The retention and ongoing use of a deceased person's DNA profile is inconsistent with tikanga Māori and intrudes on the privacy of the deceased's family and whānau, given the use of familial searching, discussed in Chapter 23.

### *Gaughran v The United Kingdom*

20.24 Whether the indefinite retention of DNA profiles from offenders is reasonable and proportionate was recently considered by the European Court of Human Rights in *Gaughran v The United Kingdom*.<sup>16</sup> That case concerned the regime that operates in the United Kingdom under which a person's DNA profile and other biometric information is retained indefinitely with no grounds for review on conviction of any imprisonable offence.<sup>17</sup> In *Gaughran*, the applicant had been convicted of driving with excess alcohol (an imprisonable offence) in 2008. He was fined £50 and was disqualified from driving for 12 months. The Court held that the indefinite retention of his biometric information

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<sup>16</sup> *Gaughran v The United Kingdom* ECHR 45245/15, 13 February 2020.

<sup>17</sup> Police and Criminal Evidence Act 1984 (UK), s 63I.

“constitutes a disproportionate interference with the applicant’s right to respect for private life and cannot be regarded as necessary in a democratic society”.<sup>18</sup>

20.25 While the Court recognised that retaining DNA profiles from offenders serves a legitimate aim (the detection and therefore prevention of crime),<sup>19</sup> it observed that there is a distinction between retaining DNA profiles indefinitely and setting a defined limit on the retention period, even if that limit is linked to the biological life of the person concerned.<sup>20</sup> That is because, given the use of familial searching, “retaining genetic data after the death of the data subject continues to impact on individuals biologically related to the data subject”.<sup>21</sup> The Court also rejected an argument that the regime has regard to a minimum degree of seriousness as it limits retention to imprisonable offences only. The Court, endorsing the approach in *S and Marper v The United Kingdom*,<sup>22</sup> observed that retention in relation to imprisonable offences only “still left such a wide variety of offences falling within the retention regime that the regime could be characterised as applying whatever the nature or seriousness of the offence”.<sup>23</sup>

20.26 The Court observed that whether the United Kingdom overstepped the acceptable margin of appreciation in establishing the regime depended not only on the duration of the retention period but also on whether the regime takes into account the seriousness of the offending and the need to retain the data and the safeguards available to the individual.<sup>24</sup> In this case, it was relevant that the applicant’s biometric information was retained without reference to the seriousness of the offence and without regard to any continuing need to retain that data indefinitely.<sup>25</sup> In addition, there was no provision allowing the applicant to apply to have the information deleted if retaining it no longer appeared necessary given the nature of the offence, the age of the person concerned, the length of time that had elapsed and the person’s current personality.<sup>26</sup> Accordingly, the Court held that:<sup>27</sup>

... the indiscriminate nature of the powers of retention of the DNA profile, fingerprints and photograph of the applicant as person convicted of an offence, even if spent, without reference to the seriousness of the offence or the need for indefinite retention and in the absence of any real possibility of review, failed to strike a fair balance between the competing public and private interests.

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<sup>18</sup> *Gaughran v The United Kingdom* ECHR 45245/15, 13 February 2020 at [97].

<sup>19</sup> At [75].

<sup>20</sup> At [81].

<sup>21</sup> At [81].

<sup>22</sup> *S and Marper v The United Kingdom* [2008] 5 ECHR 167 (Grand Chamber).

<sup>23</sup> *Gaughran v The United Kingdom* ECHR 45245/15, 13 February 2020 at [83].

<sup>24</sup> At [88]. States have a “margin of appreciation” to decide how to give effect to the European Convention on Human Rights in domestic law. The breadth of this margin of appreciation varies and depends on a number of factors, including “the nature of the Convention right in issue, its importance for the individual, the nature of the interference and the object pursued by the interference”: at [77]. In the matter of retention of offender DNA profiles, the Court concluded that “the degree of consensus existing amongst Contracting States has narrowed the margin of appreciation available to the respondent State”: at [84].

<sup>25</sup> At [94].

<sup>26</sup> At [94].

<sup>27</sup> At [96].

- 20.27 There had, therefore, been a disproportionate interference with the applicant's right to respect for private life that "cannot be regarded as necessary in a democratic society".<sup>28</sup>
- 20.28 While this decision is not binding in Aotearoa New Zealand, the Court's findings on the disproportionate privacy interference posed by an indefinite retention policy affirms our view that the current policy under the CIBS Act is neither reasonable nor proportionate to the law enforcement value and public interest in maintaining DNA databanks.

### *Exception for rehabilitated offenders is applied inconsistently*

- 20.29 There is a limited exception to indefinite retention of profiles for rehabilitated offenders. However, this does not apply consistently to all offenders, as noted in Table 2. Specifically, it does not apply if a sample was provided pursuant to a databank compulsion notice or by a volunteer who is subsequently convicted of a qualifying offence. In our view, the inconsistent application of this exception based on how the sample was originally obtained is unjustified.

### **Retention of databank profiles in comparable jurisdictions**

- 20.30 Currently, all comparable jurisdictions reviewed in this Report (Australia, England, Wales, Scotland, Ireland and Canada) adopt an indefinite retention regime for adult offenders convicted of a qualifying offence.<sup>29</sup> However, in Canada, this is subject to a review process (see paragraph 20.32 below).
- 20.31 The *Gaughran* decision discussed above has already triggered law reform proposals in Northern Ireland<sup>30</sup> and is also expected to result in changes to the retention rules in the other United Kingdom countries.<sup>31</sup> Given the impact of that decision, it is worth noting the approach to retention taken in other European countries, as summarised by the Court in *Gaughran*:<sup>32</sup>
- (a) Four out of the 31 Council of Europe Member States surveyed (Cyprus, Ireland, North Macedonia and Montenegro) have indefinite retention periods.
  - (b) Twenty Member States have retention periods limited in time (Albania, Austria, Belgium, Bosnia and Herzegovina, Croatia, Denmark, Estonia, Finland, France,

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<sup>28</sup> At [97].

<sup>29</sup> We discuss the approach taken to qualifying offences in comparable jurisdictions in Chapter 18.

<sup>30</sup> The collection, use and retention of DNA in criminal investigations in Northern Ireland is governed by The Police and Criminal Evidence (Northern Ireland) Order 1989, and like the Police and Criminal Evidence Act 1984 (UK), it provides for indefinite retention of DNA profiles in relation to any imprisonable offence. The Department of Justice in Northern Ireland is proposing to replace indefinite retention for all imprisonable offences with a tiered system of 75 years' retention for all convictions associated with serious violent, sexual and terrorism offences, 50 years' retention for adult convictions for all other imprisonable offences and 25 years' retention in respect of a person under the age of 18 who is convicted of two or more non-serious convictions that do not involve a custodial sentence of more than five years: Department of Justice *A consultation on proposals to amend the legislation governing the retention of DNA and fingerprints in Northern Ireland* (July 2020) at 6–7.

<sup>31</sup> Michael Zander "Overstepping the mark on indefinite retention" *New Law Journal* (online ed, London, 29 April 2020); Criminal Justice Notes "Police retention of biometric data" (27 February 2020) University of Kent <[www.blogs.kent.ac.uk](http://www.blogs.kent.ac.uk)>; and Aaron Amankwaa and Carole McCartney "*Gaughran vs the UK* and public acceptability of forensic biometrics retention" (2020) 60 *Science & Justice* 204 at 205.

<sup>32</sup> *Gaughran v The United Kingdom* ECHR 45245/15, 13 February 2020 at [53]. See also Filipe Santos, Helena Machado and Susana Silva "Forensic DNA databases in European countries: is size linked to performance?" (2013) 9 *LSSP* 1.

Hungary, Latvia, Lithuania, the Republic of Moldova, the Netherlands, Norway, Poland, Portugal, Spain, Sweden and Switzerland):

- (i) Seven have a defined retention period (either general or for more serious offences) linked to the date of death of the convicted person (Bosnia and Herzegovina, Denmark, Finland, the Republic of Moldova, the Netherlands, Norway and Switzerland). The Netherlands specifies the longest retention period of 20 years from the date of death for serious offences, with decreasing periods for less serious offences.
  - (ii) Three States (the Czech Republic, Germany and Malta) do not have specific retention periods but have various substantive limitations on data retention and require periodic assessments to determine whether the substantive requirements for a prolonged retention are met.
  - (iii) Four States are without relevant regulation (San Marino, Georgia, Lichtenstein and Romania).
- (c) In respect of review mechanisms, six Member States have a possibility of an administrative or other similar specialised review of the necessity of the data retention, and in 19 States, there is a possibility of a judicial review, often coupled with prior administrative review. In five States, there is no possibility of a review. In one State, there is no specific regulation.<sup>33</sup>

20.32 In Canada, an offender's profile may be removed from the databank if the offender is granted a "criminal record suspension". A criminal record suspension can be sought 10 years after a sentence is completed or five years after conviction of a summary offence, except in relation to serious and recidivist offending. A criminal record suspension is considered on a case-by-case basis and has the effect of suspending an offender's criminal record in its entirety. A review of the DNA regime in the Australian state of Victoria recommended a similar review process whereby an offender's DNA profile could be removed from the database and destroyed after 10 years where a sentence of two years' imprisonment or less was imposed and the offender has not received a subsequent conviction in that time.<sup>34</sup> The review observed that, since the rationale for retaining the profiles of offenders is the likelihood of their reoffending, if a substantial period has elapsed without a subsequent conviction, the removal of the offender's profile could be justified provided the original offence was of a relatively minor nature.<sup>35</sup>

20.33 In relation to samples obtained prior to conviction (from suspects or from people on arrest or intention to charge), all comparable jurisdictions provide for limited retention of profiles on the DNA databank, typically for one or two years from the date the sample is taken, unless charges have been filed and the proceeding is ongoing or the person is convicted of a qualifying offence. All jurisdictions require destruction of the profile if a person is acquitted or charges are discontinued.

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<sup>33</sup> *Gaughran v The United Kingdom* ECHR 45245/15, 13 February 2020 at [57].

<sup>34</sup> Victorian Parliament Law Reform Committee *Forensic Sampling and DNA Databases in Criminal Investigations* (2004) at 201 and Recommendation 5.5.

<sup>35</sup> At xxxvi.

## Options for reform

- 20.34 In the Issues Paper, we identified several reform options with the goals of reducing complexity, increasing the emphasis on rehabilitation and providing for the removal of profiles following death.<sup>36</sup> Options for reform included:<sup>37</sup>
- (a) replacing indefinite retention with either a set retention period or different retention periods that depend on the maximum penalty or the sentence a person receives;
  - (b) introducing a more comprehensive rehabilitation regime either to provide for retention decisions to be reviewed after a set period or to require removal of offender profiles if a person has not reoffended within a specific timeframe; or
  - (c) requiring the removal of a person's profile following their death or once they reach a certain age.

## Results of consultation

- 20.35 Most submitters favoured fixed retention periods for most if not all offending rather than indefinite retention. Associate Professor Nessa Lynch noted that the New Zealand regime has now developed to a point where DNA can be retained long term for minor offending that does not give rise to significant public safety concerns. This, she considers, raises questions of proportionality, reintegration and the growth of state surveillance. Similarly, Professor Carole McCartney and Dr Aaron Amankwaa noted that there is limited evidence to demonstrate that holding profiles indefinitely leads to crime prevention, detection, investigation or prosecution. Several other submitters commented that indefinite retention is a disproportionate invasion of informational privacy, particularly in relation to relatively minor offending.
- 20.36 Fixed retention periods that varied depending on the seriousness of offending were supported by several submitters, including the New Zealand Law Society (NZLS) and the New Zealand Bar Association (endorsing NZLS's submission in its entirety), the Public Defence Service (PDS), the Privacy Commissioner, Nessa Lynch, Professor Dennis McNevin and three other individuals. NZLS and Nessa Lynch supported indefinite retention for only the most serious offending. PDS supported a standard period of perhaps 10 years for serious offending, provided that the person does not reoffend within that retention period, and a retention period that mirrors the clean slate legislation in relation to minor offending to create a consistent approach to rehabilitation. NZLS also agreed that rehabilitation should be one of the factors that should be considered when deciding on an appropriate retention period, particularly for young people.
- 20.37 Carole McCartney and Aaron Amankwaa acknowledged the difficulties in setting a fixed limitation period due to practical challenges and uncertainties in predicting when an individual may commit a crime in the future or when a match may be obtained between their profile and a profile from a reinvestigated previous crime. They considered a pragmatic solution could be an evidence-based case-by-case and/or clustered approach — that is, when research shows a particular trend or pattern, categories may be created with a defined retention period. As a general principle, retention periods should not be arbitrary but informed by evidence of criminal behaviour, the

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<sup>36</sup> Issues Paper at [14.111]–[14.113].

<sup>37</sup> At [14.114].

effectiveness of DNA retention and the views of the public and stakeholders. They considered that weighty reasons are required for retention of DNA indefinitely, especially if the individual has not been imprisoned.

- 20.38 The Privacy Commissioner supported greater alignment with the clean slate scheme, which supports the principle of limiting retention. This helps an individual to live normally in society once the consequences of their past offending have been dealt with, consistent with the privacy principles that allow individuals to request the correction of personal information that is held about them (including the deletion of that information) to ensure it is up to date and not misleading, having regard to the purpose for which the information may be lawfully used. The Auckland District Law Society Criminal Law Committee (ADLS) and Sue Petricevic, in contrast, did not consider that the DNA databank was comparable to the clean slate regime.
- 20.39 Other options were favoured by some submitters. Nine individuals suggested a single fixed retention period of between four and 10 years for all offending, provided the person did not reoffend in that time. Four individuals favoured retention decisions being made on a case-by-case basis by a judge on sentencing, who they considered would be best placed to make a decision taking into account the particular circumstances of the offending and the risk of reoffending.
- 20.40 Te Mana Raraunga | Māori Data Sovereignty Network submitted that there should be wide consultation with Māori around how long profiles should be retained and under what circumstances. Any new arrangements should be subject to Māori governance and independent oversight.
- 20.41 Indefinite retention was supported by Police, the Innocence Project New Zealand and 11 individuals. The Innocence Project pointed to the possibility of crime scene profiles being uploaded to the CSD in relation to historical cold cases or cases where the convicted person is exonerated. Removing profiles from the DPD might reduce the possibility of resolving such historical cases and achieving justice for the victims of criminal offending.

### ***Retention of profiles after death***

- 20.42 Several submitters commented on whether an offender's profile should be retained on a databank after their death. NZLS considered that DNA profiles should not be retained beyond death, noting that there is no chance of reoffending following a person's death. However, NZLS noted that there would need to be an accurate and practicable mechanism for Police to verify that the person has died. It may not, for example, always be possible to accurately link the name of a person in the deaths register to the name associated with a profile on the databank. Karaitiana Taiuru submitted that legislation must reflect the fact that it is culturally inappropriate to leave DNA profiles of dead people in the same system as living people and to cross-reference the living with the dead.



- 20.43 ADLS and Sue Petricevic took a different view, noting that profiles from dead individuals may still be of value to familial searching, and if such searches are to be authorised, profiles should be retained after death. Other submitters considered there may be some benefit in retaining profiles for a limited period following a person's death. PDS supported removing DNA profiles within 10 years after a person's death on the basis that this would balance the tension between privacy interests and the possibility that cold cases may be resolved. Nessa Lynch suggested that profiles could be retained following death by means of a court order, for example, where Police has a reasonable belief that a deceased person may have been responsible for past offending and that a match might exonerate another person.
- 20.44 Police and ESR supported retaining profiles following death. They noted the potential for new DNA analysis techniques to result in the identification of an offender in a historical case after their death.

## RECOMMENDATIONS

### Retaining adult profiles on the offenders index

#### RECOMMENDATION

#### 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.

- 20.45 We recommend that adult profiles on the offenders index of the proposed DNA databank should be retained for the remainder of the offender's life unless the conviction is quashed or the person was sentenced to a non-custodial sentence and has not been convicted of a subsequent qualifying offence within seven years of the date of conviction. The retention of children's and young people's profiles on the offenders index is addressed in Chapter 21.
- 20.46 We consider that the retention of all adult offender profiles for the remainder of the offender's life rather than indefinitely is reasonable and proportionate to the law enforcement value and public interest in maintaining databanks, which is to identify suspects in future offending.<sup>38</sup> Requiring the removal and destruction of an offender's

<sup>38</sup> In 2018, a survey of 201 people conducted in England and Wales suggested strong support for a long-term retention regime for convicted adults, with around 83 per cent of respondents favouring long-term retention (indefinite/100 years/until death) of DNA profiles from adults convicted of a serious offence. Less than half (47 per cent) supported long-term retention for adults convicted of minor offences, and 38 per cent favoured a retention approach based on the length of sentence for the conviction of a minor offence: Aaron Amankwaa "Forensic DNA databasing: retention

profile from the proposed DNA databank within a reasonable timeframe after their death will:

- (a) minimise inconsistency with tikanga Māori by ensuring that DNA profiles from deceased persons are destroyed and consequently are not stored within the same system as DNA from living people;
- (b) minimise privacy intrusions on relatives of a deceased offender who may otherwise continue to be identified as potential suspects in unresolved offending through familial searching of the proposed DNA databank;
- (c) promote consistency with recent international developments;
- (d) improve the overall effectiveness of the proposed DNA databank (as the chances of a deceased offender’s profile generating a link to a historical cold case that is subsequently loaded to the crime scene index is, we consider, remote);<sup>39</sup> and
- (e) be easy to implement in practice under Police’s Information Sharing Agreement with the Registrar-General of Births, Deaths and Marriages, under which Police will receive information on registered deaths in bulk on a weekly basis (or on a timeframe otherwise agreed in operational procedures).<sup>40</sup>

20.47 Our recommended provision for rehabilitated offenders in R160.b departs from the existing regime in three key respects:

- (a) First, it would apply to all profiles on the DNA databank, regardless of how a person provided a sample. This would remove the existing inconsistencies and make the regime easier for the public to understand and for Police to apply.
- (b) Second, we propose restricting the provision to offenders who receive a non-custodial sentence rather than restricting the provision to certain types of offences. This should better reflect the seriousness of the offending in a particular case, given that some offences capture a broad range of culpability<sup>41</sup> and will increase the emphasis on rehabilitation associated with non-custodial sentences.<sup>42</sup> This also

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regimes and efficacy” (PhD Thesis, University of Northumbria at Newcastle, 2019) as cited in Aaron Amankwaa and Carole McCartney “*Gaughran vs the UK* and public acceptability of forensic biometrics retention” (2020) 60 *Science & Justice* 204 at 205.

<sup>39</sup> As we explain in Chapter 4, the effectiveness of a DNA databank is usually assessed by looking at the “link rate”, which is the percentage of profiles that have matched another profile on one of the databanks. The more profiles on the DPD that do not generate links, the lower the link rate will be. In England and Wales, more than 1.7 million DNA profiles of people who had not been convicted were deleted from the National DNA Database (NDNAD) in 2013 following the decision of the European Court of Human Rights in *S and Marper v The United Kingdom* [2008] 5 ECHR 167 (Grand Chamber). Since then, the NDNAD match rate has continued to increase: National DNA Database Strategy Board *Annual Report 2012–2013* (Home Office, 24 October 2013) at 23–24; and National DNA Database Strategy Board *Biennial Report 2018–2020* (Home Office, September 2020) at 21.

<sup>40</sup> Ngā Pirihimana o Aotearoa | New Zealand Police and Te Tari Taiwhenua | Internal Affairs *Information Sharing Agreement between Registrar-General and New Zealand Police Relating to the supply of registered death, registered name change, and non-disclosure direction information to assist New Zealand Police to perform its functions relating to the maintenance of the law* (September 2019) at [9].

<sup>41</sup> Imprisonment will, in general, only be imposed as a last resort for serious or recidivist offending pursuant to s 16 of the Sentencing Act 2002. See discussion in Criminal Records (Clean Slate) Bill 2001 (183-2) (select committee report) at 6 where the report notes the receipt of advice that first-time inmates released from prison between 1995 and 1998 had, on average, been convicted nine times before receiving their first custodial sentence.

<sup>42</sup> As we noted in the Issues Paper at [14.95], the most common category of offending in New Zealand is dishonesty offending, which consists of general theft, burglary and vehicle crime. A conviction for most dishonesty offences would exclude a person from having their DNA profile ever removed from the databank, regardless of whether they reoffend.

aligns with the approach to measuring the seriousness of offending in other contexts.<sup>43</sup>

- (c) Third, we propose reducing the rehabilitation period from 10 years to seven years. While any such period will, to a certain extent, be arbitrary, seven years is consistent with the rehabilitation period adopted by the Criminal Records (Clean Slate) Act 2004.<sup>44</sup> We consider that adopting a consistent period will improve transparency and accessibility and will be easier to apply in practice.

20.48 We have preferred a policy of long-term retention for all offenders, with provision for rehabilitated offenders, over the alternative options of court-determined retention periods or fixed retention periods. Requiring a court to determine the retention period on sentencing would increase the workload of the court, may result in inconsistency and risks profile retention being regarded as an additional punishment or punitive measure. We also understand from Police that it would be administratively difficult to give effect to a system that relies on individualised decisions or variable retention periods.

20.49 We have also discounted the option of a tiered system of fixed retention periods. Such a regime would, we think, be difficult to formulate, would involve a degree of arbitrariness and would result in an unnecessary level of complexity, particularly given a fixed-length retention system would have to respond to subsequent offending.

20.50 This recommendation does not address the wider issue of Māori over-representation in the criminal justice system and in the receipt of custodial sentences. Without action, this wider issue will likely filter through to over-representation of Māori on the proposed DNA databank under the retention rules proposed above. In Chapter 3, we identify that several initiatives are under way to address the wider issue. We state that the DNA regime is a small but important aspect of the wider criminal justice system and should, therefore, provide a framework for enabling the Crown to take reasonable steps to reduce inequities as part of these wider efforts, consistent with its Treaty obligations. We therefore recommend in Chapter 5 that the proposed DNA Oversight Committee should have a role in monitoring the impact of the DNA regime on Māori. This should include monitoring the representation of Māori on the proposed DNA databank.

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<sup>43</sup> Whether an offender was sentenced to a custodial sentence is relevant to the retention of young people's DNA profiles on the DNA Profile Databank under s 26A of the Criminal Investigations (Bodily Samples) Act 1995 (discussed in Chapter 21). It is also a determining factor in the application of the clean slate regime and the regime for the registration of child sex offenders. See Criminal Records (Clean Slate) Act 2004, s 7(1)(b); and Child Protection (Child Sex Offender Government Agency Registration) Act 2016, s 35.

<sup>44</sup> The Criminal Records (Clean Slate) Act 2004 adopted a seven-year rehabilitation period (reduced by the Select Committee from the original proposal of 10 years) on the basis of Tāhū o te Ture | Ministry of Justice research into the reconviction of offenders who had a non-custodial sentence imposed in 1986 and no previous custodial sentences or convictions of sexual offences: Criminal Records (Clean Slate) Bill 2001 (183-2) (select committee report) at 3 and Appendix B.

## Retaining and destroying profiles on the pre-conviction index

### RECOMMENDATIONS

**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.

20.51 We recommend that the existing requirements and practices regarding the retention and destruction of profiles derived from samples obtained on arrest or intention to charge should largely continue under the new DNA legislation. These rules appear to be working well, and we see no reason for them not to continue.

20.52 We propose special provision is made for situations where a person whose profile is on the pre-conviction index is convicted of the qualifying offence or a related qualifying offence.<sup>45</sup> We consider that these profiles should be retained on the pre-conviction index for up to one year to provide time for Police to issue a databank transfer notice (under R146 in Chapter 18). While this is a generous timeframe, it aligns with the recommended period of time within which a databank compulsion notice may be issued following conviction for a qualifying offence. The degree of intrusion on privacy during that time is minimal given the restrictions on the use of profiles on the pre-conviction index recommended under Chapter 18.

<sup>45</sup> Here, we adopt the explanation in s 2(2) of the Criminal Investigations (Bodily Samples) Act 1995 that "[f]or the purposes of this Act, 2 offences are related to one another if the elements of the 2 offences comprise substantially the same act or omission".

## CHAPTER 21

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# Children and young people and the databank

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## INTRODUCTION

- 21.1 The previous chapters in this part of the Report address the collection, use and retention of DNA samples and profiles from adults for databank searching purposes.
- 21.2 In this chapter we consider the position in respect of children and young people.<sup>1</sup> This involves a different set of considerations, given New Zealand's international obligations under the United Nations Convention on the Rights of the Child (UNCROC),<sup>2</sup> the reintegrative focus of the youth justice system in Aotearoa New Zealand and what is known about adolescent offending (and reoffending).<sup>3</sup>
- 21.3 Below we apply these considerations in respect of two key questions:
- (a) Whether and, if so, when DNA samples should be obtained from children and young people for databank purposes.
  - (b) How long profiles from children and young people should be retained on the proposed DNA databank.

## CURRENT LAW AND PRACTICE

- 21.4 Before we explain the operation of the CIBS Act in respect of children and young people, we briefly describe the basis and operation of the youth justice system in Aotearoa New Zealand. This explanation sets the context within which DNA samples are taken and profiles are retained from children and young people.

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<sup>1</sup> In this chapter, we use the term “children” to include people under the age of 14 and the term “young people” to include people of or over 14 years of age but under 18 years of age, which reflects the definition of young person in the CIBS Act and the Oranga Tamariki Act 1989.

<sup>2</sup> Convention on the Rights of the Child 1577 UNTS 3 (opened for signature 20 November 1989, entered into force 2 September 1990) (UNCROC). New Zealand signed UNCROC on 1 October 1990 and ratified it on 6 April 1993.

<sup>3</sup> In this chapter, we use the term “adolescent” when that is necessary to reflect the academic or scientific literature we are discussing. “Adolescence” is typically described as the period during which a person is developing from a child to an adult. Scientific evidence is showing that adolescent development extends into the mid-20s: Peter Gluckman *It's never too early, never too late: A discussion paper on preventing youth offending in New Zealand* (Office of the Prime Minister's Chief Science Advisor, 12 June 2018) at 6.

## Youth justice system

- 21.5 The youth justice system is established under the Oranga Tamariki Act 1989 and is underpinned by the rights of children and young people affirmed in UNCROC.<sup>4</sup> In respect of youth justice, UNCROC reinforces the need for special procedural safeguards for children and young people and the desirability of promoting their reintegration into society, based on the assumption that children and young people are capable of fulfilling constructive roles as adults.<sup>5</sup>
- 21.6 The justification for a separate youth justice system focused on reintegration was explained by the United Nations Committee on the Rights of the Child in 2019:<sup>6</sup>
- Children differ from adults in their physical and psychological development. Such differences constitute the basis for the recognition of lesser culpability, and for a separate system with a differentiated, individualized approach. Exposure to the criminal justice system has been demonstrated to cause harm to children, limiting their chances of becoming responsible adults.
- 21.7 In Aotearoa New Zealand, the government recognises that reintegration is best served by informal justice processes, and this underpins the youth justice system described below.<sup>7</sup> Analysis undertaken by the Ministry of Justice has identified that 17-year-olds dealt with in the adult system have “significantly worse” reoffending outcomes than those dealt with by the Youth Court<sup>8</sup> and that receiving a conviction has a negative impact on a young person’s future employment opportunities and other life opportunities, which can undermine rehabilitation.<sup>9</sup>
- 21.8 It is also imperative that the youth justice system is effective for Māori children and young people.<sup>10</sup> As we note in Chapter 3 and explore in greater detail below, Māori are significantly over-represented in the youth justice system compared to non-Māori. The Government’s *Youth Crime Action Plan* recognises that this is a situation that must be addressed and one that requires more than a single government initiative or plan.<sup>11</sup> One step that has been taken to help young Māori to engage in the youth justice process

<sup>4</sup> In 2017, s 5(1)(b)(i) of the Oranga Tamariki Act 1989 was amended to include, as a principle to be applied in the exercise of powers under that Act, the principle that “the child’s or young person’s rights (including those rights set out in UNCROC ... ) must be respected and upheld”. In *New Zealand Police v FG* [2020] NZYC 328 at [105], the Youth Court observed that the principles in s 5 “now require that the rights of young people under [UNCROC] be respected and upheld”.

<sup>5</sup> Convention on the Rights of the Child 1577 UNTS 3 (opened for signature 20 November 1989, entered into force 2 September 1990), arts 37 and 40.

<sup>6</sup> United Nations Committee on the Rights of the Child *General comment No 24 (2019) on children’s rights in the child justice system* UN Doc CRC/C/GC/24 (18 September 2019) at [2]. See also United Nations Committee on the Rights of the Child *General comment No 10 (2007) on children’s rights in juvenile justice* UN Doc CRC/C/GC/10 (25 April 2007).

<sup>7</sup> Tāhū o te Ture | Ministry of Justice has observed that formal justice processes for 17-year-olds “are demonstrated to contribute to reoffending, reoffending more regularly, and reoffending more violently”, whereas more intensive interventions, especially family group conferences (discussed below) are “demonstrated to reduce reoffending”: Tāhū o te Ture | Ministry of Justice *Regulatory Impact Statement: Including 17 year-olds, and convictable traffic offences not punishable by imprisonment, in the youth justice system* (December 2016) at 16. On this basis, in 2019, the Oranga Tamariki Act was amended to extend the jurisdiction of the Youth Court to 17-year-olds under the Oranga Tamariki Legislation Bill 2019.

<sup>8</sup> Tāhū o te Ture | Ministry of Justice *Regulatory Impact Statement: Including 17 year-olds, and convictable traffic offences not punishable by imprisonment, in the youth justice system* (December 2016) at [48].

<sup>9</sup> At [55].

<sup>10</sup> At [41].

<sup>11</sup> Tāhū o te Ture | Ministry of Justice *Youth crime action plan 2013–2023: Report* (2013) at 3.

and better involve Māori whānau and communities is the establishment of Ngā Kōti Rangatahi | Rangatahi Courts (alongside the Pasifika Youth Courts) within the Youth Court structure. Ngā Kōti Rangatahi are held on marae and follow tikanga Māori processes. Pasifika Courts are held in Pasifika churches and community centres and follow Pasifika cultural processes. Evidence suggests that young people who attend these courts are 15 per cent less likely to reoffend in the following year than comparable youth, commit 14 per cent fewer offences (if they do reoffend) and are 11 per cent less likely to commit a new serious offence within the next year than comparable youth.<sup>12</sup> A number of other initiatives and work programmes seek to address the problem of Māori over-representation, including the *Children's Action Plan* and Police's *Te Huringa o Te Tai: A Whānau Ora Crime and Crash Prevention Strategy*.

- 21.9 The courts in Aotearoa New Zealand recognise the reduced criminal culpability of young people due to the age-related neurological differences they experience compared to adults, which reduces their decision-making ability and makes them more impulsive with less of an orientation to the future than adults.<sup>13</sup> The courts also recognise that young people have a greater capacity for rehabilitation and that adolescent offending is frequently a phase that passes fairly rapidly.<sup>14</sup> A “well-balanced reaction” is therefore required in order to avoid alienating young people from society.<sup>15</sup>
- 21.10 This courts' approach is borne out in the scientific evidence, which points to the existence of two groups of adolescent offenders:<sup>16</sup>
- (a) **Adolescent-limited offenders.** Most anti-social behaviour is “adolescent-limited” offending, which is influenced by peers and social contexts and is associated with transient risk-taking behaviour characteristic of adolescence.<sup>17</sup> Evidence suggests that adolescent-limited offenders can transition out of offending as they mature. However, they are at risk of so-called “snares” that keep them on the “prison pipeline” into adulthood. These snares include combinations of factors such as substance-use disorders, early school-leaving, having a criminal record, imprisonment and being on the receiving end of further violence and victimisation.<sup>18</sup> There is, therefore, a “crucial need to address such ‘snares’ as early as possible”.<sup>19</sup>
  - (b) **Life-course persistent offenders.** This is a small group of offenders whose anti-social behaviour begins in childhood and deteriorates thereafter, engaging in crime throughout their lives. At age 26, they have higher levels of psychopathic personality traits, mental health problems, employment problems and drug-related and violent crime apprehensions. While imprisonment is criminogenic (that is, likely

<sup>12</sup> Tāhū o te Ture | Ministry of Justice *Regulatory Impact Statement: Including 17 year-olds, and convictable traffic offences not punishable by imprisonment, in the youth justice system* (December 2016) at 17.

<sup>13</sup> *DP v R* [2015] NZCA 476, [2016] 2 NZLR 306 at [12] citing expert evidence “which justifies the special need for protection of young people recognised by UNCROC and s 25(i) of the [New Zealand Bill of Rights Act 1990]” referred to in *Churchward v R* [2011] NZCA 531, (2011) 25 CRNZ 446 at [50]–[55] and [77]–[92]. See also *New Zealand Police v FG* [2020] NZYC 328 at [145]; and *New Zealand Police v SN* [2015] NZYC 239, [2015] DCR 175 at [25].

<sup>14</sup> *DP v R* [2015] NZCA 476, [2016] 2 NZLR 306 at [12(d)–(e)].

<sup>15</sup> At [12(e)].

<sup>16</sup> Peter Gluckman *It's never too early, never too late: A discussion paper on preventing youth offending in New Zealand* (Office of the Prime Minister's Chief Science Advisor, 12 June 2018) at 18. See at 13 for a general discussion of the evidence regarding anatomical and functional brain development in adolescents and how this affects behaviour.

<sup>17</sup> At 15.

<sup>18</sup> At 29.

<sup>19</sup> At 29.

to encourage criminal offending) for adults and adolescents alike, the most severely entrenched life-course persistent offenders need custodial care to maintain public safety.<sup>20</sup>

- 21.11 To prevent children and young people becoming life-course persistent offenders, the evidence suggests that early and intense intervention is needed for all children who show aggression and for children and young people who offend.<sup>21</sup> Consistent with this, the Government's *Youth Crime Action Plan* aims to reduce escalation by dealing with children and young people at the lowest appropriate level and providing early and sustainable exits from the criminal justice system.<sup>22</sup>

### *Objectives and principles of the youth justice system*

- 21.12 In line with Aotearoa New Zealand's international obligations under UNCROC, the purpose of the Oranga Tamariki Act is to promote the wellbeing of children, young people and their families, whānau, hapū, iwi and family groups, including by:<sup>23</sup>

- (i) responding to alleged offending and offending by children and young persons in a way that—
  - (i) promotes their rights and best interests and acknowledges their needs; and
  - (ii) prevents or reduces offending or future offending; and
  - (iii) recognises the rights and interests of victims; and
  - (iv) holds the children and young persons accountable and encourages them to accept responsibility for their behaviour:
- (j) assisting young persons who are or have been in care or custody under the Act to successfully transition to adulthood in the ways provided in the Act.

- 21.13 The Oranga Tamariki Act also seeks to promote wellbeing by recognising mana tamaiti (tamariki), whakapapa and the practice of whanaungatanga.<sup>24</sup> These and other tikanga Māori considerations are important to the operation of the Act and the obligations that arise from the Treaty and its principles.<sup>25</sup>

- 21.14 Any court or person exercising powers under the Oranga Tamariki Act in relation to youth justice matters must weigh four primary considerations of:<sup>26</sup>

- (a) the wellbeing and best interests of the child or young person;
- (b) the public interest (which includes public safety);
- (c) the interests of any victim; and
- (d) the accountability of the child or young person for their behaviour.

<sup>20</sup> At 28.

<sup>21</sup> At 8 and 18.

<sup>22</sup> Tāhū o te Ture | Ministry of Justice *Youth crime action plan 2013–2023: Report* (2013) at 11.

<sup>23</sup> Oranga Tamariki Act 1989, s 4(1)(i)–(j).

<sup>24</sup> Section 4(1)(g). Section 2(1) defines “mana tamaiti (tamariki)” to mean:

... the intrinsic value and inherent dignity derived from a child's or young person's whakapapa (genealogy) and their belonging to a whānau, hapū, iwi, or family group, in accordance with tikanga Māori or its equivalent in the culture of the child or young person

<sup>25</sup> Section 7AA. See also Oranga Tamariki | Ministry for Children *Improving outcomes for tamariki Māori, their whānau, hapū and iwi | Te whanake i ngā hua mō ngā tamariki Māori, ō rātau whānau, hapū, iwi anō hoki: Section 7AA Report* (2020) at 6 and 19.

<sup>26</sup> Oranga Tamariki Act 1989, ss 4A(2) and 208(1).



- 21.15 In weighing these considerations, the court or person must be guided by a number of “youth justice principles”.<sup>27</sup> These principles emphasise the wellbeing and rehabilitation of the child or young person and the need to steer children and young people away from formal court processes.<sup>28</sup> They include the principles that a child’s or young person’s age is a mitigating factor in determining whether or not to impose sanctions in respect of offending and the nature of any such sanctions and that any sanctions should take the least-restrictive form that is appropriate in the circumstances.<sup>29</sup> These principles also recognise that the vulnerability of children and young people entitles them to “special protection” during any criminal investigation.<sup>30</sup> We discuss this principle in the context of suspect sampling in Chapter 8.
- 21.16 In addition to the specific youth justice principles, consideration must also be given to the broader principles of the Oranga Tamariki Act,<sup>31</sup> which identify a particular need to protect mana tamaiti (tamariki) and the child’s or young person’s wellbeing by recognising their whakapapa and the whanaungatanga responsibilities of their family, whanau, hapū, iwi and family group.<sup>32</sup>
- 21.17 The New Zealand Bill of Rights Act 1990 (Bill of Rights Act) is also relevant. It provides that every “child” (including a young person) who is charged with an offence has, in relation to the determination of the charge, the right “to be dealt with in a manner that takes account of the child’s age”.<sup>33</sup> This has been interpreted by the Court of Appeal as requiring, in all respects concerning children, that the child’s best interests be a primary consideration.<sup>34</sup>

### **Role of the Youth Court**

- 21.18 The Youth Court, which is a division of the District Court, has jurisdiction to hear most charges against children and young people. There are some exceptions, including murder, manslaughter and a limited range of other offending, which is heard in the adult jurisdiction of the District Court or High Court.<sup>35</sup>

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<sup>27</sup> Sections 5 and 208(2)–(3).

<sup>28</sup> For example, s 208(2)(a) of the Act provides that, unless the public interest requires otherwise, criminal proceedings should not be instituted against a child or young person if there is an alternative means of dealing with the matter. In addition, the principles state that measures for dealing with offending should be designed to strengthen and foster the ability of families, whānau, hapū, iwi and other family groups to develop their own means for dealing with offending by their children and young people (s 208(2)(c)), that a child or young person who commits an offence or is alleged to have committed an offence should be kept in the community so far as is practicable and consonant with the need to ensure public safety (s 202(2)(d)) and that any measures for dealing with offending should so far as is practicable address the causes underlying the offending (s 208(2)(fa)).

<sup>29</sup> Section 208(2)(e)–(f).

<sup>30</sup> Section 208(2)(h).

<sup>31</sup> Section 208(2).

<sup>32</sup> Section 5(1)(b)(iv).

<sup>33</sup> New Zealand Bill of Rights Act 1990, s 25(i). This provision refers to a “child”, and that term is not defined. However, it has been interpreted as adopting the definition of child in the UNCROC, which defines “child” as a person under the age of 18 years: *R v Kaukasi* HC Auckland T014047, 4 July 2002 at [5].

<sup>34</sup> *DP v R* [2015] NZCA 476, [2016] 2 NZLR 306 at [10].

<sup>35</sup> Oranga Tamariki Act 1989, s 272(2A)–(3). As well as murder and manslaughter, the Youth Court does not have jurisdiction in respect of young people aged 17 years who are charged with certain serious offences specified in sch 1A (s 272(3)(baa)), or a young person charged with certain infringement offences (s 272(3)(ba)–(d)) or where the young person elects trial by jury for a category 3 or 4 offence (s 273(2)(a)). Special rules also apply where a child or young person is charged jointly with an adult: s 277.

- 21.19 In practice, most people who come before the Youth Court are young people, as children fall below the age of criminal responsibility in respect of most offending.<sup>36</sup> In 2019, just 27 children had charges finalised in the Youth Court (18 of whom were Māori), and all were aged 12 or 13.<sup>37</sup>
- 21.20 The Youth Court operates under different rules to the adult jurisdiction. A child or young person who is brought before the Youth Court is not required to enter a plea of guilty or not guilty. Rather, they may deny the charge, in which case, the Youth Court will determine whether the charge is proved. If a charge is not denied, this is “not a formal admission or plea of guilty but allows the young person to acknowledge there is a ‘case to answer’”.<sup>38</sup> The Youth Court can determine a charge by exercising its powers under sections 282 or 283 of the Oranga Tamariki Act, described below. In this chapter, we refer to an exercise of power under either of these sections as a “Youth Court outcome”.
- 21.21 Family group conferences are central to the Youth Court’s operation. A charge cannot be filed in the Youth Court before the matter has been considered by a family group conference unless the young person has been arrested.<sup>39</sup> If a young person is arrested and brought before the Youth Court, proceedings must be adjourned until a family group conference is held either if the charge is not denied or if the charge is denied and the Court makes an order for detention pending determination of the charge.<sup>40</sup> Further, where the Youth Court finds a charge is proved, the Court must not make any order unless a family group conference has had an opportunity to consider the ways in which the Court might deal with the young person in relation to the charge.<sup>41</sup>
- 21.22 Therefore, family group conferences are “the very basis of everything which is decided in the youth justice process”.<sup>42</sup> They have considerable potential to identify the underlying causes of offending, fashion interventions designed to deal with those underlying causes and hold young people to account not only by the provision of sanctions as part of an agreed plan but through the process of facing the victims and understanding the effects of their actions on others.<sup>43</sup> Family group conferences aim to encourage the acceptance of responsibility by the young person and the promotion of reconciliation between offender and victim and to dispose of the offence in a restorative and constructive manner.<sup>44</sup>

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<sup>36</sup> Section 272(1) provides that a child aged 10 or 11 may only be prosecuted for murder or manslaughter and that a child aged 12 or 13 may only be prosecuted for murder, manslaughter or any offence for which the maximum penalty available is or includes imprisonment for life or for at least 14 years. If a child aged 12 or 13 years is a “previous offender” within the meaning of s 272(1A) or (1B), they may also be prosecuted for any offence for which the maximum penalty available is or includes imprisonment for at least 10 years but less than 14 years: s 272(1)(c).

<sup>37</sup> Tauranga Aotearoa | Stats NZ “Children and young people charged in court – most serious offence calendar year” (2020) <nzdotstat.stats.govt.nz>.

<sup>38</sup> Nessa Lynch *Youth Justice in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2016) at 189.

<sup>39</sup> Oranga Tamariki Act 1989, s 245(1)(c).

<sup>40</sup> Section 247(c).

<sup>41</sup> Section 281(1).

<sup>42</sup> *New Zealand Police v SN* [2015] NZYC 239, [2015] DCR 175 at [12].

<sup>43</sup> At [13].

<sup>44</sup> Liz Campbell and Nessa Lynch “Competing Paradigms? The Use of DNA Powers in Youth Justice” (2012) 12 YJ 3 at 13.

21.23 Where a child or young person does not deny a charge and the family group conference has decided on a plan, that plan is then monitored by the Youth Court and may be monitored by the Ngā Kōti Rangatahi or Pasifika Courts, described above.

### *Discharges under section 282 of the Oranga Tamariki Act*

21.24 Under section 282 of the Oranga Tamariki Act, the Youth Court can discharge the charge.<sup>45</sup> If the Court is satisfied that the charge has been proved, the Youth Court may, in addition to discharging the charge, make one of the Group 1 or Group 2 responses under section 283 described at paragraph 21.26(a) below.<sup>46</sup>

21.25 A charge discharged under section 282 “is deemed never to have been filed”.<sup>47</sup> The Ministry of Justice explains that, usually, this means the child or young person has admitted their offending and successfully completed the set of interventions and programmes that were agreed at the family group conference.<sup>48</sup> A section 282 discharge is referred to as an “absolute discharge” and it “signals the end of the process”.<sup>49</sup> It allows the child or young person to “avoid the stigmatization and labelling effects of a criminal record”.<sup>50</sup>

### *Orders under section 283 of the Oranga Tamariki Act*

21.26 If a child or young person commits a more serious offence or does not adhere to their family group conference plan, the Youth Court may make an order under section 283 of the Oranga Tamariki Act.<sup>51</sup> A section 283 order is made when the Court determines the charge is proved. It can order one or more of a range of “responses” under section 283, which are “grouped in levels of equal restrictiveness” as follows:

- (a) Group 1 to 3 responses are the least restrictive. Group 1 responses are discharge (with a record) or admonishment. Group 2 responses include an order to return to Court if called upon within 12 months, orders to pay a fine, compensation or restitution, forfeiture of property or confiscation of a vehicle or disqualification from driving. Group 3 responses include orders to attend a parenting education programme, mentoring programme or alcohol or drug rehabilitation programme.
- (b) Group 4 to 6 responses are more serious and include supervision orders or community work (Group 4), supervision with an activity order (Group 5) or supervision with a residence order (Group 6).
- (c) The most serious order the Youth Court can make is to transfer the case to the District Court or High Court for sentencing (Group 7). This will be appropriate where the Court considers that its responses are insufficient to address the seriousness of the offending. The Court may enter a conviction prior to the transfer.

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<sup>45</sup> This applies only to category 1, 2 or 3 offences: Oranga Tamariki Act 1989, s 282(1).

<sup>46</sup> Section 282(3).

<sup>47</sup> Section 282(2).

<sup>48</sup> Tāhū o te Ture | Ministry of Justice “Children and young people in court: Data notes and trends for 2019–2020” (2020) at 1.

<sup>49</sup> At 1.

<sup>50</sup> Liz Campbell and Nessa Lynch “Competing Paradigms? The Use of DNA Powers in Youth Justice” (2012) 12 YJ 3 at 13.

<sup>51</sup> Tāhū o te Ture | Ministry of Justice “Children and young people in court: Data notes and trends for 2019–2020” (2020) at 1.

### Children and young people in the adult jurisdiction

21.27 Only rarely will a charge against a child or young person be heard in the adult jurisdiction. As noted above, this will usually be limited to charges of murder or manslaughter and other serious charges filed against 17-year-olds. In addition, serious cases may be transferred to the District Court or High Court for sentencing under section 283. If a child or young person is dealt with in the adult jurisdiction, the rules of procedure of that court will apply, except to the extent that recognition needs to be given to UNCROC and section 25(i) of the Bill of Rights Act.<sup>52</sup> This requires that the child's or young person's best interests be a primary consideration.<sup>53</sup>

### Collection of databank samples and profiles under the CIBS Act

21.28 There are three different ways in which a child's or young person's DNA profile might be loaded to a DNA databank under the CIBS Act.

21.29 First, if a child or young person is convicted of a qualifying offence, a police officer can issue a databank compulsion notice and require a DNA sample for the purposes of storing their DNA profile on the DNA Profile Databank (DPD).<sup>54</sup> A "qualifying offence" comprises any imprisonable offence or the non-imprisonable offence of peeping or peering into a dwellinghouse.<sup>55</sup> For the purposes of the CIBS Act, a "conviction" includes a finding by the Youth Court that a charge against a young person is proved.<sup>56</sup> Therefore, a databank compulsion notice can be issued following a section 283 order, because such orders are only made where a charge is proved. However, in *Police v JL*, the Youth Court held that a section 282 discharge has the effect of "quashing" a "conviction", which means that a databank compulsion notice cannot be issued in respect of a section 282 discharge.<sup>57</sup>

21.30 Second, a DNA sample may be required from a young person (but not a child) for the Temporary Databank if either the young person has been arrested for a relevant offence or a police officer has good cause to suspect the young person of committing a relevant offence and intends to charge them with that offence.<sup>58</sup> If a sample is required from a young person on arrest or intention to charge, their DNA profile can only be loaded to the Temporary Databank if they are charged within two months of the sample being taken.<sup>59</sup> In some cases, the matter will be resolved at a family group

<sup>52</sup> *DP v R* [2015] NZCA 476, [2016] 2 NZLR 306 at [10].

<sup>53</sup> At [10].

<sup>54</sup> Criminal Investigations (Bodily Samples) Act 1995, ss 29 and 39.

<sup>55</sup> Section 39 authorises the obtaining of DNA samples in relation to any imprisonable offence or any offence listed in Part 3 of Schedule 1. Part 3 of Schedule 1 was also introduced in 2009 and includes a range of minor offences. Notably, however, all but one of the offences listed in Part 3 are imprisonable. The single exception is the offence of peeping or peering into a dwellinghouse, which is an offence under s 30 of the Summary Offences Act 1981, punishable by a maximum fine of \$500.

<sup>56</sup> Section 2 definition of "conviction".

<sup>57</sup> *Police v JL* [2006] DCR 404 (YC) at [9] and [48]. This is reflected in the *Police Manual*, which notes that a databank compulsion notice cannot be obtained from a young person who receives "a s 282 order only": Ngā Pirihimana o Aotearoa | New Zealand Police "DNA Sampling" in *Police Manual* at 30.

<sup>58</sup> Criminal Investigations (Bodily Samples) Act 1995, s 24K.

<sup>59</sup> Sections 24P(1) and 60A(3)(a).

conference and no charges will be filed.<sup>60</sup> In these cases, the sample will be destroyed without a profile being loaded to the Temporary Databank. If, however, the young person is charged, their DNA profile will be loaded to the Temporary Databank and will remain there until the charge is resolved. The CIBS Act provides for a young person's DNA profile to be transferred to the DPD if they are convicted of the relevant offence (or a related relevant offence) or if the Youth Court outcome is a section 282 discharge (if the charge has been proved) or a section 283 order.<sup>61</sup> The definition of "relevant offence" is limited to a small group of serious offences, which includes the offences listed in Schedule 1 of the CIBS Act, any offence punishable by a term of imprisonment of seven years or more and any attempts or conspiracies to commit such offences.<sup>62</sup>

- 21.31 Third, if a suspect sample was obtained from a child or young person under Part 2 of the CIBS Act in relation to a qualifying offence and that child or young person is subsequently convicted of the offence (or a related offence), their DNA profile can be loaded to the DPD.<sup>63</sup> We understand this occurs automatically upon conviction.<sup>64</sup> As with databank compulsion notices, this would apply where a suspect is subject to an order under section 283 of the Oranga Tamariki Act. It is uncertain, however, whether it includes a section 282 discharge, given the decision in *Police v JL* discussed above. While that decision concerned a databank compulsion notice, the Court's finding was that a section 282 discharge has the effect of "quashing" the charge or conviction,<sup>65</sup> and section 26(a)(i) of the CIBS Act states that a DNA profile generated from a suspect sample can be stored on the DPD "unless the conviction is subsequently quashed".

### Retention of profiles on the Temporary Databank and DPD

- 21.32 As noted above, profiles are only retained on the Temporary Databank until the charge is resolved.<sup>66</sup> In some cases involving children and young people, the matter will be resolved at a family group conference and the charges will be withdrawn.<sup>67</sup> In these cases, the child's or young person's profile will be removed from the Temporary Databank and destroyed. In other cases, where the young person is convicted or the Youth Court determines the charge is proved and either discharges the charge under section 282 or makes a section 283 order under the Oranga Tamariki Act, the profile is transferred to the DPD.<sup>68</sup>

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<sup>60</sup> As noted above, if a young person hasn't been arrested, charges cannot be filed in the Youth Court until a family group conference has considered the matter: Oranga Tamariki Act 1989, s 245(1)(c).

<sup>61</sup> Criminal Investigations (Bodily Samples) Act 1995, s 26(ab) and (ac).

<sup>62</sup> Section 2 definition of "relevant offence" and s 24K. This is higher than the offence threshold for requiring samples on arrest or intention to charge from an adult, which captures all imprisonable offences and the non-imprisonable offence of peeping or peering into a dwellinghouse: s 24J.

<sup>63</sup> Section 26(a).

<sup>64</sup> Ngā Pirihimana o Aotearoa | New Zealand Police "DNA Sampling" in *Police Manual* at 28 and 52–53.

<sup>65</sup> *Police v JL* [2006] DCR 404 (YC) at [48].

<sup>66</sup> Criminal Investigations (Bodily Samples) Act 1995, ss 24P(1)(b)(i) and 60A(3)(b).

<sup>67</sup> In 2019, 303 young people had charges against them withdrawn: Tatauranga Aotearoa | Stats NZ "Children and young people charged in court – most serious offence calendar year" (2020) <nzdotstat.stats.govt.nz>.

<sup>68</sup> Criminal Investigations (Bodily Samples) Act 1995, ss 24P(1)(b)(ii) and 26(ab)–(ac).

21.33 The retention rules in relation to the DPD are described in Table 3 below.<sup>69</sup> DNA profiles from children are retained on the DPD indefinitely. The retention rules for young people are complex and vary depending on the way in which a sample was obtained, their sentence following conviction (or whether they received a section 282 discharge or a section 283 order under the Oranga Tamariki Act) and whether they have reoffended.

TABLE 3: RETENTION OF CHILDREN'S AND YOUNG PEOPLE'S PROFILES ON THE DPD			
Method of sample collection	Age at time of offending	Retention policy	Effect of subsequent offending
Suspect sample (transferred to DPD following conviction)	Young person	10 years after date of conviction or s 283 order if no imprisonment (s 26A(4))  OR  Indefinite retention if a sentence of imprisonment is imposed (s 26A(5)(a))	A further four-year retention period applies and runs concurrently if a s 282 order for discharge is subsequently made during the initial 10 year retention period (s 26A(4))  Indefinite retention if a subsequent conviction or s 283 order is made or entered against that person during the initial 10 year retention period (s 26A(5)(b))
	Child	Indefinite retention (s 26A(5)(c))	N/A
Sample required from person arrested or intended to be charged (transferred to DPD following conviction)	Young person	10 year or indefinite retention— as for suspect samples (s 26A(4)–(5))  OR  Four years after date of s 282 order for discharge where offence proved (s 26A(4))	Further retention periods as for suspect samples (s 26A(5)(b))  In addition, if a profile is retained following a s 282 order for discharge where offence proved, the following retention periods apply for subsequent offending (ss 26A(4) and (5)(b)):  A further four-year retention period applies and runs concurrently if a second s 282 order for discharge order is made.  A further 10-year retention period applies and runs concurrently if a s 283 order is made or the person is convicted by the District Court without imprisonment.  Indefinite retention applies if a sentence of imprisonment is imposed or if there is a third order/conviction against the person.
	Child	N/A	N/A
Sample required for DPD following conviction	Young person	Indefinite retention (s 26A(5)(c))	N/A
	Child	Indefinite retention (s 26A(5)(c))	N/A

<sup>69</sup> In addition to the retention rules in Table 3, the CIBS Act also makes provision to remove a profile from the DNA Profile Databank (DPD) in relation to offending committed by a young person prior to 2009. Section 26B provides for a person to request the removal of their DNA profile from the DPD if they were not sentenced to imprisonment and were not, in the 10-year period following their conviction, convicted of an imprisonable offence or the non-imprisonable offence of peeping or peering into a dwellinghouse.

## Databank sampling of children and young people in practice

- 21.34 In practice, it will be rare for a child's profile to be stored on the DPD. As noted above, children can only be prosecuted for a small range of serious offences. In 2019, just 27 children had charges finalised in the Youth Court, with 21 receiving a section 282 discharge under the Oranga Tamariki Act.<sup>70</sup>
- 21.35 Young people are far more likely than children to have a DNA sample taken for databank purposes and their profile stored on a DNA databank. This is largely due to the 2009 amendments, which gave police officers the power to require samples from young people on arrest or intention to charge and to retain their profiles on the DPD following a section 282 discharge where the charge is proved.<sup>71</sup> In addition, the *Police Manual* contains guidance on when a police officer should require a DNA sample on arrest or intention to charge and specifies that, if a person is "aged under 20 years", this is a relevant factor that weighs in favour of requiring a sample.<sup>72</sup>
- 21.36 The impact of the 2009 amendments on young people is reflected in the databank statistics. Since 2010, Police has obtained between approximately 300 and 750 samples from young people each reporting year. Police does not report on the number of profiles from young people that are loaded to the DPD following a charge proved in the Youth Court or a conviction in the adult jurisdiction. However, in 2018, ESR calculated that 4,277 profiles on the DPD had been generated from a sample obtained from a child or young person. In the six years up to 30 June 2018, 2,141 profiles were added to the DPD. In other words, with the new power to require samples from young people on arrest or intention to charge, the number of profiles on the DPD obtained from children and young people doubled in that six-year period. The impact on Māori young people is even more pronounced. We discuss this below at paragraphs 21.45–21.48.
- 21.37 In the 2018–2019 reporting year, Police obtained 452 samples from young people on arrest or intention to charge, and a DNA profile was generated for the Temporary Databank from 404 of those samples.<sup>73</sup> This amounts to 34 per cent of young people who had their most serious charge proved in court in that same period.<sup>74</sup>

## ISSUES

- 21.38 There is an obvious tension between the objectives and principles of the youth justice system described above and the CIBS Act, which enables the collection and retention of

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<sup>70</sup> Tauranga Aotearoa | Stats NZ "Children and young people charged in court – most serious offence calendar year" (2020) <nzdotstat.stats.govt.nz>.

<sup>71</sup> The 2009 amendments were described as a "radical departure" from the "conservative and sensitive approach" to the collection of DNA from young people that existed prior to 2009: Liz Campbell and Nessa Lynch "Competing Paradigms? The Use of DNA Powers in Youth Justice" (2012) 12 YJ 3 at 6–7. Prior to 2009, the main databank sampling method was volunteer sampling. However, this method of populating the databank is not available in relation to young people: Criminal Investigations (Bodily Samples) Act 1995, s 32. In addition, suspect and databank compulsion samples were only able to be obtained for more serious offending.

<sup>72</sup> Ngā Pirihimana o Aotearoa | New Zealand Police "DNA Sampling" in *Police Manual* at 17–18.

<sup>73</sup> Ngā Pirihimana o Aotearoa | New Zealand Police *Annual Report 2018–2019* (November 2019) at 169.

<sup>74</sup> Tauranga Aotearoa | Stats NZ "Children and young people charged in court – most serious offence fiscal year" (2020) <nzdotstats.govt.nz>. Note that this only compares the number of profiles from samples taken on arrest or intention against the number of young people who had their most serious charge proved in court over that same period. It does not include any suspect samples obtained or databank compulsion notices that may have been issued in that period.

children's and young people's DNA to link them to any future (or past) crimes they may commit.<sup>75</sup>

21.39 This tension gives rise to several issues:

- (a) First, requiring samples from young people on arrest or intention to charge may be inconsistent with young people's rights to special protections under UNCROC and the Oranga Tamariki Act.
- (b) Second, the CIBS Act fails to address the disproportionate impact of the databank sampling regime on young Māori. This is inconsistent with te Tiriti o Waitangi | the Treaty of Waitangi (the Treaty) and the Treaty principles of active protection, equity and partnership.
- (c) Third, treating age as a factor in favour of requiring a sample on arrest or intention to charge from a person under the age of 20 risks discrimination under the Bill of Rights Act.
- (d) Fourth, collecting and retaining samples and profiles based on a charge proved in the Youth Court undermines the rehabilitative and reintegrative focus of the youth justice system and the tikanga Māori approach underpinning Ngā Kōti Rangatahi in particular.
- (e) Fifth, the length of time profiles are retained on the DPD following a charge proved in the Youth Court gives inadequate weight to evidence about patterns of reoffending among children and young people. The retention rules are also inconsistent and complex.

21.40 We explore these issues below.

### Inconsistency with young people's rights

21.41 In Chapter 18, we explain that requiring a DNA sample on arrest or intention to charge without the subject's consent, using reasonable force if necessary and in the absence of judicial authorisation constitutes a significant intrusion on privacy and bodily integrity. The degree of intrusion is heightened for young people given their vulnerability, particularly when in police custody.<sup>76</sup> For young Māori, there may be additional concerns arising from tikanga associated with personal tapu and mana that may be impacted by the sampling process and in relation to the handling of whakapapa information contained in DNA and profiles generated from DNA samples. As discussed in Chapter 2, this gives rise to certain individual and collective responsibilities for Māori in accordance with tikanga. For example, the obligation on Māori individually and collectively to exercise kaitiakitanga in relation to whakapapa information and, as provided for in the Oranga Tamariki Act, the whanaungatanga responsibilities of whānau, hapū, iwi and the wider community to protect the mana of the young person.

21.42 The Youth Court questioned whether the power to require samples from young people on arrest or intention to charge was consistent with UNCROC and the Oranga Tamariki Act in the case of *Police v FG*.<sup>77</sup> In that case, a sample was required from a 14-year-old

<sup>75</sup> For a discussion of this tension, see Liz Campbell and Nessa Lynch "Competing Paradigms? The Use of DNA Powers in Youth Justice" (2012) 12 YJ 3.

<sup>76</sup> At 7.

<sup>77</sup> *New Zealand Police v FG* [2020] NZYC 328.



intended to be charged who had a significant communication disorder. The Court identified three features of the CIBS Act that were of concern:<sup>78</sup>

- (a) First, the inconsistency between the requirement in the CIBS Act to “inform” a child or young person of various matters<sup>79</sup> as opposed to the obligation on a police officer under the Oranga Tamariki Act to “explain” to a young person their rights before questioning them.<sup>80</sup> The latter is a special protection that means “to make something clear or intelligible or make known in detail”.<sup>81</sup> We explore this issue in Chapter 8 in relation to suspect sampling.
- (b) Second, the “form, length and content” of the document that FG had to be informed about before a police officer could require a sample.<sup>82</sup> This was described as a “five-page, densely worded document containing a large amount of legal and complex terms and language”.<sup>83</sup> The Judge observed that:<sup>84</sup>

Given [FG’s] limited understanding of verbal vocabulary ... either far more time and extra-special care was needed, or realistically, the involvement of a communication assistant. Given that Parliament has placed responsibility for carrying out this extremely difficult task on the police, it seems to me that special training will be essential. No-one could possibly have informed a young person with a disability like [FG]’s adequately without either the necessary training or without getting someone suitably qualified where the disability requires that level of expertise. It did in this case.

Because this involved a substantial intrusion into [FG]’s rights and privacy, strict compliance with the obligation to inform him of all the contents to the necessary standard was required. That was not done here, not by a long way, and there is no “reasonable compliance” saving provision in the CIBS Act. That in itself signals the clear intention of Parliament regarding the nature and quality of how the information is to be provided. Near enough is not good enough.

- (c) Third, a sample could be required without the young person receiving legal advice. The Court held that this was in breach of the young person’s rights under article 40 of UNCROC.<sup>85</sup> Respecting and upholding those rights required the provision of legal advice unless the young person waived that right by expressing it “unequivocally after all reasonable steps were taken to ensure that he was fully aware of his rights”.<sup>86</sup>

21.43 The sample taken based on an intention to charge was therefore taken improperly and was ruled inadmissible.<sup>87</sup> Although the case focused on FG’s communication disorder, the Court emphasised the weight of evidence that such disorders are over-represented in the youth justice system.<sup>88</sup> The Court’s findings, therefore, have wider significance

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<sup>78</sup> At [176].

<sup>79</sup> Pursuant to s 24M of the Criminal Investigations (Bodily Samples) Act 1995.

<sup>80</sup> Oranga Tamariki Act 1989, s 215.

<sup>81</sup> *New Zealand Police v FG* [2020] NZYC 328 at [7], [168] and [176(a)].

<sup>82</sup> Form 5A, set out in the Schedule to the Criminal Investigations (Bodily Samples) Regulations 2004.

<sup>83</sup> *New Zealand Police v FG* [2020] NZYC 328 at [31].

<sup>84</sup> At [180(a)–(b)].

<sup>85</sup> At [176(c)].

<sup>86</sup> At [170].

<sup>87</sup> At [181].

<sup>88</sup> At [148]–[149] and [190(e)]. The evidence of brain and behaviour issues in children and young people is explored in Chapter 8.

beyond the individual circumstances of FG’s case. In terms of the CIBS Act’s inconsistency with UNCROC, the Court said that:<sup>89</sup>

Obviously, there can be no solution to the CIBS Act’s non-conformity with [FG]’s rights under [UNCROC] short of legislative change. However, the fact deserves mention. Unlike the [Oranga Tamariki] Act, the CIBS Act makes no mention at all of [UNCROC] despite coming into force after we had acceded to [UNCROC], and despite having provisions that specifically apply to young people and despite authorising the taking of bodily samples from them both by consent and by compulsion.

- 21.44 This case raises a range of procedural concerns regarding the power to require samples from young people on arrest or intention to charge. A more fundamental question is whether requiring a sample from a young person for databank purposes during an investigation (usually while they are in Police custody) can ever be justified given the vulnerabilities young people face. In our view, there is a strong argument that this is inconsistent with the protective regime established under UNCROC and the Oranga Tamariki Act, in particular, the right to special protection during criminal investigations.<sup>90</sup>

### Disproportionate impact on young Māori

- 21.45 A significant concern we have identified is that the CIBS Act does not address the over-representation of young Māori in the databank sampling regime. This inequity is a concern in and of itself. It also gives rise to obligations on the Crown with respect to the Treaty and the Treaty principles of active protection, equity and partnership, discussed in Chapter 2. It is also out of step with the approach taken under the Oranga Tamariki Act and the rights of non-discrimination affirmed in UNCROC.<sup>91</sup>
- 21.46 Young Māori are “significantly and persistently over-represented” in the criminal justice system, both as victims and offenders.<sup>92</sup> Court statistics from 2019 identify that 61 per cent of children and young people with charges finalised in court were Māori and only 25 per cent were European.<sup>93</sup> Recent data from Oranga Tamariki paints a similar picture, with 67 per cent of the youth justice population identifying as Māori and a further 13 per

<sup>89</sup> At [184].

<sup>90</sup> Oranga Tamariki Act 1989, s 208(2)(h). See more generally the rights and duties in the Convention on the Rights of the Child 1577 UNTS 3 (opened for signature 20 November 1989, entered into force 2 September 1990) including that the arrest, detention or imprisonment of a child shall be used “only as a measure of last resort and for the shortest appropriate period of time” (art 37(b)), that every child deprived of liberty shall be treated in a manner that takes into account the needs of persons their age (art 37(c)), and that every child alleged to have committed a criminal offence shall be treated in a manner consistent with the promotion of the child’s sense of dignity and worth, which takes into account the child’s age, and that child is guaranteed to have their privacy fully respected at all stages of the proceedings (art 40(1) and (2)(b)(vii)).

<sup>91</sup> Article 2(1) of the Convention on the Rights of the Child 1577 UNTS 3 (opened for signature 20 November 1989, entered into force 2 September 1990) states that:

States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child’s or his or her parent’s or legal guardian’s race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.

The importance of safeguards against discrimination, and of ensuring justice sector reforms are attentive to customary, indigenous and non-State forms of justice, is highlighted in United Nations Committee on the Rights of the Child *General comment No 24 (2019) on children’s rights in the child justice system* UN Doc CRC/C/GC/24 (18 September 2019) at [40] and [102]–[104].

<sup>92</sup> Peter Gluckman *It’s never too early, never too late: A discussion paper on preventing youth offending in New Zealand* (Office of the Prime Minister’s Chief Science Advisor, 12 June 2018) at 7.

<sup>93</sup> Tāhū o te Ture | Ministry of Justice “Children and young people in court: Data notes and trends for 2019–2020” (2020) at 3.

cent identifying as mixed Māori/Pacific ethnicity.<sup>94</sup> Young Māori are also over-represented in profiles on the DPD. Data on the profiles added to the DPD from children and young people between 2012 and 2018 identified that, over that timeframe, 67 per cent of profiles were from Māori.<sup>95</sup>

21.47 The Oranga Tamariki Act recognises that promoting the wellbeing of children and young people, as well as their families, whānau, hapū, iwi and family groups, includes “providing a practical commitment to the principles of the Treaty”.<sup>96</sup> Section 7AA imposes a range of duties on the chief executive of Oranga Tamariki in order to recognise and provide a practical commitment to the principles of the Treaty, including ensuring that:

- (a) policies and practices have the objective of reducing disparities by setting measurable outcomes for Māori children and young people;
- (b) policies, practices and services have regard to mana tamaiti (tamariki) and the whakapapa of Māori children and young people and the whanaungatanga responsibilities of their whānau, hapū and iwi; and
- (c) the department seeks to develop strategic partnerships with iwi and Māori organisations.

21.48 The CIBS Act, in contrast, is silent on the impact of the collection and use of DNA on Māori, including in relation to applicable tikanga, and what the Treaty and the principles of the Treaty require in this context. We address this issue in Chapter 3 where we identify specific measures to give practical effect to the Crown’s obligations to Māori under the Treaty as they are relevant to the DNA regime.

### Age discrimination under the New Zealand Bill of Rights Act

21.49 Another concern is Police’s policy which, despite the vulnerability of young people, recognises age under 20 as a factor *in favour* of requiring a sample on arrest or intention to charge. This is likely to discriminate against young people under 18 as well as those aged between 18 and 20, contrary to the right to freedom from discrimination affirmed in the Bill of Rights Act.<sup>97</sup> Given young Māori are over-represented in the youth justice system, any discrimination will likely impact on Māori in particular.

21.50 Identifying age as a relevant factor may result in Police requiring a sample from a young person arrested or intended to be charged with a particular offence but not from an adult who is arrested or intended to be charged with the same offence. In our view, this distinction causes a material disadvantage, given the intrusive nature of databank sampling and the potential consequences for the person being sampled.

21.51 We question whether such discrimination is justified.<sup>98</sup> We acknowledge that young people are over-represented in criminal justice apprehensions,<sup>99</sup> which suggests that

<sup>94</sup> Oranga Tamariki | Ministry for Children *Section 7AA Quality Assurance Standards* (May 2020) at 2.

<sup>95</sup> Issues Paper at [11.78]–[11.79].

<sup>96</sup> Oranga Tamariki Act 1989, s 4(1)(f).

<sup>97</sup> New Zealand Bill of Rights Act 1990, s 19; and Human Rights Act 1993, s 21. Age is defined to mean any age commencing with the age of 16 years. Differential treatment on the grounds of age will be discriminatory if it imposes a material disadvantage on the person or group differentiated against: *Ministry of Health v Atkinson* [2012] NZCA 184, [2012] 3 NZLR 456 at [55].

<sup>98</sup> Any limitation on the right to be free from discrimination will only be justified if it serves a sufficiently important purpose, is rationally connected to that purpose, limits the right no more than is reasonably necessary for sufficient

obtaining more samples from young people may assist in resolving more criminal investigations.<sup>100</sup> However, the focus of the youth justice system is on reducing youth offending and promoting rehabilitation. As we explain below, there is a risk that collecting samples from young people and retaining such samples on a databank may tie young people into the justice system rather than provide them with an exit.

### Inconsistency with a reintegrative youth justice system

21.52 The collection and retention of children’s and young people’s DNA following a Youth Court outcome increases the risk of further interactions with Police and reduces the prospect of reintegration. As commentators note, it:<sup>101</sup>

... maintains a formalized link between the young person, his or her genetic material and the crime control agents of the state, and denotes state suspicion of the young person.

21.53 This undermines the rehabilitative and reintegrative focus of the youth justice system. As the *Youth Crime Action Plan* identifies, early and sustainable exits are essential to reducing reoffending and “the challenge for frontline workers is to make each intervention the last justice sector intervention for the young person and their family”.<sup>102</sup>

21.54 Retaining a child’s or young person’s DNA following a charge proved in the Youth Court might also have a stigmatising effect on them by labelling them as a person who Police believes may reoffend in future.<sup>103</sup> Labelling and stigmatising children as “offenders” is recognised as running the “serious risk of establishing criminal identities rather than diminishing them”.<sup>104</sup>

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achievement of the purpose and is otherwise proportionate to the importance of the objective: *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1 at [104].

<sup>99</sup> Forty per cent of criminal justice apprehensions are of people aged between 15 and 24 years, yet this group only makes up 14 per cent of the general population. See Peter Gluckman *It’s never too early, never too late: A discussion paper on preventing youth offending in New Zealand* (Office of the Prime Minister’s Chief Science Advisor, 12 June 2018) at 11.

<sup>100</sup> In the Issues Paper, at [11.134] we noted that, on average, 37 per cent of profiles obtained from a person aged 14 to 16 years old linked to a profile on the CSD between 2010 and 2018. However, this does not include figures for young people aged 17.

<sup>101</sup> Liz Campbell and Nessa Lynch “Competing Paradigms? The Use of DNA Powers in Youth Justice” (2012) 12 YJ 3 at 13.

<sup>102</sup> Tāhū o te Ture | Ministry of Justice *Youth crime action plan 2013–2023: Report* (2013) at 14. In addition, a 2018 report by the Prime Minister’s Chief Science Advisor outlines the principles underpinning youth desistance from criminal offending. The first principle is to “be realistic”, noting that it takes time to change entrenched behaviours and the problems that underlie them, so lapses and relapses should be expected and effectively managed. Another principle is to “promote redemption”, noting that criminal justice and policy must recognise and reward efforts to give up crime so as to encourage and confirm positive change. For ex-offenders, there must be an ending to their punishment and some means of signalling their redemption and re-inclusion within their communities. See Peter Gluckman *It’s never too early, never too late: A discussion paper on preventing youth offending in New Zealand* (Office of the Prime Minister’s Chief Science Advisor, 12 June 2018) at 30.

<sup>103</sup> In the Issues Paper, at [14.97]–[14.99] we noted the academic debate around whether retention of a person’s DNA profile has a stigmatising effect. As explained in Liz Campbell and Nessa Lynch “Competing Paradigms? The Use of DNA Powers in Youth Justice” (2012) 12 YJ 3 at 11:

The conception of stigma here is not equivalent to discriminatory treatment *per se*, but rather the official labelling of certain people as potentially criminal. Although it could be said that the stigma of DNA retention is overstated on the basis that an individual would need to divulge his or her being on the database for anyone to know, internalization of a stigmatic label occurs by virtue of his or her treatment by the State. Moreover, it is not inconceivable that a State official or leaked document could reveal a person’s inclusion in the database, thereby compounding the stigma. Nevertheless, public communication should not be seen a prerequisite for someone to be stigmatized by the State.

<sup>104</sup> Peter Gluckman *It’s never too early, never too late: A discussion paper on preventing youth offending in New Zealand* (Office of the Prime Minister’s Chief Science Advisor, 12 June 2018) at 30.

21.55 Similar concerns, albeit not in the specific context of DNA retention, have also been identified by the United Nations Committee on the Rights of the Child:<sup>105</sup>

The Committee recommends that States refrain from listing the details of any child, or person who was a child at the time of the commission of the offence, in any public register of offenders. The inclusion of such details in other registers that are not public but impede access to opportunities for reintegration should be avoided.

...

Furthermore, the Committee recommends that States parties introduce rules permitting the removal of children's criminal records when they reach the age of 18, automatically or, in exceptional cases, following independent review.

21.56 These risks are particularly acute for young Māori given their over-representation in databank sampling and risk further exacerbating the disproportionate impact of the DNA regime on Māori. Further, to the extent that the reintegrative focus of the youth justice system is more aligned with tikanga Māori approaches to justice focused on manaakitanga, maintaining whanaungatanga and restoring balance in relationships,<sup>106</sup> retention of children's and young people's DNA following a Youth Court outcome may be considered inconsistent with the objective of recognising and providing for tikanga Māori.

### *Is retaining DNA following a Youth Court outcome justifiable?*

21.57 In the previous chapters, we identify a clear public interest in the maintenance of DNA databanks and the identification of suspects in unsolved crime, particularly serious offending. Given that people aged between 15 and 24 years (14 per cent of the population) account for as much as 40 per cent of criminal justice apprehensions, the collection and retention of young people's DNA on the proposed DNA databank would likely generate more intelligence leads.<sup>107</sup>

21.58 However, there is also a strong public interest in the successful rehabilitation and reintegration of children and young people into society, which promotes public safety in the long term.<sup>108</sup> Beyond this public interest, there are also the individual interests of children and young people to consider. In *DP v R*, the Court of Appeal recognised that UNCROC and the statutory rights conferred on children and young people “do not end with completion of the trial” but continue to play a central part in discretionary decision making.<sup>109</sup> That case concerned an application for permanent name suppression. We consider it has equal application in relation to decisions to collect and retain a child's or young person's DNA for databank purposes following a conviction or a proved charge.

21.59 Ultimately, the question is whether the CIBS Act properly balances these different public and individual interests. Given the evidence on youth offending (summarised at

<sup>105</sup> United Nations Committee on the Rights of the Child *General comment No 24 (2019) on children's rights in the child justice system* UN Doc CRC/C/GC/24 (18 September 2019) at [69] and [71].

<sup>106</sup> Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (rev ed, Huia Publishers, Wellington, 2016) at 33–36. Mead discusses the centrality of manaakitanga even in the context of disputes and the importance of maintaining whanaungatanga and restoring balance in the take-utu-ea framework.

<sup>107</sup> Peter Gluckman *It's never too early, never too late: A discussion paper on preventing youth offending in New Zealand* (Office of the Prime Minister's Chief Science Advisor, 12 June 2018) at 6.

<sup>108</sup> Recognised in *P (CA479/2015) v R* [2016] NZCA 128 at [52] and [54]; and *R v Mahoni* (1998) 15 CRNZ 428 (CA) at 436–437.

<sup>109</sup> *DP v R* [2015] NZCA 476, [2016] 2 NZLR 306 at [38].

paragraphs 21.7–21.11 above), retaining a child’s or young person’s DNA on a databank would likely be justified in relation to life-course persistent offenders (that is, where there is evidence of propensity to recidivism and therefore a significant threat to public safety) and in relation to serious violent and sexual offending.<sup>110</sup> However, life-course persistent offenders are a small group.<sup>111</sup> We also note that most children and young people who appear in court do so for property offences rather than violent or sexual offending.<sup>112</sup>

### **Discharges under section 282 of the Oranga Tamariki Act**

21.60 We are particularly concerned about the retention of profiles from young people following a section 282 discharge where the charge has been proved. This “somewhat alter[s] the ‘clean slate’ nature of the s 282 discharge” and “sits uneasily with the principle of reintegration”.<sup>113</sup> It is also inconsistent with the effect of discharges without conviction in the adult jurisdiction, which amounts to a charge being “quashed” and, as a result, Police being unable to obtain or retain that person’s DNA for databank purposes.<sup>114</sup>

### **Reliance on “proved charges”**

21.61 We are also concerned about the reliance on a Youth Court finding that a charge is “proved”. Such findings usually follow an admission made in the informal context of a family group conference.<sup>115</sup> However, as the Youth Court observed in *Police v JL*:<sup>116</sup>

An admission does not necessarily mean the young person acknowledges the legal ingredients of the offence. Admitting at the [family group] conference for example that he “took” a ball is not the same as admitting to theft.

21.62 It is questionable whether it is appropriate to retain DNA following an “admission” at a family group conference. This is different to a finding of guilt in the adult jurisdiction, which is premised on an understanding that “the standard of proof has been satisfied, through adversarial hearing or through plea of guilty, resulting in that person accepting or being attributed legal responsibility for the particular offence”.<sup>117</sup> It is also questionable given that, when children and young people do admit to offending in the informal context of a family group conference, they are unlikely to understand the consequences this will have in terms of their DNA being collected and retained on a

<sup>110</sup> Liz Campbell and Nessa Lynch “Competing Paradigms? The Use of DNA Powers in Youth Justice” (2012) 12 YJ 3 at 12.

<sup>111</sup> Peter Gluckman *It’s never too early, never too late: A discussion paper on preventing youth offending in New Zealand* (Office of the Prime Minister’s Chief Science Advisor, 12 June 2018) at 18.

<sup>112</sup> In 2019, the most serious charge faced by a child or young person was most likely to be theft (21 per cent), burglary (18 per cent), robbery (16 per cent) or assault (15 per cent): Tāhū o te Ture | Ministry of Justice “Children and young people in court: Data notes and trends for 2019–2020” (2020) at 2. Far fewer children and young people appeared in relation to sexual assault and related offending (3.5 per cent) and only three (0.2 per cent) appeared in relation to homicide and related offences: Tatauranga Aotearoa | Stats NZ “Children and young people charged in court – most serious offence calendar year” (2020) <nzdostat.stats.govt.nz>.

<sup>113</sup> Nessa Lynch (ed) *Criminal Law – Youth Justice* (online ed, Thomson Reuters) at [20.Y.9.4.1(3)].

<sup>114</sup> Sentencing Act 2002, s 106. In *Police v JL* [2006] DCR 404 (YC) at [39], the Court observed that “[b]y its very nature ... a s 106 discharge is ‘without conviction’ and the provisions of the [Criminal Investigations (Bodily Samples) Act 1995] can not apply”.

<sup>115</sup> *Police v JL* [2006] DCR 404 (YC) at [20].

<sup>116</sup> At [26].

<sup>117</sup> Liz Campbell and Nessa Lynch “Competing Paradigms? The Use of DNA Powers in Youth Justice” (2012) 12 YJ 3 at 9.

databank and the impact that this will have on their privacy and bodily integrity and, for Māori, the impact in terms of tikanga associated with personal tapu, mana and whakapapa. Given the over-representation of Māori in the youth justice system, Māori young people are particularly vulnerable to these consequences. Some commentators argue that:<sup>118</sup>

Bearing in mind that the clientele of the youth justice system are invariably disadvantaged and less educated than non-offending young people, there is a responsibility to ensure that young people understand the process and consequences of making admissions, including in particular the effects on genetic privacy of DNA retention. Legal or other independent advice should be available to the young person.

### Excessive, inconsistent and complex retention periods

21.63 We have concerns regarding the length of the retention periods for profiles of children and young people as well as the inconsistent and complex application of the rules.

#### Excessive retention periods

21.64 We have concerns regarding the 10-year retention period for profiles of young people who receive an order under section 283 of the Oranga Tamariki Act or who are sentenced to a community-based sentence in the adult jurisdiction. We also have concerns regarding “indefinite” retention following a sentence of imprisonment, as outlined in Chapter 20, although we accept in principle the justification for retaining profiles of children and young people sentenced to imprisonment on a long-term basis, given that such sentences will only be imposed in the most serious cases.

21.65 The 10-year retention period was recommended by the Select Committee considering the proposed 2009 amendments on the basis of “evidence that if a young offender reaches the age of 25 without re-offending the chance of his or her re-offending is very small”.<sup>119</sup> A 10-year retention period was chosen, therefore, as it would enable DNA profiles to be retained, even for the youngest offenders captured by the scheme, until they are in their mid-20s.<sup>120</sup> While we recognise the growing scientific evidence that adolescent development continues well into the third decade,<sup>121</sup> we do not consider that this alone, without any evidence of propensity to recidivism, justifies a 10-year retention period for a first section 283 order or conviction.

21.66 We also question whether a 10-year retention period is necessary to capture recidivist offenders. In Chapter 20, we explain that the seven-year period adopted by the Criminal Records (Clean Slate) Act 2004 was based on a study of reoffending among people who received a non-custodial sentence in 1986.<sup>122</sup> That research indicated that most reoffending occurs within five years of the first conviction and that younger offenders

<sup>118</sup> At 10 (citations omitted).

<sup>119</sup> Criminal Investigations (Bodily Samples) Amendment Bill 2009 (14-2) (select committee report) at 6.

<sup>120</sup> Tāhū o te Ture | Ministry of Justice *Departmental Report for the Justice and Electoral Committee: Criminal Investigations (Bodily Samples) Amendment Bill* (June 2009) at [141].

<sup>121</sup> Peter Gluckman *It's never too early, never too late: A discussion paper on preventing youth offending in New Zealand* (Office of the Prime Minister's Chief Science Advisor, 12 June 2018) at 13.

<sup>122</sup> This research looked at the reconviction of offenders who had a non-custodial sentence imposed in 1986 and no previous custodial sentences or convictions of sexual offences. See Criminal Records (Clean Slate) Bill 2001 (183-2) (select committee report) at 3–5 and Appendices B and D.

“are reconvicted faster and more often than older offenders”.<sup>123</sup> Table 4 below summarises the findings of that research in respect of children and young people.<sup>124</sup>

TABLE 4: REOFFENDING RATES FOR 10–17 YEAR OLDS WHO RECEIVED A NON-CUSTODIAL SENTENCE IN 1986		
Years since non-custodial sentence	Percentage reconvicted in that year	Total percentage reconvicted
1	39.3	39.3
2	12.4	51.7
3	7.2	58.9
4	3.7	62.6
5	1.9	64.5
6	1.6	66.1
7	1.3	67.4
8	0.7	68.1
9	0.7	68.8
10	0.6	69.4

21.67 While this research is now quite old, the most recent available statistics on youth reoffending provide some support for these findings. Research published in 2019 identifies that of all those aged 14–16 with a charge proved in the Youth Court in 2015/2016:<sup>125</sup>

- (a) 49 per cent reoffended within one year; and
- (b) a further 16 per cent reoffended in the second year, bringing the total percentage of those aged 14–16 who reoffended within two years to 65 per cent.

21.68 While this data only covers reoffending in the first two years following a proved charge, it broadly aligns with the 1986 data. Both studies identify that a significant proportion of people reoffend in the first year, with a significant decrease in the rate of “new” reoffenders in the second year. It is reasonable to expect that the continued downward trend of new reoffenders identified in the 1986 data would also occur today.

<sup>123</sup> At 5.

<sup>124</sup> Table 4 is based on the figures reported in relation to people aged between 10 and 17 years old in Appendix D of the Criminal Records (Clean Slate) Bill 2001 (183-2) (select committee report) which reports the percentage of people given a non-custodial sentence in 1986 who were not reconvicted in each of the next 15 years, by age.

<sup>125</sup> See the spreadsheet entitled “Youth Justice Indicators August 2019 Workbook” found in Tāhū o te Ture | Ministry of Justice “Research and Data: Youth Justice Indicators” (4 March 2020) <[www.justice.govt.nz/](http://www.justice.govt.nz/)>. “Reoffended” here includes a subsequent Youth Court finding that a charge is “proved”.



21.69 This suggests that a long retention period of 10 years for a first charge proved in the Youth Court is unnecessary. Those who will reoffend are much more likely to do so in the first few years. When a person does reoffend, they have demonstrated their propensity to recidivism, which would warrant a longer retention period. In the absence of reoffending in the first few years following a conviction, we do not consider it is justified to continue to retain a young person's DNA profile for a full 10 years.

### **Complex and inconsistent retention rules**

- 21.70 In addition to these issues, we also note that the retention periods are inconsistent, as illustrated in Table 3 above. Young people are subject to complex retention periods for offending and reoffending if they provide a suspect sample or a sample on arrest or intention to charge. However, if a child or young person is issued a databank compulsion notice, their profile is retained indefinitely with no grounds for review.
- 21.71 A further inconsistency is that a profile can only be retained following a discharge under section 282 of the Oranga Tamariki Act if a sample was required on arrest or intention to charge. Police has no authority to issue a databank compulsion notice in relation to a section 282 order.
- 21.72 In our view, the inconsistent application of the retention rules based on how the sample was originally obtained is not justified. The complexity of the rules for young people is also unnecessary and undesirable.

## **RESULTS OF CONSULTATION**

21.73 Several submitters raised concerns with the current regime as it applies to children and young people, including the Office of the Children's Commissioner (OCC), the Human Rights Commission (HRC), YouthLaw Aotearoa (YouthLaw), the Privacy Commissioner, the New Zealand Law Society (NZLS), the New Zealand Bar Association (endorsing NZLS's submission in its entirety), Te Hunga Rōia Māori o Aotearoa | The Māori Law Society, the Public Defence Service (PDS) and Associate Professor Nessa Lynch.

### **Collecting samples from children and young people**

21.74 OCC, HRC and YouthLaw expressed concern about requiring samples from young people on arrest or intention to charge. These submitters considered that the current law is inconsistent with the youth justice principles of the Oranga Tamariki Act and UNCROC. As OCC submitted:

There is no reference to consent and there is no oversight role for the courts. The key concern with this is the potential for discrimination, and the lack of protection to support the vulnerabilities young people face. An officer may simply require a young person to provide a sample, and is entitled to use reasonable force to obtain if necessary. This stands in contrast to a key principle of the Oranga Tamariki Act, which states that the vulnerability of children and young people entitles a child or young person to special protection during an investigation.

- 21.75 These submitters did not support Police's current policy of treating age as a relevant factor in support of requiring a sample on arrest or intention to charge. HRC and YouthLaw considered that the high proportion of databank links for those aged 14–16 does not alone provide a strong enough justification for age discrimination. OCC also did not consider age discrimination to be justified given that young people in the justice system often face significant challenges and that it is out of step with the focus on reducing youth offending and promoting rehabilitation. OCC submitted that obtaining databank samples "may tie young persons into the justice system rather than providing them with an exit".
- 21.76 HRC supported a statutory presumption against obtaining (and retaining) DNA samples from people under the age of 18. Exceptions to this presumption, HRC said, should be supported by special protections that recognise the vulnerability of children and young people and reflect the youth justice principles of non-criminalisation and reintegration. OCC recommended reviewing Police practices with a focus on promoting the welfare and best interests of children and young people. It said that a person's age should no longer be regarded as a relevant factor in favour of deciding whether to obtain a sample.

### Retaining profiles from child and young offenders

- 21.77 HRC, OCC, YouthLaw and Te Hunga Rōia were concerned about the retention of a young person's DNA profile on a DNA databank in circumstances where the charge against them has been dealt with by way of section 282 discharge under the Oranga Tamariki Act. Te Hunga Rōia submitted that a young person's sense of time is an important factor, observing that:

Sometimes, DNA or fingerprint evidence can surface long after the actual offence is committed, and sometimes after a young person has been before the Court on other charges, completed a rehabilitative plan and been discharged. The issues which lead to this can often be resource related in terms of Police investigations, but holding on to DNA samples beyond a s 282 discharge can lead to this sort of circumstance arising, where the young person is bought back into the system.

- 21.78 Several submitters were also concerned about the indefinite retention of a profile if a young person is sentenced to imprisonment or is the subject of a databank compulsion notice. OCC submitted there needs to be serious consideration of the purpose of retaining profiles for an extended length of time, taking into account the need to promote the welfare and best interests of children and young people and the youth justice principles of rehabilitation and reduced youth offending. This should include consideration of a review process to reduce retention periods or to obtain a 'clean slate'. OCC submitted:

We have been told by children and young people in the criminal justice system that they feel as if no one expects anything of them, or worse, everyone expects them to make bad choices and to fail. They told us about how they are not being given the chance to step up. Children and young people, who have had contact with the criminal justice system, should not be made to feel like they have been written off. They need to feel supported and valued, which includes cutting ties with the system where possible.

- 21.79 A greater focus on rehabilitation and reintegration for children and young people was also supported by NZLS, PDS, the Privacy Commissioner and Nessa Lynch. The Judges of the District Court also commented that regulation of the DNA databanks to increase the emphasis on rehabilitation, particularly for young people, would be desirable.
- 21.80 Police had no concerns regarding indefinite retention if a person is convicted as per the current legislation. However, it noted the two inconsistencies in the youth regime explored above, namely the different definitions of “qualifying offence” and “relevant offence” and inconsistency in relation to retention following a section 282 discharge.

### Disproportionate impact on Māori

- 21.81 Several submitters, including Te Hunga Rōia, HRC, OCC, YouthLaw and PDS, were particularly concerned about the disproportionate impact of the current regime on young Māori. Te Hunga Rōia submitted that the over-representation of young Māori shows “the importance that Policing [practice] can have in an area like DNA collection”. While the law can be changed, Te Hunga Rōia’s concern is also in the way the law is policed. To the extent that there is discretion to be exercised in the collection of DNA, it noted it is “almost certain” that, against that context, the discretion will more often than not be exercised against Māori interests. Given the issues that arise from forensic DNA phenotyping and familial searching, the implications of discretionary power being exercised by the Police has implications for whānau, hapū and iwi. Te Hunga Rōia submitted that retaining profiles following a section 282 discharge in particular:

... is another lever which is capable of continuing to compound Māori criminal justice rates, or conversely if pulled in line with the scheme of the Oranga Tamariki Act as well as the United Nations Convention on the Rights of the Child, and the Beijing Rules, could in a principled way, help stem the flow of Māori in the criminal justice pipeline.

- 21.82 In order for the law to be constitutionally sound, Te Hunga Rōia submitted that consideration must be given to not just the principles of the Treaty but also to UNCROC. Te Hunga Rōia supported a commitment to giving Māori a central role in oversight (discussed in Chapter 5) and greater accountability to Māori, similar to the requirements imposed under section 7AA of the Oranga Tamariki Act, described above.
- 21.83 HRC submitted that the current law is inconsistent with the youth justice principle concerned with strengthening and fostering the ability of whānau, hapū and iwi to deal with offending by their rangatahi and tamariki.<sup>126</sup> YouthLaw submitted that the Crown has an obligation under the Treaty to address this disparity “rather than making it worse by cycling young people back into the criminal justice system”.

### Comments from Youth Court Judges

- 21.84 We received comments from Judge John Walker, Principal Youth Court Judge, with input from nine senior Youth Court Judges, including Ngā Kōti Rangatahi Judges. The Judges favoured a more nuanced regime retention of DNA profiles from children and young people. They were of the view that:
- (a) No child or young person should have their DNA retained if the charge against them is disposed of under section 282 of the Oranga Tamariki Act. The Judges observed that such orders are made when the Court is satisfied that the child’s or young person’s general culpability in the widest sense is such that their case is to

<sup>126</sup> Oranga Tamariki Act 1989, s 208(2)(c) and (f)(i).

be treated as though “the charge had never been filed”. They noted that the public interest (which includes public safety) is one of the considerations that must be weighed up by the Judge in determining whether a section 282 order is appropriate. They commented that:

We view the wording of the provision as a clear indication that Parliament intended to enable children and young people to have a clean slate moving forward in appropriate circumstances.

- (b) Where a child’s or young person’s case is disposed of by way of an order under section 283 of the Oranga Tamariki Act, the Judge should have discretion at disposition to order the retention of DNA if appropriate. The Judges noted that, if orders are made under section 283, this is because the charges have been proved and the offending is sufficiently serious to warrant a higher-end response. The Judges noted that the focus on diversion and alternative action for young people’s offending means a significant amount of offending does not reach the Youth Court (approximately 80 per cent), and as a result, the risk posed to the community and therefore the public interest in retention can vary. The Judges favoured discretion to address the specific circumstances and nature of the offending. In relation to how long a child’s or young person’s DNA profile should be retained, the Judges would defer to any academic evidence as to appropriate timeframes. They supported a presumption in favour of automatic destruction of DNA when the determined timeframe is concluded.
- (c) Where a charge against a child or young person is transferred to the District or High Court, a more prescriptive arrangement will usually be appropriate.

21.85 The Judges also placed importance on ensuring consistency between the Oranga Tamariki Act and the CIBS Act and on ensuring that tikanga and te ao Māori considerations under the Oranga Tamariki Act are strengthened and supported through the application of the CIBS Act. The value of DNA retention, the Judges considered, must be carefully considered against the infringement of personal privacy, and this is heightened by tikanga considerations.

21.86 The Judges also supported developing best-practice guidelines and processes around the collection of DNA from children and young people. They observed that this must account for cultural considerations and ensure the child or young person is informed, respected and given opportunities to understand the process. The Judges also pointed to the need to ensure that steps are taken to address cognitive limitations in children and young people. We explore these limitations in Chapter 8.

### **Views of young people with experience in the youth justice system**

21.87 In October 2019, we visited Korowai Manaaki Youth Justice residence to seek the views of young people with experience in the youth justice system on the collection and retention of DNA.<sup>127</sup>

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<sup>127</sup> Our process for engaging with young people at Korowai Manaaki Youth Justice Residence is summarised in Chapter 8.

### *Views on DNA collection*

- 21.88 We asked whether there is anything that is confusing about DNA being taken, who should be present when DNA is taken from a young person and whether young people should be able to decide for themselves that Police can take their DNA. These views are explored in detail in Chapter 8 in the context of suspect sampling, but they are also relevant to the collection of databank samples.
- 21.89 Broadly speaking, these young people consistently expressed uncertainty about the DNA collection process, including whether they could refuse to give a DNA sample, why Police were taking a sample and what it was going to be used for. They recognised the vulnerability of their situation and identified a need for effective adult support.

### *Views on DNA retention*

- 21.90 We also sought young people's views on whether DNA information collected by Police should be able to be retained and used again. Many young people thought that DNA should only be used for the investigation in relation to which it was obtained. While a few thought that Police should be able to retain and use DNA in future, most thought that this was unfair. Some were concerned that their DNA could be used to wrongly implicate them in offending. One young person said that it was like giving their information away to strangers.
- 21.91 We also asked how long Police should be able to keep DNA information, why Police might want to keep someone's DNA and whether it would help young people to "go clean" if DNA was destroyed if they didn't reoffend for some time, such as two years.
- 21.92 Views were mixed on how long Police should retain a young person's DNA. Some thought that DNA should be destroyed after the investigation in relation to which it was obtained is concluded. Others suggested a finite time period, such as one month, one year or four years. None of the young people suggested retention periods longer than four years. One young person thought the judge should be able to decide whether it should be retained. Several young people thought that DNA should be destroyed on discharge or once the young person leaves the care of Oranga Tamariki. Others suggested destruction after a period of time if the person has not reoffended.
- 21.93 There were mixed views about whether young people would be encouraged to "go clean" if they knew their DNA would be destroyed if they did not reoffend. Some felt that it would not make a difference, while others felt that it would help them turn a new page in their life.

## **APPROACH IN COMPARABLE JURISDICTIONS**

- 21.94 Comparable jurisdictions adopt a range of approaches to the collection and retention of profiles from young people on DNA databanks.
- 21.95 Some jurisdictions prohibit or restrict the collection of databank samples from children and young people. For example, Australian Commonwealth legislation provides that samples can only be obtained from a child or young person who is convicted of a relevant offence by court order.<sup>128</sup> In Victoria, a police officer can only require a sample

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<sup>128</sup> Crimes Act 1914 (Cth), s 23XWO(2). Similar restrictions also apply in New South Wales, Victoria and the Australian Capital Territory.

from a young person on arrest for a prescribed list of serious offences and must apply to the Children's Court for an order permitting the retention of that sample following their conviction.<sup>129</sup> Similarly, in Canada, DNA samples can only be obtained for the DNA Data Bank by order of the court on sentencing.<sup>130</sup>

21.96 As noted in Chapter 20, all comparable jurisdictions reviewed in this Report adopt an indefinite retention regime for offenders convicted of a qualifying offence. However, most jurisdictions include limited retention periods for children and young people as an exception to the general rule:

- (a) In England and Wales, limited retention periods apply in relation to first-time, minor offences committed by a person who is aged under 18 at the time of the offending. Profiles are retained for five years from the sample being taken if a non-custodial sentence is imposed or for five years after a custodial sentence ends (provided the sentence was for less than five years).<sup>131</sup> These limited retention periods do not apply if the person reoffends within that five-year period.<sup>132</sup>
- (b) In Ireland, profiles of children and young people are removed within four years of the sample being taken if a non-custodial sentence is imposed or within six years of the expiry of a custodial sentence.<sup>133</sup> However, these limited retention periods do not apply if the child or young person is convicted of a serious offence or if they reoffend during the retention period.<sup>134</sup>
- (c) In Scotland, a child's or young person's DNA profile might be retained for a limited period of three years in relation to certain sexual or violent offences if the child is referred to a children's hearing on the ground that they have committed a relevant offence, and an order may be made extending this period by two years.<sup>135</sup>
- (d) Canada operates a nuanced retention regime in respect of young people (over the age of 12 but under the age of 18). If a young person is discharged without conviction, their profile is retained for one year.<sup>136</sup> If a young person is convicted, their profile is retained for three years in relation to minor offending and five years in relation to serious offending, with additional concurrent retention periods to apply in respect of reoffending within that timeframe.<sup>137</sup> However, certain serious violent offences (including murder, manslaughter and aggravated sexual assault) and decisions to impose an adult sentence result in indefinite retention.<sup>138</sup>

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<sup>129</sup> Crimes Act 1958 (Vic), ss 464SE and 464ZFB(1). Similarly, in Tasmania, arrestee samples can only be required by order of a magistrate if the person is aged between 10 and 14: Forensic Procedures Act 2000 (Tas), s 8(3).

<sup>130</sup> Criminal Code RSC 1985 c C-46, s 487.051.

<sup>131</sup> Police and Criminal Evidence Act 1984 (UK), s 63K.

<sup>132</sup> Section 63K(5).

<sup>133</sup> Criminal Justice (Forensic Evidence and DNA Database System) Act 2014 (Ireland), s 84.

<sup>134</sup> Sections 84–85. The limited retention periods do not apply if the offence is one that is triable by the Central Criminal Court or is an offence that is specified in an order made under s 84 as being excluded from the application of s 84 by reason of the nature and seriousness of an offence: s 84(2).

<sup>135</sup> Criminal Procedure (Scotland) Act 1995, ss 18E and 18F.

<sup>136</sup> Youth Criminal Justice Act SC 2002 c 1, s 119(2)(e). If the youth sentence is a conditional discharge, however, the retention period is three years: s 119(2)(f).

<sup>137</sup> Section 119(2)(g)–(j).

<sup>138</sup> Sections 117 and 120(3)(b). See also s 9(1) of the DNA Identification Act SC 1998 c 37.

21.97 In contrast, DNA legislation in Australia does not prescribe limited retention rules for children and young people. Presumably, this is due to the fact that the collection of DNA samples from children and young people itself is often tightly prescribed (discussed at paragraph 21.95 above).

## RECOMMENDATIONS

### Introducing judicial determination of databank sample collection and retention

#### RECOMMENDATIONS

**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.

21.98 In our view, the principles of the youth justice system established under the Oranga Tamariki Act and affirmed in UNCROC warrant enhanced procedural protections for children and young people under new DNA legislation.

21.99 We recommend that DNA samples should only be required from children and young people and used for databank purposes pursuant to a court order. This is consistent with our recommendation in Chapter 8 that a suspect sample should only be obtained pursuant to a suspect compulsion order granted by a Youth Court Judge.

21.100 Where a charge is disposed of in the Youth Court pursuant to a section 283 order, the Youth Court should be able to decide whether to make an order requiring the child or young person to provide a DNA sample for databank purposes or, if a suspect sample has already been obtained from that person, an order authorising the transfer of that person's DNA profile to the offenders index of the proposed DNA databank

(collectively, a “databank order”). If a charge is heard in the adult jurisdiction or a case is transferred from the Youth Court for sentencing under section 283(o) of the Oranga Tamariki Act and the Youth Court Judge has not already made a databank order, the presiding Judge in the adult jurisdiction should also be able to make a databank order.

- 21.101 Police officers should no longer have the power to require DNA samples from children and young people on arrest or intention to charge or to issue databank compulsion notices following a charge proved in the Youth Court or a conviction in the District Court or High Court. In our view, the concerns identified above relating to the vulnerability of children and young people, particularly when in Police custody (at paragraphs 21.41–21.44), the different public and individual interests that must be considered when deciding whether to require a databank sample from a child or young person (at paragraphs 21.57–21.59), the issues with relying on admissions made in family group conferences (at paragraphs 21.61–21.62), as well as the disproportionate impact on Māori (at paragraphs 21.45–21.46) all point to the need for sampling decisions to be made in an independent and impartial court setting.
- 21.102 When deciding whether to make a databank order, the Judge should have regard to the nature and seriousness of the offence and any history of prior offending (see R138 in Chapter 18). The Judge should also be guided by the considerations and principles that apply when exercising youth justice powers under the Oranga Tamariki Act. This will address the current concerns identified above regarding the tension between the youth justice system and the CIBS Act and will ensure that decision making under the new DNA legislation is consistent with other decision making in the youth justice context. Importantly, this will ensure the tikanga Māori considerations in the relevant provisions of the Oranga Tamariki Act, including mana tamaiti (tamariki), whakapapa and whanaungatanga, are taken into account.
- 21.103 Requiring a databank order to be made formally by the court will facilitate transparency and oversight of the impact of the DNA regime on children and young people and on young Māori in particular.
- 21.104 While we appreciate this will increase the Youth Court’s workload, we consider this is justifiable given the policy reasons identified above and the relatively small number of children and young people who appear in court and who receive a section 283 order or an adult sentence (333 in 2019).<sup>139</sup>

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<sup>139</sup> Tāhū o te Ture | Ministry of Justice “Children and young people in court: Data notes and trends for 2019–2020” (2020) at 4.



## Prohibiting retention for discharges under section 282 of the Oranga Tamariki Act

### RECOMMENDATION

#### 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.

21.105 We recommend that, when a charge against a child or young person is disposed of by way of an order under section 282 of the Oranga Tamariki Act, there should be no ability to load their DNA profile to the offenders index, whether or not the Judge is satisfied that the charge was proved. We agree with the Youth Court Judges and the views of submitters that retaining profiles following a section 282 discharge is at odds with the "clean slate" nature of the discharge and is unjustified given the Youth Court's individualised determination that, in all the circumstances of the case, the child's or young person's culpability is such that the charge should be treated as if it had never been filed.

## Taking a rehabilitative approach to retention

### RECOMMENDATIONS

#### 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.

21.106 We recommend clear, simple and consistent retention rules for children and young people with a greater emphasis on rehabilitation. When a Judge makes a databank order, the child's or young person's profile should be retained on the offenders index of the proposed DNA databank for a period of five years unless the offending was sufficiently serious to warrant a sentence of imprisonment in the adult jurisdiction. This reduces the existing retention period from 10 years to five years. We consider that this is more consistent with the evidence of reoffending among youth (see paragraphs 21.66–21.69), which suggests that those who reoffend will do so within the first few years of conviction. If a child or young person reaches the five-year timeframe without reoffending, they can be considered to have successfully reintegrated into society.

- 21.107 If a child or young person is found to have committed a second qualifying offence in that five-year period, the adult retention rules should then apply (under R160, discussed in Chapter 20). If the child or young person has committed a second qualifying offence, their profile should remain on the offenders index for seven years from the date of that conviction and then be removed unless they commit a third qualifying offence within that period or were sentenced to imprisonment. This provides children and young people who were not sentenced to imprisonment a further chance to rehabilitate and have their profile removed from the offenders index.
- 21.108 Where offending is sufficiently serious to result in a sentence of imprisonment in the adult jurisdiction, we consider that the public interest in retaining that child's or young person's DNA profile on the offenders index of the databank outweighs the privacy and other interests for that individual. This is consistent with the current approach under the CIBS Act, except that we recommend, in Chapter 20, removing profiles following a person's death to minimise intrusions on privacy and applicable tikanga Māori.
- 21.109 We have preferred fixed retention periods over the options of granting discretion to the Judge to make their own assessment as to the appropriate retention period or a regime of tiered retention periods based on the type of order made under section 283. While Youth Court Judges have ample expertise in making individualised decisions when disposing of cases involving children and young people, we consider that set retention rules will avoid the risk of inconsistent outcomes, will be less complex and therefore easier to administer and is consistent with the approach taken in most comparable jurisdictions. In terms of a tiered retention regime, we consider this is undesirable given that there may be a range of reasons why a particular section 283 response is chosen that have no bearing on that child's or young person's propensity to recidivism (which is, in our view, the key determining factor in establishing retention periods).
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## CHAPTER 22

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# Investigating missing and unidentified people

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## INTRODUCTION

- 22.1 The previous chapters in this part of the Report address the use of DNA databanks in criminal investigations. However, DNA can also be used for identification purposes in non-criminal investigations, where the identity of a deceased person or of human remains is unknown or where a person is unable to identify themselves due to incapacity.
- 22.2 In these situations, a DNA profile from the unidentified deceased person, human remains or unidentified person can be compared to a DNA profile derived from personal items belonging to a missing person (such as a razor, toothbrush or hairbrush) to see if they match. An unidentified person's DNA profile can also be compared to a DNA profile from a close genetic relative of a missing person. This may result in a *near* match which could also assist with identification.
- 22.3 DNA can be particularly helpful in the context of disaster victim identification, where there may be multiple unidentified deceased people and severely injured people who, due to their injuries, are unable to identify themselves. In rare situations where Police has no leads to help identify an unidentified person, it might also be useful to compare their DNA profile against profiles of known people on a DNA databank.
- 22.4 The CIBS Act only applies to the collection and use of DNA in criminal investigations. The question addressed in this chapter is whether new DNA legislation should also prescribe a regime for the collection and use of DNA for identification purposes.

## CURRENT LAW AND PRACTICE

- 22.5 There is no statutory regime that governs the collection and use of DNA for identification purposes. In the absence of a statutory regime, Police has developed an internal policy, outlined in the *Police Manual*.<sup>1</sup>

### Collecting DNA samples for identification purposes

- 22.6 DNA samples for identification purposes are obtained on a purely voluntary basis, similar to elimination sampling discussed in Chapter 9.

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<sup>1</sup> Ngā Pirihimana o Aotearoa | New Zealand Police "Missing persons" in *Police Manual*; and Ngā Pirihimana o Aotearoa | New Zealand Police "Disaster Victim Identification" in *Police Manual*.

- 22.7 In missing person investigations, the *Police Manual* records that, as a general rule, forensic samples, including DNA samples, should be collected for future identification purposes if the case remains unresolved after one year.<sup>2</sup> However, where a delay of one year may lead to difficulties in locating and collecting suitable forensic material, police officers should “always consider obtaining the specimens early, as part of the general investigation and enquiry process”.<sup>3</sup> Consideration should be given to obtaining specimens of the missing person’s DNA directly from personal items, such as a razor toothbrush or hairbrush, or obtaining DNA samples from a close genetic relative.<sup>4</sup> If no DNA can be obtained from these sources, the *Police Manual* also mentions the possible use of newborn blood spot cards. These are collected at a baby’s birth as part of the Ministry of Health’s Newborn Metabolic Screening Programme. However, these can only be used “if all other sources have been exhausted”.<sup>5</sup> Use of blood spot cards is discussed in Chapter 12.
- 22.8 In relation to disaster victim identification, the *Police Manual* records that DNA can be used for identification purposes, preferably in conjunction with other primary identifiers such as fingerprints and forensic odontology.<sup>6</sup> DNA samples will be collected from all human remains at the post-mortem stage for possible DNA analysis, and when required, DNA profiles will be generated and compared to profiles generated from reference samples collected from personal items of the missing people/potential victims or from relatives.<sup>7</sup>
- 22.9 Police has developed a standard form to be used when obtaining DNA samples from relatives for identification purposes. The standard form records that:<sup>8</sup>
- (a) The person has been asked to consent to Police obtaining a DNA sample by way of mouth (buccal) swab and for a DNA profile to be developed from the sample for comparison with other DNA profiles obtained for the “missing person/disaster victim”.
  - (b) The person providing the sample has been advised and understands that:
    - (i) they do not have to give the sample if they do not wish to;
    - (ii) they can withdraw consent at any time and the sample/profile will be destroyed;
    - (iii) the sample will be analysed on behalf of Police and, along with any information resulting from that analysis, will be held by or on behalf of Police;
    - (iv) the sample and information derived from it will only be used in connection with the reason for the request;

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<sup>2</sup> Ngā Pirihimana o Aotearoa | New Zealand Police “Missing persons” in *Police Manual* at 29.

<sup>3</sup> At 29.

<sup>4</sup> At 29.

<sup>5</sup> At 29.

<sup>6</sup> Ngā Pirihimana o Aotearoa | New Zealand Police “Disaster Victim Identification” in *Police Manual* at 94.

<sup>7</sup> At 95.

<sup>8</sup> Ngā Pirihimana o Aotearoa | New Zealand Police “DNA Elimination Sample Consent Form” (DNA300 – 08/17). This form states that it is to be used for DNA sampling not governed by the CIBS Act, including elimination sampling in the context of criminal investigations and missing person and disaster victim identification.

- (v) the sample and any information derived from it will be destroyed once the information is no longer needed for the purpose it was provided for; and
  - (vi) they may consult a lawyer before deciding whether to consent to the collection of the sample.
- (c) If the person providing the sample is under 18 years of age, their parent or caregiver must also provide consent for the person to provide a sample.

22.10 The *Police Manual* also records that:<sup>9</sup>

Samples taken purely for elimination or identification purposes (Missing Person and [Disaster Victim Identification]) cannot be converted to suspect samples or to obtain a sample for databank purposes. They can only be used for the particular investigation for which they were taken and are not taken to obtain a DNA profile for inclusion on the [DNA Profile Databank].

### Use of databanks for identification purposes

22.11 The DNA Profile Databank (DPD) and the Temporary Databank established under the CIBS Act are designed to be used in criminal investigations, not for identification purposes. Section 27 describes the purposes for which information on the DPD can be accessed, and this is limited to “forensic comparison in the course of a criminal investigation”.<sup>10</sup> Similarly, information on the Temporary Databank can only be accessed in order to “compare with unidentified DNA information obtained from the scenes of offences under investigation”.<sup>11</sup>

22.12 Therefore, it is not possible to use the DPD or Temporary Databank to identify an unidentified person unless Police suspects a person’s death or inability to identify themselves is associated with criminal offending. If that was the case, the CIBS Act could be interpreted as permitting a comparison of the unidentified person’s DNA profile against profiles on the DPD or Temporary Databank.

22.13 Currently, there is no missing or unidentified person databank. However, the latest Forensic Science Services Agreement between Police and ESR makes provision for the development of such a databank. While we understand that this is still in the early planning stages, that agreement records that:

- (a) ESR will analyse family reference samples or other samples from deceased people and store these on the missing persons databank;
- (b) ESR will establish protocols regarding storage, analysis and retention of samples; and
- (c) profiles on the databank will be able to be compared with other profiles on the missing persons databank as well as profiles on the Crime Sample Databank, DPD and the Temporary Databank.

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<sup>9</sup> Ngā Pirihimana o Aotearoa | New Zealand Police “DNA Sampling” in *Police Manual* at 46.

<sup>10</sup> Criminal Investigations (Bodily Samples) Act 1995, s 27(1)(a).

<sup>11</sup> Section 24R(1)(a).

## ISSUES

22.14 There are two issues with the current situation:

- (a) The regime for obtaining DNA samples for identification purposes (the identification sampling regime) lacks certainty, transparency and accountability.
- (b) The CIBS Act's restrictions on the use of the DNA databanks for identification purposes creates inconsistency and underutilises the databanks.

### Regime lacks certainty, transparency and accountability

22.15 Because the identification sampling regime is not prescribed in legislation, it lacks certainty and transparency. Police does not have clear statutory powers to obtain samples for identification purposes by consent or otherwise. This might become particularly problematic in situations where a person is unable to identify themselves due to incapacity. In these situations, it may be very likely that the person concerned lacks the ability to provide informed consent to the collection of a DNA sample.<sup>12</sup> Because they are unidentified, the consent of another responsible adult cannot be relied on, as is the case in the context of elimination sampling, for example (discussed in Chapter 9).

22.16 There is also a lack of clarity as to Police's power to request a DNA sample to be taken from an unidentified deceased person for identification purposes. A pathologist may take bodily samples if they believe it is necessary for a post-mortem of a body directed by a coroner.<sup>13</sup> Post-mortems are conducted for the purpose of enabling the coroner to decide whether to open an inquiry or to enable completion of an inquiry into the death concerned.<sup>14</sup> One of the purposes of coronial inquiries is to establish, so far as possible, the person's identity.<sup>15</sup> This would appear to authorise the pathologist to collect a DNA sample for identification purposes when conducting a post-mortem, but there is no express power to do so.

22.17 The identification sampling regime also lacks accountability. Because identification sampling is based on consent, there is no independent oversight in the form of court approval. There are also no clear statutory consequences for contravening Police policy or using identification samples for an improper purpose (such as comparing a profile generated from an identification sample to an unrelated crime scene profile).<sup>16</sup> The lack of reporting requirements for Police and the absence of independent auditing also make it difficult to monitor the regime and ensure the correct procedures are followed.

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<sup>12</sup> We discuss the concept of a person who lacks the ability to consent to provide a DNA sample in Chapters 8, 9 and 11.

<sup>13</sup> Coroners Act 2006, s 47(1).

<sup>14</sup> Section 31.

<sup>15</sup> Section 57(2)(b).

<sup>16</sup> Evidence obtained as the result of the improper use of a DNA sample obtained for identification purposes may constitute improperly obtained evidence under s 30 of the Evidence Act 2006. However, this will not necessarily lead to exclusion of that evidence. According to s 30(2)(b) of that Act, exclusion must be:

... proportionate to the impropriety by means of a balancing process that gives appropriate weight to the impropriety and takes proper account of the need for an effective and credible system of justice.

## Restrictive use of the DNA databanks for identification purposes

22.18 DNA databanks, even if established for criminal investigation purposes, can provide a valuable source of intelligence in the identification of unidentified people.<sup>17</sup> As noted above, whether the DPD and Temporary Databank can be used for identification purposes depends on whether the investigation involves criminal offending. This creates an arbitrary distinction. It prevents Police from utilising available intelligence when trying to identify victims of disasters and people who have died in non-suspicious circumstances. Further, as we observed in the Issues Paper, it can be difficult for police officers to know at the outset whether an investigation involves criminal offending.<sup>18</sup> This can create uncertainty as to the appropriate course of action for Police to take upon discovery of an unidentified human body where a DNA profile might assist in identification.

## APPROACH IN COMPARABLE JURISDICTIONS

22.19 It appears that all comparable jurisdictions (Australia, the United Kingdom, Ireland and Canada) permit the use of DNA databanks established for criminal investigations to identify unknown people. Australia, Ireland and Canada maintain indexed DNA databanks that have separate indices for investigative purposes.

22.20 In Australia, the National Criminal Investigation DNA Database (NCIDD), as well as the databanks in most states and territories, includes a “missing persons” index and an “unknown deceased persons” index.<sup>19</sup> The missing persons index includes profiles of missing people as well as relatives of missing people who have volunteered a sample. Profiles on the missing persons and unknown deceased persons indices can be compared against all other profiles on the databank.<sup>20</sup>

22.21 In Ireland, DNA legislation prescribes a regime for obtaining samples from people or from unknown deceased bodies for identification purposes.<sup>21</sup> Samples may be obtained in three scenarios:<sup>22</sup>

- (a) In the case of a missing person (including following a natural or other disaster), samples can be taken from the clothing or other belongings of that person or from a relative of the missing person with their consent.

<sup>17</sup> See, for example, Case 4 described in National DNA Database Strategy Board *Annual Report 2017–2018* (Home Office, February 2019) at 49–50.

<sup>18</sup> Issues Paper at [56] and [10.68(e)].

<sup>19</sup> Crimes Act 1914 (Cth), s 23YDAC definition of “Commonwealth DNA database system”; Crimes (Forensic Procedures) Act 2000 (NSW), s 90 definition of “DNA database system”; Crimes Act 1958 (Vic), s 464(2) definition of “DNA database system”; Police Powers and Responsibilities Regulation 2012 (Qld), reg 4; Criminal Investigation (Identifying People) Regulations 2002 (WA), reg 5B(2); Criminal Law (Forensic Procedures) Act 2007 (SA), s 40 definition of “DNA database system”; Forensic Procedures Act 2000 (Tas), s 3 definition of “DNA database system”; and Crimes (Forensic Procedures) Act 2000 (ACT), s 94 definition of “DNA database system”. The exception is the Northern Territory, where legislation authorises the maintenance of a database but separate indices are not prescribed: Police Administration Act 1978 (NT), s 147.

<sup>20</sup> Crimes Act 1914 (Cth), s 23YDAF; Crimes (Forensic Procedures) Act 2000 (NSW), s 93; Crimes Act 1958 (Vic), s 464ZG; Police Powers and Responsibilities Regulation 2012 (Qld), sch 1; Criminal Law (Forensic Procedures) Act 2007 (SA), s 45; Forensic Procedures Act 2000 (Tas), s 54; and Crimes (Forensic Procedures) Act 2000 (ACT), s 97.

<sup>21</sup> Criminal Justice (Forensic Evidence and DNA Database System) Act 2014 (Ireland), pt 6.

<sup>22</sup> Sections 48–50.

- (b) In the case of a person who is seriously ill or severely injured and who, by reason of that illness or injury is unable to identify themselves, a sample can be taken from that person but only with the authorisation of the High Court.
  - (c) In the case of an unknown deceased person, a sample can be taken from that person with the authorisation of the Coroner to whom the death is reported.<sup>23</sup>
- 22.22 Samples are obtained to generate a DNA profile to be entered in the missing and unknown persons index of the DNA Database System. Profiles on that index may be compared with other profiles on that index as well as profiles entered in the crime scene index and reference index “but only for the purpose of finding or identifying the missing person, the unknown person or the unknown deceased person concerned”.<sup>24</sup>
- 22.23 In Canada, DNA legislation was amended in 2018 to create three new indices of the National DNA Data Bank to assist in the investigation of missing people and human remains:<sup>25</sup>
- (a) The missing persons index, which contains profiles of missing persons, including profiles derived from DNA obtained from their personal effects.
  - (b) The relatives of missing persons index, which contains profiles of relatives who provided a DNA sample by consent for the purpose of assisting in “confirming the identity of a person whose DNA profile is contained in the missing persons index or human remains index”.
  - (c) The human remains index, which contains profiles derived from human remains.
- 22.24 Profiles can only be added to the missing persons index or relatives of missing persons index if the Commissioner “is satisfied that other investigative procedures have been tried and have failed or are unlikely to succeed, or that the urgency of the situation requires the comparison of the profile to others”.<sup>26</sup> Profiles on the missing persons and human remains indices can be compared to all other profiles on the National DNA Data Bank, while profiles on the relatives of missing persons index can only be compared with profiles on the missing persons index and the human remains index.<sup>27</sup>
- 22.25 In the United Kingdom, legislation does not prescribe the use of the DNA databanks for identification purposes, although it appears profiles from unknown deceased people are regularly compared against profiles on the National DNA Database (NDNAD).<sup>28</sup> A separate Missing Persons Database and a Vulnerable Persons DNA Database have also been established to keep profiles provided by consent for identification purposes separate from profiles obtained on arrest for the NDNAD.<sup>29</sup> The Missing Persons Database holds profiles derived from samples obtained from the belongings of people

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<sup>23</sup> Legislation governing forensic procedures in Western Australia and South Australia also make specific provision for conducting a forensic procedure on a deceased person for identification purposes: Criminal Law (Forensic Procedures) Act 2007 (SA), s 55; and Criminal Investigation (Identifying People) Act 2002 (WA), s 21.

<sup>24</sup> Criminal Justice (Forensic Evidence and DNA Database System) Act 2014 (Ireland), s 68(8).

<sup>25</sup> DNA Identification Act SC 1998 c 37, s 5(4.2)–(4.4).

<sup>26</sup> Section 5.3(2)(b).

<sup>27</sup> Section 5.5(1)–(2).

<sup>28</sup> See, for example, Case 4 described in National DNA Database Strategy Board *Annual Report 2017–2018* (Home Office, February 2019) at 49–50.

<sup>29</sup> National DNA Database Strategy Board *Biennial Report 2018–2020* (Home Office, September 2020) at 28.



who have gone missing or from their close relatives. As of 31 March 2020, there were 1,879 records in the Missing Persons Database, and in the 2019–2020 reporting year, the database produced 22 matches.<sup>30</sup> The Vulnerable Persons DNA Database contains profiles from people who are at risk (or who consider themselves at risk) of harm and have asked for their profile to be added.<sup>31</sup> If a person subsequently goes missing, their profile can be checked against the NDNAD. As of 31 March 2020, there were 5,656 profiles on the Vulnerable Persons DNA Database.<sup>32</sup>

## RESULTS OF CONSULTATION

- 22.26 We did not seek specific feedback on the use of DNA databanks for identification purposes in the Issues Paper, given that non-criminal investigations fall outside the scope of our terms of reference. However, we did note that the option of establishing a DNA database system put forward in the Issues Paper (and ultimately recommended in Chapter 4) could be structured to help address the broader issues around the use of DNA for identification purposes.<sup>33</sup>
- 22.27 We nevertheless received some submissions that addressed the use of DNA for identification purposes. One individual considered that a missing person database could be useful. The Auckland District Law Society Criminal Law Committee, Sue Petricevic and another individual considered that indirect sampling (obtaining a DNA sample from a person's personal items, such as a toothbrush) should only be used when a sample cannot be obtained any other way, such as when a person is missing or deceased.
- 22.28 Police also signalled its support for a statutory regime for obtaining samples relating to missing persons and disaster victim cases, which could be similar to a statutory regime for elimination sampling.
- 22.29 In relation to storage and retention more generally, discussed in Chapter 20, Karaitiana Taiuru submitted that legislation must reflect the fact that it is culturally inappropriate to leave DNA profiles of dead people in the same system as living people and to cross-reference the living with the dead.

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<sup>30</sup> At 28.

<sup>31</sup> At 30.

<sup>32</sup> At 30.

<sup>33</sup> Issues Paper at [56]–[58] and [10.68(e)].

## RECOMMENDATIONS

### Establishing a statutory regime for identification sampling

#### RECOMMENDATION

**R170**

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

22.30 We recommend the collection and use of DNA samples for identification purposes be prescribed in new DNA legislation. While this is strictly outside the terms of reference of our review, we consider it would be an appropriate and efficient use of resources to expand the new DNA legislation and the role of the proposed DNA databank so that it can also be utilised for identification purposes. Given the issues with the current identification sampling regime identified above, we also consider there is a strong argument for clarifying the powers police officers have to obtain DNA samples for identification purposes and regulating the collection and use of such samples. This will ensure sampling for identification purposes is certain, transparent and accountable. It also meets our broader objectives of ensuring the DNA regime is fit for purpose, constitutionally sound and accessible.

### Obtaining samples in relation to missing people

#### RECOMMENDATIONS

**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.

22.31 We recommend a clear statutory power to obtain, by informed consent, a DNA sample from a close family member for identification purposes.<sup>34</sup> This power could be exercised during a missing person investigation so that Police has a family reference sample

<sup>34</sup> We have not limited this to close genetic relatives, because if a sample is obtained from a biological child of a missing person, a sample might also be obtained from the other biological parent of that child for elimination purposes: Ngā Pirihiimana o Aotearoa | New Zealand Police “Disaster Victim Identification” in *Police Manual* at Appendix 4b.

should it be required in future. It could also be exercised to assist with disaster victim identification or upon the discovery of an unidentified deceased person or human remains. We recommend a consent-based process similar to that recommended for elimination sampling in Chapter 9. Restrictions on the use of family reference samples discussed below should ensure that such samples are not used for an improper purpose.

- 22.32 If a person is in possession of personal items believed to belong to or to have been used by the missing person, Police may request the use of such items for the purpose of obtaining a DNA sample in relation to the missing person. We do not recommend new search powers in situations where consent is not forthcoming. If a police officer suspects a missing person investigation may involve criminal offending, they may be able to rely on search powers under the Search and Surveillance Act 2012. We discuss the extent of these powers in relation to indirect sampling in Chapter 12. Granting additional search powers to obtain material when no offence is suspected would constitute a significant privacy intrusion and engage tikanga Māori, particularly if the missing person may be deceased, given the high level of tapu that attaches to the belongings of the dead according to tikanga.<sup>35</sup>
- 22.33 Given we did not consult on this possibility in the Issues Paper, we do not recommend such a power here.

### Obtaining samples from people who cannot identify themselves

#### RECOMMENDATIONS

##### 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.

<sup>35</sup> Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (rev ed, Huia Publishers, Wellington, 2016) at 54–55.

- 22.34 We recommend that new DNA legislation include a power to obtain a DNA sample in relation to an unidentified person. This could be used, for example, to identify people who are seriously injured following a natural disaster and who are unable to identify themselves. However, we consider that obtaining a DNA sample from a person who is in such a condition constitutes a significant privacy intrusion, even if a sample is obtained indirectly. We therefore recommend that a court order be required to authorise obtaining a sample from an unidentified person. This would align the regime with that proposed for indirect sampling in criminal investigations, discussed in Chapter 12.
- 22.35 Before making an order, the Judge must be satisfied that the person is unable to identify themselves and that this inability is likely to endure for a prolonged period. This might include, for example, a person who has suffered a serious injury or illness or a child who is very young. This should ordinarily require the evidence of a registered medical practitioner. The Judge must also be satisfied that it is in the best interests of the person to be identified and that, where appropriate, the unidentified person has been consulted and does not object to the sample being obtained.

### Obtaining samples from unidentified deceased people

#### RECOMMENDATION

#### R176

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

- 22.36 We recommend a new power to obtain a DNA sample from an unidentified deceased person for identification purposes, with the authorisation of the responsible coroner. While the Coroners Act 2006 includes a power to obtain bodily samples for the purposes of a post-mortem (described at paragraph 22.16 above), we think it is desirable to include a clear statutory power to obtain DNA samples from unidentified deceased people for the specific purpose of identifying the deceased person, similar to the approach in Ireland. This power could be included in new DNA legislation or in the Coroners Act.
- 22.37 The collection and use of DNA samples from a deceased person has significant implications in terms of tikanga, given the high level of tapu of deceased people. As we note in Chapter 3, the Coroners Act recognises this and provides opportunities for tikanga-based practices where appropriate.<sup>36</sup> Any power in new DNA legislation to obtain a DNA sample from an unidentified deceased person should also address these considerations.

<sup>36</sup> Coroners Act 2006, s 3. See, for example, s 50 requiring a coroner to notify immediate family (which includes “whānau”) of retention and rights to request return of bodily samples.

## Using samples obtained for identification purposes

### RECOMMENDATIONS

**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.

22.38 Samples obtained for identification purposes should only be used for the purpose for which they were obtained. We therefore recommend that DNA profiles from family reference samples should be stored on the relatives index of the proposed DNA databank and only compared against profiles on the missing and unidentified index or the unidentified deceased index. As each person's DNA is unique, such comparisons will seek to identify a *near* match, not a direct match.

22.39 Profiles generated from DNA samples obtained in relation to a missing person or an unidentified person should be stored on the missing and unidentified index. If a DNA sample is taken from the body of an unidentified deceased person, the DNA profile generated from that sample should be stored on the unidentified deceased index. Profiles on these indices should be able to be compared against the offenders and pre-conviction indices as a last resort, when a comparison to other profiles on the missing and unidentified index, unidentified deceased index and relatives index has not resulted in the identification of that person. These recommendations are reflected in Table 7 in Appendix 5, which summarises the recommended matching rules for the proposed DNA databank.

22.40 We acknowledge that the use and retention of a deceased person's DNA profile is inconsistent with tikanga given the high level of tapu of the dead person. Requiring that these profiles be stored on a separate index to the profiles of living people would, to some extent, mitigate this inconsistency.

### Retaining profiles for identification purposes

#### RECOMMENDATION

##### 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.

22.41 We recommend that profiles retained on the proposed DNA databank for identification purposes should be retained until such time as they are no longer required for the investigation or, in the case of profiles on the relatives index, until such time as consent is withdrawn.

22.42 This departs from our recommendations in Chapter 20 in relation to the retention of offender profiles on the proposed DNA databank. There, we recommend that profiles be retained on the offenders index for no longer than the remainder of the offender's life (subject to limited exceptions) as this is less intrusive than retaining offender profiles indefinitely. However, in the different context of investigating missing and unidentified people, there is clear public interest in retaining profiles beyond the natural lifespan of the person concerned, as an unidentified body may be discovered years or decades into the future. Given that profiles on the missing and unidentified, unidentified deceased and relatives indices can only be used for identification purposes, we consider that it is appropriate to retain these profiles indefinitely or until such time as the case is resolved.

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## CHAPTER 23

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# Other uses of the proposed DNA databank

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## INTRODUCTION

- 23.1 In this chapter, we consider other uses of the proposed DNA databank not addressed in the previous chapters of this Report. Specifically, we consider:
- (a) familial searching to identify near matches between crime scene profiles and profiles from known people;
  - (b) searches on behalf of foreign law enforcement authorities; and
  - (c) access for research.

## FAMILIAL SEARCHING

- 23.2 In criminal investigations, familial searching is the process of searching a DNA databank for a near match between a crime scene profile and a known person profile rather than a direct match. A near match might indicate that a close genetic relative of the known person (such as a parent, child or sibling) was the source of the DNA found at the crime scene, thereby implicating them as a potential suspect. A near match might then be used by Police to investigate the known person's relatives to see whether any are potential suspects in the offending.

### Current law and practice

- 23.3 The CIBS Act does not address familial searching. It does not appear that familial searching was given any serious consideration when the CIBS Act was first enacted.<sup>1</sup>
- 23.4 Section 27 of the CIBS Act outlines the permitted uses of the DNA Profile Databank (DPD), and section 27(1)(a) provides that information on the DPD can be used “for the purpose of forensic comparison in the course of a criminal investigation by the Police”. The CIBS Act defines forensic comparison as follows:<sup>2</sup>

**forensic comparison** means the comparison of a DNA profile stored in a DNA profile databank with another DNA profile, where that comparison is undertaken for the purpose

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<sup>1</sup> We have identified only one reference to familial searching in the parliamentary debates. Richard Northey MP commented in the context of concerns about retention of profiles on the DNA Profile Databank that were generated from samples that “had been voluntarily given by innocent people”. He observed: “I had material that ... said quite specifically that this ... could be used to find out information about the genetic make-up of relatives of people on the databank. That is just one example of improper use of this material.”: (12 October 1995) 551 NZPD 9724.

<sup>2</sup> Criminal Investigations (Bodily Samples) Act 1995, s 2 definition of “forensic comparison”.

of confirming or disproving the involvement of any person in the commission of an offence

- 23.5 Similarly, section 24R outlines the permitted uses of the Temporary Databank, which include using information on the Temporary Databank “to compare with unidentified DNA information obtained from the scenes of offences” for the purpose of a criminal investigation by Police.<sup>3</sup>
- 23.6 In 2008, the High Court considered whether the CIBS Act permitted familial searching on the DPD and concluded that the definition of forensic comparison did not restrict the use of this technique.<sup>4</sup> Although this decision was prior to the establishment of the Temporary Databank, from the definition in section 24R, it also follows that familial searching would be similarly permitted on the Temporary Databank.

### **Current Police policy**

- 23.7 In the absence of a statutory framework, Police and ESR (Police’s forensic services provider) have developed a protocol to govern when and how familial searching should be undertaken (the Protocol).<sup>5</sup>
- 23.8 The Protocol recognises that familial searching has “important ethical implications” and should only be considered on a case-by-case basis. Requests to ESR for a familial search must be authorised by a Police District Crime Manager and a copy of the authorisation and familial search request form sent to the National Forensic Services Advisor at Police National Headquarters. The Protocol also sets out that ESR will keep a record of the number of search requests made and summarise these in “an annual NZ DNA Profile Databank Report”.<sup>6</sup>
- 23.9 The authorisation process requires that:
- (a) the investigation is of a serious offence (“serious” being undefined);
  - (b) there is no direct match between the crime scene profile and a profile on the DPD or Temporary Databank; and
  - (c) the search is considered “necessary and proportionate” to the circumstances of the case.
- 23.10 The Protocol explains that a familial search will result in a list of people on the DPD or Temporary Databank who are potential close relatives of the person who left the crime

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<sup>3</sup> Section 24R(1)(a).

<sup>4</sup> *Police v Reekers* HC Auckland CRI-2008-404-221, 8 October 2008 at [19].

<sup>5</sup> The Protocol comprises two documents: ESR and Ngā Pirihimana o Aotearoa | New Zealand Police “Protocols – Familial Testing” (25 September 2012); and ESR and Ngā Pirihimana o Aotearoa | New Zealand Police “NZ Police request for a familial search of the NZ DNA Profile Databank” (25 September 2012). These documents are set out at Appendix 3 of the Issues Paper. The Protocol refers to familial searching being conducted on the “NZ DNA Profile Databank”. Police has confirmed that this includes profiles on the DNA Profile Databank and the Temporary Databank.

<sup>6</sup> This appears to be an internal report as this information is not publicly available.



scene profile (the suspected offender). The list will be ranked statistically by how likely it is that a person will be related to the suspected offender.<sup>7</sup>

- 23.11 The list might comprise any number of profiles from a handful to hundreds. Most if not all these near matches will be “false positives” — that is, the person on the list will *not* be related to the suspected offender. For this reason, Police has advised that further intelligence is always required before a person is approached for questioning based on the results of a familial search. This usually involves the construction of family trees to identify people of interest and the acquisition of DNA samples from those individuals for DNA analysis.<sup>8</sup>
- 23.12 A familial search is a one-off search of the DPD and Temporary Databank, although it may be repeated on Police request.<sup>9</sup>

### Current practice

- 23.13 Police first used familial searching in 2004. Between 2004 and 2019, Police conducted 99 familial searches across 66 different investigations.<sup>10</sup> In 14 of those investigations, two or more familial searches were conducted. Most of these investigations were classified as sexual assault inquiries.
- 23.14 In the Issues Paper, we observed that only two familial searches have resulted in convictions (one for murder and one for rape).<sup>11</sup> We do not know how many people were investigated following a familial search.

### Issues with familial searching

- 23.15 Familial searching in the context of criminal investigations raises several issues. It constitutes a significant privacy intrusion, is inconsistent with applicable tikanga Māori, has a disproportionate impact on Māori, which raises issues of consistency with te Tiriti o Waitangi | the Treaty of Waitangi (the Treaty), and risks inconsistency with the rights affirmed in the New Zealand Bill of Rights Act 1990 (Bill of Rights Act). These issues were explored in detail in the Issues Paper and are summarised below.<sup>12</sup> In addition, the way in which familial searching is regulated is itself an issue because it lacks transparency and accountability, as we explore below.

### Intrusion on privacy

- 23.16 Familial searching intrudes on the privacy of people on the DPD and Temporary Databank as well as their close genetic relatives in a way not seriously contemplated when the CIBS Act was first enacted. People on the databanks effectively become

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<sup>7</sup> In the Issues Paper at [13.9], n 7, we explained that a threshold of 1,000 is set for the likelihood ratio. The number of names above the threshold therefore varies for each case. The results are discussed with Police on a case-by-case basis, and Police may request all the names above the threshold or only a certain number from the top of the list.

<sup>8</sup> Ngā Pirihimana o Aotearoa | New Zealand Police “DNA evidence at crime scenes” in *Police Manual* at 7, which provides a link to “A Guide to the Familial Search Process”.

<sup>9</sup> At 7, which provides a link to “A Guide to the Familial Search Process”. Police advises the request to run another search will come from the District Crime Manager.

<sup>10</sup> Provided in a spreadsheet attached to an email from Inspector John Walker (National Manager Police Forensic Services) to the Law Commission regarding databank familial searches in New Zealand (20 December 2019).

<sup>11</sup> Issues Paper at [13.10], n 9. The two cases were *Police v Reekers* HC Auckland CRI-2008-404-221, 8 October 2008; and *R v Jarden* [2009] NZCA 367 (familial search conducted in 2007).

<sup>12</sup> Issues Paper at [13.11]–[13.56].

genetic informants on their relatives, with the effect of “[increasing] the footprint of the database without Parliament having legislated for that increased footprint”.<sup>13</sup> Yet most, if not all, of the results of a familial search will be false positives. Most, if not all, of the relatives who might be further investigated as a result of a familial search will be innocent of the crime in relation to which that search was conducted. There may also be very real consequences for people who become genetic informants and their relatives. As we noted in the Issues Paper, familial searching may reveal previously unknown or concealed genetic relationships or may result in the disclosure of a person’s prior offending to their family members.<sup>14</sup>

- 23.17 While the retention of profiles from offenders for the purpose of linking them to unsolved crime is widely accepted, it is questionable whether the use of offender profiles to implicate family and whānau members in criminal offending is a justified privacy intrusion. This question is debated worldwide.<sup>15</sup> In Aotearoa New Zealand, it is also notable that close to half of all profiles on the DPD were obtained by consent,<sup>16</sup> but there is no requirement that a person be informed that their profile will be used in familial searches when giving consent. This raises questions as to whether people have truly given informed consent to their DNA profiles being used in this way. Further, some of the people who provided a DNA sample by consent may not, in fact, have been convicted of any offence.<sup>17</sup> In the absence of a conviction, a person may have an even greater right to privacy in respect of the information their DNA reveals about their close genetic relatives.

### *Inconsistency with tikanga Māori*

- 23.18 Familial searching in criminal investigations involves the use of whakapapa information to identify potential suspects. In Chapter 2, we explain that whakapapa information is considered a taonga that is tapu. Whakapapa is also determinative of personal tapu.<sup>18</sup> The use of whakapapa information in criminal investigations generally, and in familial searching in particular, gives rise to certain rights and responsibilities for Māori according to tikanga. This includes the responsibility of both Māori individuals and whānau, hapū and iwi to exercise kaitiakitanga to protect whakapapa. Responsibilities in relation to whanaungatanga and manaakitanga to maintain relationships and uphold the mana of Māori individuals and communities are also engaged. Familial searching in criminal investigations could undermine these tikanga. The actions of one person in the

<sup>13</sup> Tony Wall “Privacy fear for DNA dragnet” *Sunday Star Times* (online ed, Auckland, 20 January 2013).

<sup>14</sup> Issues Paper at [13.49]–[13.50].

<sup>15</sup> For commentary, see Nuffield Council on Bioethics *The forensic use of bioinformation: ethical issues* (September 2007) at 33; National Research Council *DNA Technology in Forensic Science* (National Academy Press, July 1992) at 86–87; Sonia M Suter “All in the Family: Privacy and DNA Familial Searching” (2010) 23 *Harv J L & Tech* 309 at 329–349; Richard Willing “Suspects Get Snared by a Relative’s DNA” *USA Today* (online ed, Virginia, 7 June 2005); Henry T Greely and others “Family Ties: The Use of DNA Offender Databases to Catch Offenders’ Kin” (2006) 34 *J L Med & Ethics* 248 at 256; and Alexandra Flaus “Familial Searches and the New Zealand DNA Profile Databank: The Thin Edge of the Genetic Wedge?” (LLB (Hons) Dissertation, University of Otago, 2013) at 20.

<sup>16</sup> See Appendix 3.

<sup>17</sup> Adults and young people whose profiles are on the Temporary Databank and adults who have provided a voluntary databank sample under Part 3 of the Criminal Investigations (Bodily Samples) Act 1995.

<sup>18</sup> Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (rev ed, Huia Publishers, Wellington, 2016) at 47–51.

kin group could bring other members of the family and whānau to Police attention. In addition, familial searching may circumvent the exercise by Māori of control over their whakapapa in accordance with tikanga. Limiting the use of familial searching to a small number of cases minimises the risk of compromising duties arising from tikanga Māori.

### ***Disproportionate impact on Māori***

- 23.19 Māori are significantly over-represented on the DPD and Temporary Databank.<sup>19</sup> As a result, Māori are more likely than non-Māori to have a close genetic relative on a databank and are therefore more likely to be subjected to investigation following a familial search. Being investigated for an offence a person did not commit can cause distress and stigma. Further, family and whānau relationships could be damaged if previously unknown genetic relationships or prior convictions are revealed. It is especially important to consider the impact that this could have on Māori, for whom any interaction with Police may be informed by a history of negative interactions, unconscious or overt bias and associated feelings of disconnection and victimisation.
- 23.20 This raises questions of consistency with the Treaty, including the Treaty principle of equity and the Crown's duty to reduce inequities between Māori and non-Māori. In Chapter 2, we explain our view that, for legislation governing the DNA regime to be constitutionally sound, it should provide the means for the Crown, working in partnership with Māori, to meet its Treaty obligations to take active steps to reduce inequities and positively promote equity in the DNA regime.
- 23.21 There is also a risk that familial searching constitutes unlawful discrimination against Māori contrary to the Bill of Rights Act, which we discuss next.

### ***Risk of inconsistency with the New Zealand Bill of Rights Act***

- 23.22 Section 21 of the Bill of Rights Act guarantees the right of everyone to be secure from unreasonable search and seizure. As we explain in Chapter 2, section 21 will be engaged whenever there is an intrusion upon a "reasonable expectation of privacy".<sup>20</sup> Given that familial searching involves a significant privacy intrusion as outlined above, that people providing DNA samples for the DPD by consent are not informed that their profiles will be used in familial searches and that there is no independent approval or oversight of the use of familial searching, we consider there is a risk that familial searching may amount to unreasonable search and seizure.
- 23.23 There is also a risk that familial searching is inconsistent with the right to freedom from discrimination affirmed in section 19 of the Bill of Rights Act on the prohibited grounds of family status, race or ethnic origins.<sup>21</sup> This is because familial searching results in the investigation of a particular group of people for a crime they did not commit simply because they are related to a person on the DPD or Temporary Databank. That group is likely to include a disproportionate number of Māori given the over-representation of

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<sup>19</sup> See discussion in Chapter 3. In the Issues Paper, we estimated that around 15 per cent of the Māori population aged 15 or over had a DNA profile on the DNA Profile Databank or Temporary Databank, compared to just 3.4 per cent of the adult non-Māori population: Issues Paper at [13.18], n 15.

<sup>20</sup> *R v Alsford* [2017] NZSC 42, [2017] 1 NZLR 710 at [63]–[64]; and *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305 at [160] and [163].

<sup>21</sup> Section 19(1) of the New Zealand Bill of Rights Act 1990 provides that everyone has the right to be free from discrimination on the grounds set out in s 21 of the Human Rights Act 1993, including on the grounds of family status, race and ethnic or national origins.

Māori on the databanks. Whether this differential treatment amounts to unlawful discrimination will depend in part on how often familial searching is conducted and the safeguards in place.<sup>22</sup>

### **Lack of transparency and accountability**

23.24 The lack of a statutory regime for familial searching results in a lack of transparency as to the use of familial searching. While there is a Protocol between ESR and Police, it is not widely available outside Police and ESR and aspects of the Protocol itself are unclear. For example, the term “serious offence” is not defined, which renders the conditions for conducting a familial search unclear. Furthermore, familial searching lacks accountability given the absence of any independent oversight of decisions to conduct familial searching and the lack of reporting requirements relating to familial searching. This makes it difficult to ensure the appropriate procedures are followed and to monitor its effectiveness in resolving criminal investigations.

### **Familial searching in comparable jurisdictions**

23.25 Familial searching is conducted in Australia and the United Kingdom but not in Canada or Ireland.

23.26 In Australia and the United Kingdom, familial searching is not expressly provided for in legislation. Rather, legislation does not exclude the possibility of using the DNA databanks to identify a near match.<sup>23</sup> Familial searching is governed by internal policies that are not publicly available, and in general, familial searching is reserved for serious offending only.<sup>24</sup>

23.27 In the United Kingdom, familial searching was introduced as an investigative tool in 2002.<sup>25</sup> Familial searches of the National DNA Database (NDNAD) must be approved by the Forensic Information Databases Strategy Board, the body responsible for overseeing the operation of NDNAD. In 2019–2020, 16 familial searches were carried out on NDNAD.<sup>26</sup> In Australia, the National Criminal Investigation DNA Database (NCIDD) was updated in 2018 to enable familial searching.<sup>27</sup> Familial searching is also conducted

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<sup>22</sup> We addressed the risk of discrimination comprehensively in the Issues Paper, where we concluded that it was a live question whether the differential treatment was discriminatory but that the risk of discrimination would increase if the practice of familial searching becomes more widespread: Issues Paper at [13.11]–[13.42].

<sup>23</sup> See, for example, Police and Criminal Evidence Act 1984 (UK), s 63AA; and Crimes Act 1914 (Cth), s 23YDAE, which refers to “forensic comparison” permitted under the matching rules in s 23YDAF. Section 23YDAF sets out when “a matching of a DNA profile on an index” is permitted.

<sup>24</sup> National DNA Database Strategy Board *Annual Report 2017–2018* (Home Office, February 2019) at 9; and Australia and New Zealand Policing Advisory Agency *Fact Sheet: Familial DNA Searching* (January 2018).

<sup>25</sup> The United Kingdom is seen as pioneering the technique, which led to the conviction of Jason Ward for the murder of Gladys Godfrey in 2002. See CN Maguire and others “Familial searching: a specialist forensic DNA profiling service utilizing the National DNA Database to identify unknown offenders via their relatives – the UK experience” (2014) 8 *FSI Genetics* 1 as cited in Allison Murray and others “Familial DNA Testing: Current Practices and Recommendations for Implementation” (2017) 9(4) *ISJ* 1 at 2.

<sup>26</sup> National DNA Database Strategy Board *Biennial Report 2018–2020* (Home Office, September 2020) at 8.

<sup>27</sup> Peter Dutton “Law enforcement to match DNA profiles across borders” (29 September 2018) Minister for Home Affairs <[www.minister.homeaffairs.gov.au](http://www.minister.homeaffairs.gov.au)>; and Australian Criminal Intelligence Commission *Annual Report 2017–2018* (October 2018) at 138.

within and across state and territory databases.<sup>28</sup> No information is published on how often familial searching is carried out.

- 23.28 In Canada, legislation establishing the National DNA Data Bank has been interpreted as prohibiting familial searching.<sup>29</sup> In 2010, the Standing Senate Committee on Legal and Constitutional Affairs considered whether the legislation should be amended to permit familial searching.<sup>30</sup> It concluded that it should not be allowed until further work was undertaken to determine how to appropriately craft a provision that balances the competing needs of protecting society, protecting privacy and preserving the presumption of innocence.<sup>31</sup> At the time of writing this Report, no amendments have been introduced to permit familial searching of the National DNA Data Bank.<sup>32</sup> In Ireland, legislation establishing the DNA Database System does not refer to familial searching. The statutory language restricts the database use to “the searching of the System ... to ascertain whether there is a match between two DNA profiles in the System”,<sup>33</sup> and we understand that the language has been interpreted as not permitting it.<sup>34</sup>
- 23.29 Given the lack of uniform approaches to familial searching, we have also looked at approaches further afield. In Europe, several countries have introduced legislation that allows familial searching, including the Netherlands, France and, more recently, Germany.<sup>35</sup> In other European countries the situation remains unclear, although there are records of criminal cases that involved the use of relatives’ DNA to search for criminal suspects in countries such as Spain, Poland and Italy.<sup>36</sup> In the United States, there is no familial searching of the federal DNA databank, and the approach in different states varies.<sup>37</sup> Some states permit familial searching in relation to serious offending pursuant to established protocols.<sup>38</sup> Other states have expressly banned familial searching

<sup>28</sup> Australia and New Zealand Policing Advisory Agency *Fact Sheet: Familial DNA Searching* (January 2018). This part of the fact sheet applies only “for the [i]nvestigation of [c]rime in Australia” and does not extend to New Zealand.

<sup>29</sup> Section 6 of the DNA Identification Act SC 1998 c 37 specifies that the Data Bank can only communicate a profile and related information if the profile matches the profile of the sample sent in by Police. This has been interpreted as limiting the use of the Data Bank to direct matches only: Standing Senate Committee on Legal and Constitutional Affairs *Public Protection, Privacy and the Search for Balance: A Statutory Review of the DNA Identification Act – Final Report* (Canadian Senate, June 2010) at 57. See also Amelia Bellamy-Royds and Sonya Norris *New Frontiers in Forensic DNA Analysis: International Practices and Implications for Canada* (Library of Parliament, PRB 08-29E, 3 March 2009) at 12; Rawlson King “RCMP currently examining use of DNA familial searching” (12 January 2017) Biometric Update <www.biometricupdate.com>; and Aedan Helmer “Familial DNA searches could help crack Canadian cold cases” *Ottawa Citizen* (online ed, Ottawa, 7 January 2017).

<sup>30</sup> Standing Senate Committee on Legal and Constitutional Affairs *Public Protection, Privacy and the Search for Balance: A Statutory Review of the DNA Identification Act – Final Report* (Canadian Senate, June 2010) at 61–64.

<sup>31</sup> At 64.

<sup>32</sup> The Committee observed in its report that provincial laboratories do conduct familial searches because they are not bound by the legislation: at 62. However, it is unclear what databank these familial searches are made against.

<sup>33</sup> Criminal Justice (Forensic Evidence and DNA Database System) Act 2014 (Ireland), s 67(2)(c).

<sup>34</sup> Email from Geraldine O’Donnell (Director of DNA Forensic Science Ireland) to the Law Commission regarding Ireland’s DNA database system (21 January 2020) noting that “guidance [was recently sought] from our Attorney General’s Office (highest legal position in Ireland) as to whether Familial searching was permissible based [on the] fact the Act is silent on it. It was ruled as not permissible”.

<sup>35</sup> Helena Machado and Rafaela Granja *Forensic Genetics in the Governance of Crime* (Palgrave Pivot, Singapore, 2020) at 87.

<sup>36</sup> At 87.

<sup>37</sup> Federal Bureau of Investigation “Combined DNA Index System (CODIS)” <www.fbi.gov>.

<sup>38</sup> Familial searching is conducted in Arkansas, Arizona, California, Colorado, Florida, Michigan, New York, Ohio, Texas, Utah, Virginia, Wisconsin and Wyoming. See Federal Bureau of Investigation “Combined DNA Index System (CODIS)” <www.fbi.gov>; Arizona Department of Public Safety Scientific Analysis Bureau “Familial DNA Analysis” (2018)

altogether given its potentially disproportionate effect on minority groups and infringement on the Fourth Amendment privacy rights of the family members of an offender.<sup>39</sup>

## Options for reform

23.30 In the Issues Paper, we identified several options for reform:<sup>40</sup>

- (a) Publishing the Protocol and improving its accessibility by defining what qualifies as a “serious offence” if familial searching were to continue to be governed primarily by the Protocol.
- (b) Prescribing a permissive regime for the use of familial searching in new DNA legislation. This would specify when familial searching should be undertaken, the parameters of its use and the need for independent oversight.
- (c) Prohibiting familial searching in new DNA legislation altogether, given the issues with familial searching identified above.

## Results of consultation

23.31 We received 51 submissions from 10 organisations and 41 individuals on familial searching. Of these, 43 submissions expressed concerns about the use of familial searching. Concerns often reflected the issues identified in the Issues Paper and discussed above. Common themes included:

- (a) **Privacy concerns.** Many submitters were concerned that familial searching intrudes on the privacy of both people on the DNA databank and their relatives. These submitters did not think it was fair that an innocent person might be investigated simply because they have a relative on a DNA databank. The Auckland District Law Society Criminal Law Committee (ADLS) and Sue Petricevic submitted that familial searching amounts to a covert search of another individual’s DNA without their consent. They consider it risks exposing innocent individuals to interrogation and may therefore create additional victims. Gavin English noted that familial searching could provide the basis for a search warrant, leading to family members being questioned or detained in relation to matters unrelated to the offending under investigation.
- (b) **Unjustified discrimination.** The Human Rights Commission (HRC) submitted that familial searching has the potential to discriminate on the grounds of family status and race. It would allow the targeting and sampling of people who are otherwise not connected to the commission of a crime simply because of their relationship to a person on the DNA databank. Similar concerns were raised by the New Zealand Law Society (NZLS), the New Zealand Bar Association (endorsing NZLS’s

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Arizona Department of Public Safety <[www.azdps.gov](http://www.azdps.gov)>; Division of Criminal Justice Services “Familial DNA Searching in New York State” (2018) <[www.criminaljustice.ny.gov](http://www.criminaljustice.ny.gov)>; and Ohio BCI Crime Laboratory *Familial Search Policy and Procedures* (9 November 2016).

<sup>39</sup> Familial searching is banned in Maryland and the District of Columbia. See Michael B Field and others *Study of Familial DNA Searching Policies and Practices: Case Study Brief Series* (Office of Justice Programs’ National Criminal Justice Reference Service, August 2017).

<sup>40</sup> Issues Paper [13.63]–[13.68].

submission in its entirety) and the Public Defence Service (PDS). Professor Carole McCartney and Dr Aaron Amankwaa also observed that familial searching may result in “the unjustified perception of criminality in certain families and the potential criminalisation of certain social groups”, which may lead to a form of stigmatisation.

- (c) **Reliability of the science.** Several submitters, including NZLS, questioned whether familial searching was justified given the high likelihood of “false positives”. The risk that familial searching can produce hundreds of results and that relatives may not be able to be accurately identified due to unknown paternity or adoption may undermine its value to Police as an investigative tool. Some members of the public were also concerned that familial searching would result in the conviction of innocent people. The Independent Forensic Practitioners Institute (IFPI) submitted that the reliability of familial searching has yet to be established.
- (d) **The risk of damage to social cohesion.** Several submitters, including PDS and Associate Professor Nessa Lynch, were concerned that familial searching might inadvertently reveal unknown family relationships, thereby leading to family conflict. PDS also noted that there is a risk that people who have been adopted or conceived using a donor may be linked to their biological relatives, which could create concern for people adopting children or donating sperm or ova.
- (e) **Inconsistency with applicable tikanga Māori.** Several submitters were concerned about the impact of familial searching on tikanga Māori. Te Mana Raraunga | Māori Data Sovereignty Network submitted that familial searching impacts on the concept of whanaungatanga and raises particular concerns about the balance of individual and collective Māori rights in relation to Māori data sovereignty. Te Mana Raraunga submitted that current practices undermine principles of collective rights and free, prior and informed consent affirmed under the United Nations Declaration on the Rights of Indigenous Peoples. Karaitiana Taiuru submitted that, due to the tapu nature of DNA, the tapu and privacy of whānau, hapū and iwi should be considered as well as the impact of making public certain personal circumstances such as whāngai arrangements. Te Hunga Rōia Māori o Aotearoa | The Māori Law Society raised similar concerns, noting that familial searching raises concerns in relation to both individual and collective privacy and impacts whakapapa, whānau, hapū and iwi. Te Hunga Rōia also raised concerns relating to the absence of any consideration of tikanga Māori once profiles are on the DNA databank. We address this issue in Chapters 16 and 20.
- (f) **The potentially disproportionate impact of familial searching on Māori and the risk of inconsistency with the Treaty.** This was raised as a concern by several submitters, including Te Mana Raraunga, Te Hunga Rōia, Karaitiana Taiuru, PDS and HRC. As noted above, HRC characterised familial searching as potentially discriminatory against Māori both directly and indirectly. Te Hunga Rōia was concerned that, without strict regulation, familial searching could be a lever pulled to compound the existing systemic bias against Māori.

23.32 Police submitted that the process used by Police and ESR to regulate familial searching works well, but it recognises that familial searching has important ethical implications and should only be considered on a case-by-case basis in serious cases where other avenues of investigation have been exhausted.

23.33 Just seven submitters were not concerned about the use of familial searching. Professor Dennis McNevin took the view that familial searching as an aid to an investigation is no different to searching social media for evidence of criminal activity, including the identification of criminal associations. Six other individual submitters either stated that they had no concerns with familial searching or pointed to the lack of a problem if the science was valid and it resulted in identification of suspects.

#### *Views on how familial searching should be regulated*

23.34 We received 14 submissions that commented on how familial searching should be regulated. As noted above, Police submitted that the current protocol process works well.

23.35 Most submitters, including NZLS, ADLS, Te Mana Raraunga, the Privacy Commissioner, Sue Petricevic, Gavin English and one other individual, supported a statutory regime with independent approval of familial searches, usually by a court order. These submitters recognised that, despite the concerns identified above, familial searching was a potentially useful investigative tool that could provide valuable intelligence and assist in the resolution of investigations of serious crime. There was general agreement among submitters that familial searching should only be authorised for serious offending and only when other investigative leads have been exhausted. The Privacy Commissioner noted that the number of familial searches being conducted suggests that judicial oversight is an option. NZLS considered that serious offending should be defined in legislation and that familial searching should also be monitored by an independent oversight body.

23.36 ESR considered there should be a policy related to familial searching, which could be audited by an oversight body for compliance.

23.37 Several other submitters, including PDS, Karaitiana Taiuru and one other individual, submitted that familial searching should be prohibited given the concerns identified above. PDS noted that, if familial searching is to be permitted, it should only be authorised by a court or an independent oversight body. IFPI submitted that familial searches not be admissible in court until such time as their reliability has been established. Regardless, IFPI considered that familial searching should be the subject of close independent oversight.

23.38 Carole McCartney and Aaron Amankwaa submitted that, as a general principle, familial searching should be prohibited, given the concerns identified above. They considered the only exception to this rule should be where it is “absolutely necessary” — that is, where the case cannot be progressed or solved otherwise and the use of familial searching is not excessive. They considered that the entire procedure should be sensitive to the ethical implications and ensure the privacy and confidentiality of individuals, families and social groups are adequately protected.



## RECOMMENDATIONS

### Establishing a statutory regime for familial searching in criminal investigations

#### RECOMMENDATION

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

23.39 We recommend that new DNA legislation should prescribe the use of familial searching in criminal investigations. As we explain above, familial searching significantly expands the footprint of the proposed DNA databank by providing intelligence that leads to the investigation of people who are not on the databank themselves, most of whom will not have committed the crime in question. This poses a significant privacy intrusion and utilises whakapapa information in a way that intrudes on central tikanga Māori. Māori are likely to be disproportionately affected given their over-representation on the existing DNA databanks, which raises concerns of inconsistency with the Treaty and its principles. Given these risks, it is important that legislation prescribes a clear process for familial searching with appropriate safeguards to minimise intrusions on privacy and tikanga Māori. A prescribed familial searching regime will also promote accessibility, transparency and accountability.

23.40 We do not prefer the alternative option of publishing and clarifying the Protocol, as we do not think this will provide sufficient safeguards, such as independent oversight, to ensure familial searching is undertaken appropriately in future. We have also rejected the option of following Canada in prohibiting familial searching altogether, recognising the need for Police to have access to investigative tools to resolve serious offending when other investigative leads have been exhausted.

### Requiring familial searching to have court authorisation

#### RECOMMENDATIONS

**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.

- 23.41 Familial searches that seek to identify a potential suspect or suspects should only be conducted pursuant to a court order. A Judge should only issue a familial search order if satisfied that conventional use of the proposed DNA databank (applying the permitted matching rules) has failed to identify a suspect and that a familial search is reasonable in all the circumstances, having regard to a prescribed list of relevant considerations. This largely reflects existing practice as outlined in the Protocol.
- 23.42 The prescribed list of relevant considerations reflects the seriousness of the privacy intrusion that results from a familial search both of the known person on the DNA databank whose profile is searched and of their genetic relatives who may become the focus of Police attention as a result of the search. It is designed to ensure that familial searching is used sparingly as a last resort in respect of offending that, when considered in its full context, is sufficiently serious to warrant such an intrusion.
- 23.43 We have not proposed a minimum level of seriousness of offending that must be met to conduct a familial search. Defining serious offending would be a necessarily arbitrary task, regardless of whether the definition depends on a maximum sentence that may be imposed for the offending, the sentence actually imposed or a prescribed list of offences. Our preference, therefore, is for a decision to be made on a case-by-case basis as to whether the offending concerned is serious enough to warrant a familial search in all the circumstances of the case. Like mass screening (discussed in Chapter 10), we doubt familial searching for minor offending could ever meet this threshold.
- 23.44 Familial searches should only be carried out in relation to crime scene samples of a suitable quality. If a crime scene profile does not meet the quality threshold for databank searching (discussed in Chapter 17), a Judge cannot be satisfied of R184.a, and a familial search will not be an available option.

23.45 Our view is that familial searching should only be conducted on the offenders index of the proposed DNA databank. We do not consider it is appropriate to use profiles on other indices for the purpose of identifying potential suspects. Profiles on the elimination, missing and unidentified, unidentified deceased and relatives indices are obtained from people who are not suspects and with their informed consent for a particular purpose. In these circumstances, we do not think it is justifiable to use their profiles for what is a very different purpose. In addition, we do not think it is appropriate to use profiles on the pre-conviction index in a familial search, given these are profiles of people who have not yet been convicted of the offence for which their DNA profile was obtained.

### Imposing conditions and duration requirements on familial search orders

#### RECOMMENDATION

**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.

23.46 The Judge issuing the familial search order should be able to impose any conditions on the familial search they think appropriate. This might include, for example, limiting the familial search order to a one-off familial search within a specific time-frame or permitting the familial search to be conducted at regular intervals for the duration of the investigation. This recognises the benefit in re-running a familial search as more profiles are added to the offenders index. The Judge might also want to impose restrictions on who is able to access the information resulting from a familial search or how familial search results are to be investigated, recognising the privacy intrusion inherent in conducting a familial search. This is consistent with current Police practice as reflected in the Protocol.

### Requiring practice guidelines for familial searching

#### RECOMMENDATION

**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.

23.47 Police and the forensic services provider in consultation with the DNA Oversight Committee should develop practice guidelines on both the procedural and technical requirements relating to familial searches and how the results of a familial search are investigated. This should include matters such as when the search is to be undertaken and when it is to be halted (for example, if a suspect is identified by other means during the familial search process), how the familial search is conducted by the forensic services provider, what results are reported to Police and how those results should be further investigated. The guidelines should also address the retention and destruction of results. Compliance with these requirements may then be subject to regular audits undertaken by the Independent Police Conduct Authority (discussed in Chapter 5). This will ensure appropriate oversight and accountability in respect of familial searching.

### Using the results of a familial search order

#### RECOMMENDATION

**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.

23.48 The results of a familial search order shall not of itself be sufficient to constitute reasonable grounds to suspect a person of committing the offence under investigation, either for the purpose of obtaining a DNA sample under the suspect sampling regime (discussed in Chapter 8) or for any other purpose such as making an arrest or issuing a search or surveillance warrant.<sup>41</sup> Given the high risk of false positives discussed at paragraph 23.11 above, further investigation and additional evidence to support a reasonable suspicion will be necessary.

### Reporting

23.49 In Chapter 5, we recommend that new DNA legislation should include comprehensive reporting requirements. This should include reporting on the number of familial search orders that are applied for and issued, how many familial searches are conducted (including any searches that are re-run pursuant to the terms of the familial search order) and the nature of the investigation in each case. This will promote transparency and enable effective oversight of the use of familial searching.

23.50 We have not recommended requiring Police to report on whether a familial search resulted in investigative leads. We consider that the efficacy of familial searching is best reviewed through regular auditing and oversight by the DNA Oversight Committee. We discuss oversight in Chapter 5.

<sup>41</sup> A constable may arrest and take into custody without a warrant any person if the constable has good cause to suspect the person of having committed any offence punishable by imprisonment: Crimes Act 1961, s 315(2)(b). Similarly, a constable may only issue and serve a summons in relation to a charge if they have good cause to suspect that the person has committed an offence: Criminal Procedure Act 2011, s 28(1)(a). A search warrant may be issued under s 6 of the Search and Surveillance Act 2012 if there are reasonable grounds to suspect that an imprisonable offence has been or will be committed, while s 51 permits a surveillance device warrant to be issued if there are reasonable grounds to suspect that an offence has been committed, is being committed or will be committed.

## SEARCHING ON BEHALF OF FOREIGN COUNTRIES

23.51 Foreign countries occasionally request New Zealand’s assistance in the investigation and prosecution of criminal offending overseas. Below we consider whether and, if so, how the proposed DNA databank should be used to assist criminal investigations in foreign countries.

### Current law

23.52 The Mutual Assistance in Criminal Matters Act 1992 (MACMA) provides a framework for facilitating New Zealand’s provision of assistance in international criminal matters.<sup>42</sup> It provides “a way of tapping into existing domestic law relating to investigative and evidence-gathering powers”.<sup>43</sup>

23.53 In 2015, MACMA and the CIBS Act were amended to permit access to and disclosure of information on the DPD in response to a request from a foreign country.<sup>44</sup> Prior to 2015, the CIBS Act only permitted access to the DPD in relation to criminal investigations conducted by Police.<sup>45</sup> The 2015 amendments aligned New Zealand law with the approach in Australia and other comparable jurisdictions (discussed below) and gave effect to the agreement Aotearoa New Zealand had entered into with the United States on Enhancing Cooperation in Preventing and Combatting Crime (the PCC Agreement).<sup>46</sup>

23.54 Now, section 31 of MACMA provides for a foreign country to request that the Attorney-General assist in arranging “the undertaking of a forensic comparison” under the CIBS Act and “the production of a document specifying the result of that comparison”.<sup>47</sup> The Attorney-General may authorise the requested assistance if satisfied that:<sup>48</sup>

- (a) the request relates to a criminal matter in the foreign country; and
- (b) the request is in respect of an offence that corresponds to an offence in New Zealand that is punishable by a term of imprisonment of more than one year.

23.55 MACMA also contains a number of “gate-keeping” safeguards to ensure foreign access to New Zealand investigative tools is only provided in appropriate circumstances and that the rights of individuals affected by such requests are sufficiently protected.

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<sup>42</sup> For a comprehensive analysis of the Mutual Assistance in Criminal Matters Act 1992 and New Zealand’s international legal obligations to facilitate transnational information exchange and cooperation in criminal matters, see Te Aka Matua o te Ture | Law Commission *Extradition and Mutual Assistance in Criminal Matters* (NZLC IP37, 2014) at chs 12–13. In 2016, the Commission recommended the repeal and replacement of MACMA but did not recommend substantive changes to the ability of foreign countries to request assistance in relation to criminal matters. See Te Aka Matua o te Ture | Law Commission *Modernising New Zealand’s Extradition and Mutual Assistance Laws* (NZLC R137, 2016).

<sup>43</sup> Te Aka Matua o te Ture | Law Commission *Modernising New Zealand’s Extradition and Mutual Assistance Laws* (NZLC R137, 2016) at 21. The Commission noted that, unlike extradition treaties, mutual assistance treaties are not given direct effect in domestic legislation. Many international instruments are non-binding, and those agreements that seek to be binding are often expressly subject to domestic law.

<sup>44</sup> Amendments were made pursuant to the Mutual Assistance in Criminal Matters Amendment Act 2015 and the Criminal Investigations (Bodily Samples) Amendment Act 2015, which were originally part of an omnibus bill, the Organised Crime and Anti-corruption Legislation Bill 2014 (219-2).

<sup>45</sup> Criminal Investigations (Bodily Samples) Act 1995, s 27(1)(a). See Tāhū o te Ture | Ministry of Justice *Regulatory Impact Statement: All of Government Response to Organised Crime* (6 June 2013) at 19–20.

<sup>46</sup> Agreement on Enhancing Cooperation in Preventing and Combating Crime, New Zealand–United States of America [2017] NZTS 15 (signed 20 March 2013, entered into force 12 December 2017).

<sup>47</sup> Mutual Assistance in Criminal Matters Act 1992, s 31(1)(c).

<sup>48</sup> Section 31(2)(b).

Incoming requests must follow the appropriate form requirements and be accompanied by substantial supporting documentation.<sup>49</sup> MACMA also contains an extensive range of grounds on which a request must or may be refused.<sup>50</sup> The grounds for refusal act as a check to ensure that providing assistance is not objectionable or contrary to New Zealand's legal system.<sup>51</sup>

- 23.56 Section 27 of the CIBS Act permits access to and disclosure of any information on the DPD for the purpose of responding to a request under MACMA if access to the information requested is authorised by the Attorney-General.<sup>52</sup>
- 23.57 There is no equivalent power to access and disclose information on the Temporary Databank pursuant to a request under MACMA. It is unclear from the legislative material associated with the 2015 reforms why the Temporary Databank was excluded, but we think it is likely due to the fact that people on the Temporary Databank have not yet been convicted of an offence.

### Current practice

- 23.58 In the Issues Paper, we reported that, since 2015, Police had conducted a preliminary search of the DPD on behalf of a foreign country 44 times. This involved Police asking ESR to compare a foreign crime scene profile against profiles on the DPD to identify whether there was a match. Police then advised the foreign country whether there was a match or not. No further information was shared unless the foreign country made a request to the Attorney-General pursuant to MACMA.<sup>53</sup>
- 23.59 Only one of these 44 preliminary searches resulted in a match. It related to an unsolved homicide in South Australia, which had occurred 18 years previously. In light of the preliminary search result, the South Australian Police made a MACMA request to the Attorney-General in late 2017. The matching DNA profile was then identified as belonging to a man who had been arrested in Aotearoa New Zealand and charged with minor offending in July 2017. When he was charged, Police had obtained a sample for the Temporary Databank, which was transferred to the DPD when he was convicted. Once the Australian authorities were informed of the match, an arrest warrant was issued and he was extradited to Australia to face charges.<sup>54</sup>

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<sup>49</sup> Section 26.

<sup>50</sup> Section 27.

<sup>51</sup> Te Aka Matua o te Ture | Law Commission *Extradition and Mutual Assistance in Criminal Matters* (NZLC IP37, 2014) at [15.1].

<sup>52</sup> Criminal Investigations (Bodily Samples) Act 1995, s 27(1)(d). The requirement that the request relates to an offence that corresponds to an offence in New Zealand punishable by a term of imprisonment of more than one year is also reiterated in s 27(1)(d)(ii).

<sup>53</sup> This practice broadly aligns with the approach taken under the Prüm Convention, discussed at [23.63] below.

<sup>54</sup> See "Auckland man Paul Maroroa guilty of manslaughter in Australian cold case" *The New Zealand Herald* (online ed, Auckland, 1 December 2019).

## Issues with current mutual assistance arrangements

23.60 In 2016, the Commission completed a review of MACMA. The guiding principles of that review were:<sup>55</sup>

- Powers and investigative techniques that are available to domestic authorities should also be available for use in response to requests for assistance in foreign investigations and prosecutions.
- New Zealand must keep pace with international developments on mutual assistance and ensure its legislative regime gives effect to its international obligations in this area.
- New Zealand must ensure that it has sufficient oversight and control of any mutual assistance it provides and that it balances law enforcement needs and human rights values.

23.61 In the Issues Paper, we said we remain of the view that, in principle, domestic investigative tools should be made available to foreign law enforcement agencies under MACMA as long as their use is authorised by the Attorney-General on a case-by-case basis.<sup>56</sup>

23.62 Applying these principles, we identified two potential issues with the current regime:<sup>57</sup>

- (a) First, whether the prohibition on sharing information on the Temporary Databank is appropriate, in light of the Attorney-General's robust gate-keeping function.
- (b) Second, whether a familial search of the DPD could be conducted on behalf of a foreign country. We observed that, under section 31 of MACMA, the Attorney-General may authorise Police to undertake a "forensic comparison" under the CIBS Act. As explained at paragraph 23.6 above, this has been interpreted, for the purposes of the CIBS Act, to include a familial search.<sup>58</sup> A question therefore arises as to whether MACMA authorises a foreign country to request a familial search of the DPD.

## Approach in comparable jurisdictions

23.63 Mutual assistance arrangements in relation to DNA databanks are largely modelled on the Prüm Convention. Originally a treaty signed by several European countries, the Prüm Convention was incorporated into European Union legislation in 2008.<sup>59</sup> Under the legislation, each Member State makes its DNA databank available to other Member States for automated searches on a "match/no match" basis.<sup>60</sup> If a match is found, the information remains anonymous until personal data is exchanged between countries following their own mutual legal assistance processes.<sup>61</sup> Each Member State has flexibility to nominate which profiles are available for transnational searching.<sup>62</sup> To date,

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<sup>55</sup> Te Aka Matua o te Ture | Law Commission *Modernising New Zealand's Extradition and Mutual Assistance Laws* (NZLC R137, 2016) at [12.3].

<sup>56</sup> Issues Paper at [12.19].

<sup>57</sup> At [12.19]–[12.21].

<sup>58</sup> *Police v Reekers* HC Auckland CRI-2008-404-221, 8 October 2008 at [19].

<sup>59</sup> Council Decision 2008/615/JHA on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime [2008] OJ L210/1.

<sup>60</sup> Article 3(2).

<sup>61</sup> Article 5.

<sup>62</sup> Article 2(3).

nearly all Member States have allowed transnational searching against profiles obtained from convicted offenders.<sup>63</sup> Some Member States have not permitted access to profiles from suspects.<sup>64</sup>

- 23.64 The United States has signed a host of bilateral treaties modelled on the Prüm Convention, including the PCC Agreement with New Zealand mentioned at paragraph 23.53 above.<sup>65</sup> These treaties similarly provide a two-stage process for DNA comparisons on a “match/no-match” basis.<sup>66</sup>
- 23.65 The match/no-match system under the Prüm Convention and the PCC Agreement necessarily excludes familial searching techniques, which are designed to identify partial matches indicating genetic relatedness between two individuals.<sup>67</sup> The PCC Agreement also states that DNA searching shall be used only where there exists “a potential nexus between the data sought and the requested Party”.<sup>68</sup> The approach to familial searching within comparable jurisdictions also varies, as discussed at paragraphs 23.25–23.29 above.
- 23.66 The United Kingdom is one of the few jurisdictions that permits familial searching on behalf of a foreign country on its DNA databank. However, strict oversight and compliance mechanisms are in place. Guidelines issued by the Home Office advise that foreign country requests for familial searching will not normally be granted.<sup>69</sup> Exceptional cases will be heard by the Forensic Information Databases (FIND) Strategy Board, which is the body vested with the power to determine all applications to use

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<sup>63</sup> General Secretariat of the Council *Implementation of the provisions on information exchange of the “Prüm Decisions”* (5081/2/17 Rev 2, 22 May 2017) at Annex 3 bis.

<sup>64</sup> Filipe Santos “The transnational exchange of DNA data: Global standards and local practices” in Kai Jakobs and Knut Blind (eds) *EURAS Proceedings 2017: Digitalisation – Challenge and Opportunity for Standardisation* (Verlag Mainz, Aachen (Germany), 2017) 305 at 312.

<sup>65</sup> Agreement on Enhancing Cooperation in Preventing and Combating Crime, New Zealand–United States of America [2017] NZTS 15 (signed 20 March 2013, entered into force 12 December 2017).

<sup>66</sup> Agreement on Enhancing Cooperation in Preventing and Combating Crime, New Zealand–United States of America [2017] NZTS 15 (signed 20 March 2013, entered into force 12 December 2017), art 8(2). See generally Aaron Opoku Amankwaa “Trends in forensic DNA database: transnational exchange of DNA data” (2020) 5 *Forensic Science Research* 8 at 11; and Paul Luif and Florian Trauner “The Prüm Process: The Effects of Enhanced Cooperation within Europe and with the United States in Combating Serious Crime” in Ronald L Holzhaecker and Paul Luif (eds) *Freedom, Security and Justice in the European Union: Internal and External Dimensions of Increased Cooperation after the Lisbon Treaty* (Springer Science & Business Media, New York, 2014) 101 at 113.

<sup>67</sup> Under the Prüm Convention, matches are generated only when two profiles share “six fully matching loci”, with one deviation or “wildcard” being tolerated. See Kees van der Beek “Forensic DNA Profiles Crossing Borders in Europe (Implementation of the Treaty of Prüm)” (2011) *Promega Corporation* <[www.promega.com](http://www.promega.com)>; and Carole I McCartney, Tim J Wilson and Robin Williams “Transnational Exchange of Forensic DNA: Viability, Legitimacy, and Acceptability” (2011) 17 *Eur J Crim Policy Res* 305 at 310. Nuffield Council on Bioethics *The forensic use of bioinformation: ethical issues* (September 2007) at [7.51] notes that new laws would be required to allow familial searching to be carried out across borders.

<sup>68</sup> Agreement on Enhancing Cooperation in Preventing and Combating Crime, New Zealand–United States of America [2017] NZTS 15 (signed 20 March 2013, entered into force 12 December 2017), art 2(2). This suggests that the requesting party must have an evidential basis for suspecting that a DNA search will yield helpful results.

<sup>69</sup> Home Office *Forensic Information Databases Service (FINDS): International DNA and Fingerprint Exchange Policy for the United Kingdom* (FINDS-P-040 Issue 2, 21 June 2019) at 16.



familial searching on the National DNA Database.<sup>70</sup> When considering a foreign country's request, the Board's task is to ensure sufficient "justification, control, and approval and, where appropriate, consent".<sup>71</sup>

23.67 In Australia, Commonwealth legislation expressly anticipates the two-stage approach developed under the Prüm Convention, providing that:<sup>72</sup>

(2) A person may access information stored on the Commonwealth DNA database system or NCIDD for one or more of the following purposes: ...

(da) the purpose of assisting a foreign country to decide whether to make a request under the Mutual Assistance in Criminal Matters Act 1987;

(e) the purpose of and in accordance with the Mutual Assistance in Criminal Matters Act 1987 or the Extradition Act 1988 ...

## Results of consultation

23.68 We received six submissions on the use of the DNA databanks on behalf of foreign law enforcement agencies, from Police, NZLS, the New Zealand Bar Association (endorsing NZLS's submission in its entirety), PDS, the Privacy Commissioner and Nessa Lynch.

23.69 Most submitters focused on how requests for assistance should be governed. NZLS submitted that the DPD should continue to be available to foreign law enforcement agencies, subject to strict compliance with MACMA, including the requirement for case-by-case authorisation by the Attorney-General. PDS and Nessa Lynch made similar submissions.

23.70 In relation to the scope of information that should be available to foreign law enforcement agencies, Police submitted that the current settings under section 27 of the CIBS Act establish appropriate limits on the searching of crime profiles for other jurisdictions. Police observed that the PCC Agreement lays down similar restraints on transnational DNA profile matching.

23.71 The Privacy Commissioner submitted that it is important to ensure that the legislative settings for international information sharing (including familial searching) align with those set domestically and are not more permissive.

23.72 NZLS commented on familial searching, submitting that this should meet two minimum requirements. First, it should only be available to foreign law enforcement agencies whose own jurisdictions permit its use. Second, any such requests should be subject to an approval process that is no less onerous than the regime that applies within Aotearoa New Zealand.

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<sup>70</sup> This power is contained in the governance rules for the FIND Strategy Board (previously known as the National DNA Database Strategy Board) issued periodically by the Secretary of State under s 63AB(6) of the Police and Criminal Evidence Act 1984 (UK). The governance rules state that:

It is the responsibility of the Chair of the Strategy Board to assess requests from the police to carry out a familial search of the NDNAD, and where they consider the circumstances justify such a search, to approve the request in writing.

Home Office *Governance Rules for the National DNA Database Strategy Board* (June 2014) at 7.

<sup>71</sup> Home Office *Forensic Information Databases Service (FINDS): International DNA and Fingerprint Exchange Policy for the United Kingdom* (FINDS-P-040 Issue 2, 21 June 2019) at 16.

<sup>72</sup> Crimes Act 1914 (Cth), s 23YDAE(2)(da)–(e).

## RECOMMENDATIONS

### Clarifying mutual assistance arrangements under new DNA legislation

#### RECOMMENDATIONS

**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.

23.73 We recommend that new DNA legislation provide a clear framework for mutual assistance in relation to the proposed DNA databank. This should largely incorporate current practice, identified above, consistent with the approach taken in comparable jurisdictions. To meet our objectives of fit for purpose and accessible legislation, this framework should be outlined in new DNA legislation, similar to the approach in Australia.

23.74 The framework for providing mutual assistance should be a two-step process:

- (a) First, Police should be able to conduct a preliminary search against the proposed DNA databank on behalf of a foreign country (within the limits discussed below) and report whether that search resulted in a match. Building this power into the new DNA legislation gives Police a clearer statutory basis for its current system of preliminary searching.
- (b) Second, if a request for foreign assistance is made under MACMA and is authorised by the Attorney-General, Police should be able to conduct a formal search against the proposed DNA databank on behalf of a foreign country and report on the results of that search, including a disclosure of any identifying information associated with the profile that is found to match. We expect that requests will only be made if a preliminary search has identified a match or if, under the limits discussed below, assistance is required in obtaining a judicial order to authorise the search of the databank.

23.75 Access and disclosure of information on the proposed DNA databank should align with the profile-matching rules that govern domestic use of the databank and should be available where the requirements for domestic use of the proposed DNA databank (with appropriate modifications) are met. This would promote consistency with the principle that investigative techniques that are available to domestic authorities should also be available in response to requests under MACMA.

23.76 We discuss the effect of our recommendations below.

### *Comparing foreign crime scene profiles against the offenders and crime scene indices*

23.77 Police would continue to be able to compare a crime scene profile from a foreign country against profiles of convicted offenders. That comparison would offer the greatest utility to foreign countries as it could reveal the identity of a previously unknown offender.<sup>73</sup> This is consistent with the approach taken in most comparable jurisdictions, as noted above.

23.78 In addition, we recommend that a foreign crime scene profile should be able to be compared against DNA profiles on the crime scene index of the proposed DNA databank. This would be of significant value for foreign countries in helping combat transnational offending. Crime scene index searching could also uncover significant “criminological data on the activities of an individual or group of individuals that have left biological traces at crime scenes in multiple jurisdictions”.<sup>74</sup> Much like domestic investigations, this data can prove helpful in linking multiple crime scenes to one offender<sup>75</sup> or in generating information to help identify geographic trends in criminal offending.<sup>76</sup> This type of searching is also extensively used at a transnational level by other countries.<sup>77</sup>

### *Comparing foreign known person profiles against the offenders and crime scene indices*

23.79 Our recommendation would also permit the comparison of a DNA profile of a known person from a foreign country against the crime scene index and the offenders index, mirroring our recommended domestic matching rules. Some foreign criminal investigations may benefit from identifying whether that person is linked to unresolved offending in New Zealand or has a profile on the offenders index (for example, if a

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<sup>73</sup> Victor Toom *Cross-border Exchange and Comparison of Forensic DNA Data in the Context of the Prüm Decision* (Directorate General for Internal Policies of the Union, PE 604.971, June 2018) at 22; and Filipe Santos and Helena Machado “Patterns of exchange of forensic DNA data in the European Union through the Prüm system” (2017) 57 *Science & Justice* 307 at 309. To illustrate, an empirical study of transnational DNA exchange between the Netherlands and other Prüm countries found that, of the 138 mutual legal assistance requests lodged by the Netherlands in the study window, 86 per cent related to matches between crime scenes and a foreign known person profile. Of these requests, 62 per cent led to further personal information being sent to police for use in a criminal investigation, and 44 per cent of these situations were brought to court: MD Taverne and APA Broeders *The light’s at the end of the funnel! Evaluating the effectiveness of the transnational exchange of DNA profiles between the Netherlands and other Prüm countries* (Paris Legal Publishers, November 2015) at 48.

<sup>74</sup> Filipe Santos and Helena Machado “Patterns of exchange of forensic DNA data in the European Union through the Prüm system” (2017) 57 *Science & Justice* 307 at 309.

<sup>75</sup> GeneWatch UK *Parliamentary vote on the Prüm Decisions: Sharing DNA profiles and fingerprints across the EU requires further safeguards* (December 2015) at 3; and Filipe Santos and Helena Machado “Patterns of exchange of forensic DNA data in the European Union through the Prüm system” (2017) 57 *Science & Justice* 307 at 309.

<sup>76</sup> MD Taverne and APA Broeders *The light’s at the end of the funnel! Evaluating the effectiveness of the transnational exchange of DNA profiles between the Netherlands and other Prüm countries* (Paris Legal Publishers, November 2015) at 63.

<sup>77</sup> For example, art 8 of Council Decision 2008/616/JHA on the implementation of Decision 2008/615/JHA on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime [2008] OJ L210/12 (which implements the Prüm system) makes clear that both unidentified DNA profiles and reference DNA profiles can be automatically compared against the DNA databases of participating jurisdictions. “Unidentified DNA profile” is defined in art 2 of Decision 2008/616/JHA as a profile “obtained from traces collected during the investigation of criminal offences and belonging to a person not yet identified”. To date, nearly all Member States have formally permitted searching against their crime scene profiles. See General Secretariat of the Council *Implementation of the provisions on information exchange of the “Prüm Decisions”* (5081/2/17 Rev 2, 22 May 2017) at Annex 3 bis. Therefore, crime scene-to-crime scene matching is commonplace under the Prüm system.

person is active in two countries and operating under an alias).<sup>78</sup> Given the robust gate-keeping role of the Attorney-General under MACMA, we are satisfied that such access to the proposed DNA databank should be available.

- 23.80 However, foreign matching should satisfy the same requirements proposed for domestic matching. If the foreign known person is a convicted offender, they must have been convicted of an offence punishable by two or more years' imprisonment. If the foreign known person is suspected of committing an offence, a District Court or High Court Judge would need to authorise a search of the crime scene index, consistent with our recommendations in relation to profiles on the pre-conviction index in Chapter 18. This will ensure New Zealand's mutual assistance framework operates in harmony with domestic law.
- 23.81 Because our recommendation in Chapter 18 prohibits any matching of a profile on the pre-conviction index against unrelated profiles on the crime scene index until such time as a court order is obtained, Police would not be able to provide a preliminary result on a match/no-match basis without first obtaining a court order. To permit otherwise would effectively provide foreign countries with more permissive access to the proposed DNA databank than what we recommend for domestic legislation.

#### **No access to the pre-conviction and missing and unidentified people indices**

- 23.82 We have not recommended that access should be permitted, on behalf of foreign countries, to other indices on the proposed DNA databank. This largely aligns with our proposed matching rules for domestic use.
- 23.83 Allowing access to and possibly sharing a person's DNA profile internationally in circumstances where they have not yet been convicted would, in our view, be an unjustified intrusion on their privacy. Although our recommendations would permit a one-off comparison of a profile on the pre-conviction index against all profiles on the crime scene index, we do not provide for the opposite situation (a one-off comparison of a crime scene profile against all profiles on the pre-conviction index).<sup>79</sup> We therefore recommend the continuation of the existing approach under the CIBS Act, which is to prohibit access to the Temporary Databank for the purpose of mutual assistance requests. We note that the existing approach was supported by Police in its submission.
- 23.84 In addition, we recommend that the indices proposed for investigating missing and unidentified people in Chapter 22 be excluded. These indices are intended to be used solely for non-criminal identification purposes and should not be available in relation to foreign criminal investigations.

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<sup>78</sup> MD Taverne and APA Broeders *The light's at the end of the funnel! Evaluating the effectiveness of the transnational exchange of DNA profiles between the Netherlands and other Prüm countries* (Paris Legal Publishers, November 2015) at 21 and 25. A foreign country might also invoke extraterritorial or universal jurisdiction in relation to criminal offending in New Zealand under a particular treaty or customary international law. For discussion, see Alberto Costi "Jurisdiction" in Alberto Costi (ed) *Public International Law: A New Zealand Perspective* (LexisNexis, Wellington, 2020) 361.

<sup>79</sup> While we do provide for internal matches on the pre-conviction index and comparison to profiles on the offenders index, this is largely for the purposes of databank administration rather than to generate investigative leads. We do not think comparison of a foreign known person profile against profiles on the pre-conviction index is justifiable in the same way.

## Prohibiting familial searching on behalf of foreign countries

### RECOMMENDATION

**R191**

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

- 23.85 We recommend clarifying in new DNA legislation that familial searching of the proposed DNA databank on behalf of a foreign country should not be permitted.
- 23.86 This departs from the principle that foreign countries should have access to the same investigative powers and techniques available domestically. However, we consider this departure is justified on the basis that it appropriately balances law enforcement needs and human rights values, having regard to:
- (a) The speculative nature of familial searching, which undermines its law enforcement value. A near match does not guarantee that a relative of a known person is the offender. In fact, most near matches will be “false positives” (see paragraph 23.11 above). In these circumstances, we question whether familial searching could reasonably have been expected to fall within the power to obtain evidence under MACMA.<sup>80</sup>
  - (b) The intrusive nature of familial searching, described at paragraphs 23.16–23.17 above. We note that, while MACMA includes various safeguards to protect suspects and third parties, a person who operates as a “genetic informant” receives no formal protections.
  - (c) The approach taken in comparable jurisdictions, as explained at paragraph 23.65 above, which typically restricts mutual assistance to automated match/no-match searching while still providing for familial searching domestically.
- 23.87 In addition, the Crown’s obligations under the Treaty must also be considered. We do not consider that familial searching of the offenders index on behalf of a foreign country and disclosing those results to a foreign country would be in keeping with the Crown’s obligations to Māori under the Treaty.

## RESEARCH ON THE PROPOSED DNA DATABANK

- 23.88 Genetic research forms a central part of the modern scientific landscape. Law enforcement DNA samples and DNA databanks have the potential to offer a rich pre-existing source of research data.
- 23.89 Our recommendations in previous chapters would strictly limit the use of DNA samples obtained under new DNA legislation, thereby excluding their use for secondary research purposes. We consider this is appropriate given the significant privacy intrusion this would pose and, for Māori, the inconsistency with applicable tikanga.<sup>81</sup>

<sup>80</sup> The Attorney-General’s authorisation power is contained in a provision entitled “Assistance in obtaining evidence in New Zealand”: Mutual Assistance in Criminal Matters Act 1992, s 31.

<sup>81</sup> We discuss the significance of the collection and use of DNA in tikanga Māori, including for health research purposes, in Chapter 2.

23.90 In this chapter, we consider whether and, if so, in what circumstances the DNA profiles that will be held on the proposed DNA databank should be available for research purposes.

### Current law and practice

23.91 Sections 24R and 27 of the CIBS Act limit access to and disclosure of the information held on the Temporary Databank and the DPD (the DNA databanks) to a small number of authorised purposes. Undertaking research on the DNA databanks is not an authorised purpose. However, those sections do not apply “in relation to information that does not identify any person”.<sup>82</sup> However, it is unclear whether DNA profiles can ever be rendered truly non-identifiable.<sup>83</sup> A DNA profile could be divorced from all associated identifying information, leaving behind only the sequence of numbers and letters that make up the DNA profile (the anonymised profile). However, as we explore below, the potential remains for anonymised profiles to be re-identified.

### Police research approval process

23.92 Police has overall responsibility for the DNA databanks under the CIBS Act and would need to approve any request to use non-identifiable information for research purposes. With external research requests, Police would apply its external research policy, which governs all requests by third parties for access to Police data.<sup>84</sup>

23.93 Before Police considers an external research request, the research must be approved by an accredited institutional ethics committee or reviewed by a recognised human ethics body.<sup>85</sup> Police subject matter experts and staff of the Evidence Based Policing Centre (EBPC) then conduct an initial review of the application.<sup>86</sup>

23.94 EBPC was established in 2017 as a joint partnership between Police, the University of Waikato’s Institute for Security and Crime Science, ESR and Police’s technology partner Vodafone New Zealand.<sup>87</sup> We have been advised that, in future, EBPC will handle all external and any internal research requests with privacy, human rights or ethics implications.

23.95 Once EBPC has established that a research application meets the minimum requirements, the Police Research Panel applies the external research policy to determine whether to grant research approval.<sup>88</sup> The “overall principle” of the policy is

<sup>82</sup> Criminal Investigations (Bodily Samples) Act 1995, ss 24R(3) and 27(2).

<sup>83</sup> We note that, if DNA profiles are rendered non-identifiable, the information privacy principles in the Privacy Act 1993 (and its successor, the Privacy Act 2020) that govern the use and disclosure of personal information by agencies would not apply. This is because those Acts define “personal information” as “information about an identifiable individual”: Privacy Act 1993, s 2; and Privacy Act 2020, s 7.

<sup>84</sup> Ngā Pirihimana o Aotearoa | New Zealand Police *Police Policy for External Researchers’ Access to Resources, Data or Privileged Information* (August 2018).

<sup>85</sup> At 4–5.

<sup>86</sup> Ngā Pirihimana o Aotearoa | New Zealand Police “Research – External Researcher Requests” (September 2020) <[www.police.govt.nz](http://www.police.govt.nz)>.

<sup>87</sup> Ngā Pirihimana o Aotearoa | New Zealand Police “Evidence-Based Policing (EBP)” <[www.police.govt.nz](http://www.police.govt.nz)>.

<sup>88</sup> Ngā Pirihimana o Aotearoa | New Zealand Police “Research – External Researcher Requests” (September 2020) <[www.police.govt.nz](http://www.police.govt.nz)>.

that Police will make available the best possible quality data and facilitate access to resources for research while ensuring all relevant legal and ethical obligations are followed.<sup>89</sup> Data produced in response to external research requests does not include any identifiable information.<sup>90</sup> Police has indicated that DNA profiles would be treated as highly sensitive data requiring careful anonymisation before research approval would be granted. When evaluating a DNA-related proposal, the context and nature of the project would also have a significant bearing on whether to permit access.

- 23.96 We understand that, to date, Police has only received one proposal, from ESR and Police staff, to conduct research using the DNA databanks. The proposal involved researching the efficacy of the databank in deterring or preventing criminal offending. That proposal was declined on the basis that it would have involved disclosure of identifiable information, which is not permitted under the CIBS Act.
- 23.97 However, given the growing popularity of “crime science”,<sup>91</sup> we expect that there will be growing interest in the DNA databanks.

### Issues with permitting research on DNA databanks

- 23.98 We have identified a range of issues with the prospect of using information on the DNA databanks for research purposes:
- (a) **The risk of re-identifying profiles.** As noted above, it is questionable whether DNA profiles can truly be made non-identifiable. DNA profiles are generated for the sole purpose of accurately identifying individuals, and technological and scientific developments have gradually increased the capacity for re-identification.<sup>92</sup>
  - (b) **The lack of informed consent.** Using DNA profiles for research purposes has not been expressly authorised by the CIBS Act nor has it been consented to by individuals whose DNA profiles are retained on the databank. Normally, research using identifiable human data must only occur with the informed consent of all data subjects.<sup>93</sup> This recognises the significant human rights values engaged by the

<sup>89</sup> Ngā Pirihiimana o Aotearoa | New Zealand Police *Police Policy for External Researchers' Access to Resources, Data or Privileged Information* (August 2018) at 5.

<sup>90</sup> At 8.

<sup>91</sup> “Crime science” is multi-disciplinary and aims to reduce crime using the application of scientific methods and knowledge. Crime science is becoming increasingly popular, with some universities establishing crime science institutes or offering crime science courses. In New Zealand, Te Puna Haumarua | Institute for Security and Crime Science at the University of Waikato was established in 2017. For a description of crime science, see UCL Department of Security and Crime Science “About” University College London <[www.ucl.ac.uk](http://www.ucl.ac.uk)>.

<sup>92</sup> Many scientific methods have been used to re-identify ostensibly non-identifiable profiles, including by using different demographic datasets, by linkage with other genetic markers through the process known as “linkage disequilibrium” and through long-range familial searching of the type used by genetic ancestry databases, discussed in Chapter 15. See, for example, Harald Schmidt and Shawneequa Callier “How anonymous is ‘anonymous’? Some suggestions towards a coherent universal coding system for genetic samples” (2012) 38 J Med Ethics 304 at 306; Mahsa Shabani and Luca Marelli “Re-identifiability of genomic data and the GDPR: Assessing the re-identifiability of genomic data in light of the EU General Data Protection Regulation” (2019) 20 EMBO reports e48316; Bradley Malin and Latanya Sweeney “Re-Identification of DNA through an Automated Linkage Process” in Suzanne Bakken (ed) *A Medical Informatics Odyssey: Visions of the Future and Lessons from the Past – Proceedings of the American Medical Informatics Association Annual Symposium* (Hanley and Belfus, Philadelphia, 2001) 423; and Yaniv Erlich and others “Identity inference of genomic data using long-range familial searches” (2018) 362 Science 690.

<sup>93</sup> The guidelines issued by the Health Research Council of New Zealand make it clear that informed consent is the foundational principle of medical ethics: Te Kaunihera Rangahau Hauora o Aotearoa | Health Research Council of New Zealand *HRC Research Ethics Guidelines* (December 2017) at 7–8. See also World Medical Association “Declaration of Helsinki: Ethical Principles for Medical Research Involving Human Subjects” 79 Bulletin of the World Health Organisation 373 at 374.

collection and use of human tissue and related information, including DNA and associated DNA profiles. Even if DNA profiles were rendered non-identifiable, their use might still constitute a significant privacy intrusion, especially if the outcome of that research has negative consequences for that individual (such as perpetuating harmful stereotypes, as we discuss below).

- (c) **Methodological and ethical issues with using information on DNA databanks in research.** We question the methodological and ethical soundness of using the DNA databanks for research purposes. The DNA databanks are not representative of the general population of Aotearoa New Zealand. The ethnic makeup of DNA profiles is skewed, as noted below, and the dataset has not been randomly constituted but instead contains DNA profiles of people who have come into contact with the criminal justice system or are of interest to Police (as they include profiles of convicted people, arrestees and volunteers). We therefore question whether using the DNA databanks for non-crime-related research would be appropriate. We are also concerned about the ethical implications of crime research that makes links between or focuses attention on genetics and behaviour. This type of research can perpetuate harmful stereotypes.<sup>94</sup> The paradigm example is the “warrior gene” controversy, which concerned research on a gene that was linked with risk taking, anti-social behaviour and behavioural aggression.<sup>95</sup> It was hypothesised that Māori men are more likely to have this gene variant,<sup>96</sup> which was subsequently reported as suggesting a link between ethnicity and undesirable behavioural traits.<sup>97</sup> This was subsequently widely criticised given the small sample size of 17 people<sup>98</sup> and sparked deep concern about the use of genetics to explain individual differences in behaviour and highlights the risks of poorly framed or misunderstood genetic research.<sup>99</sup>
- (d) **Disproportionate impact on Māori.** Any research using the DNA databanks will have a disproportionate impact on Māori, who are over-represented on the DNA databanks (see discussion in Chapter 3). This raises issues in terms of the guarantee of equity for Māori under the Treaty and its principles. While genetic research in a health context can generate positive outcomes for Māori, there is also a significant risk that research using the information on DNA databanks could further stigmatise Māori, such as the “warrior gene” controversy noted above.

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<sup>94</sup> See Ilan Dar-Nimrod and Steven J Heine “Genetic Essentialism: On the Deceptive Determinism of DNA” (2011) 137 *Psychological Bulletin* 800 at 800. In Chapter 14, we discuss the possibility and implications of analysing crime scene samples for this type of genetic information.

<sup>95</sup> See discussion in the Issues Paper at [12.29]–[12.34].

<sup>96</sup> See David Hall and others “Tracking the Evolutionary History of the MAOA Gene in the South Pacific” (paper presented to Institute of the 11th International Congress of Human Genetics, Brisbane, 6–10 August 2006); and Rod Lea and Geoffrey Chambers “Monoamine oxidase, addiction, and the ‘warrior’ gene hypothesis” (2007) 120(1250) *NZMJ* 5. The methodology was subsequently widely criticised given the small sample size of 17 people: Peter Crampton and Chris Parkin “Warrior genes and risk-taking science” (2007) 120(1250) *NZMJ* 63.

<sup>97</sup> See, for example, “‘Warrior gene’ blamed for Maori violence” *The Sydney Morning Herald* (online ed, Sydney, 9 August 2006).

<sup>98</sup> Peter Crampton and Chris Parkin “Warrior genes and risk-taking science” (2007) 1250 *NZMJ* 63.

<sup>99</sup> Patrick Whittle “Health, inequality and the politics of genes” (2010) 123(1320) *NZMJ* 67; and Grant Gillett and Armon J Tamatea “The warrior gene: epigenetic considerations” (2012) 31 *New Genetics and Society* 41.



Research on the DNA databanks also raises questions of Māori data sovereignty and the guarantee of tino rangatiratanga under the Treaty, which includes the right of Māori to control how their DNA is collected and used (see discussion in Chapter 2). Currently, however, there is no formalised role for Māori to be involved in decisions surrounding the use of Māori DNA profiles for research purposes.<sup>100</sup>

### Options for reform

23.99 In the Issues Paper, we said that, given the CIBS Act does not prohibit access to non-identifiable information on the DNA databanks and given the issues with such access and use, we think reform is required. We identified several options for reform:<sup>101</sup>

- (a) A statutory prohibition on research using any information on the DNA databanks.
- (b) Requiring approval and oversight of internal and external research requests by an independent body, which should provide a central role for Māori consistent with the Crown's obligations under the Treaty.
- (c) Establishing an additional group to perform a kaitiaki role to provide support and accountability for the Māori members of the independent body<sup>102</sup> or a more informal kaitiaki mechanism that could act on an ad hoc basis.

### Results of consultation

23.100 We received 45 submissions that addressed the use of the DNA databanks for research purposes. Of these, 19 submissions opposed any use of the DNA databanks for research purposes, while 24 submitters thought that anonymised profiles should be able to be used for research in some situations.<sup>103</sup> We explore these views below.

#### Opposition to research on the databanks

23.101 Te Mana Raraunga, Karaitiana Taiuru, David Eccles, Dennis McNevin and 15 other individuals opposed the use of anonymised profiles in research.

23.102 Te Mana Raraunga, Karaitiana Taiuru and three other individuals were concerned about the use of Māori DNA profiles. Te Mana Raraunga pointed to the inappropriate stigmatising claims made about Māori populations in the past (noted above) and submitted that there should be a clear separation between ESR's forensic and research functions. Given the coercive nature in which DNA samples are routinely obtained (with or without consent), profiles should only be used for law enforcement purposes and

<sup>100</sup> We do note, however, that New Zealand-based ethics committees are likely to apply *Te Ara Tika*, which provides guidelines for ethics committee members on addressing Māori ethical issues when making decisions about research, particularly in the health sector. Specific guidance has also been issued on the use of biobanking and genomic research in the health context using Māori samples and data. See Pūtaiora Writing Group *Te Ara Tika: Guidelines for Māori research ethics – A framework for researchers and ethics committee members* (Health Research Council of New Zealand, 2010); Maui Hudson and others *He Tangata Kei Tua: Guidelines for Biobanking with Māori* (Te Mata Hautū Taketake | Māori and Indigenous Governance Centre, October 2016); and Maui Hudson and others *Te Mata Ira: Guidelines for Genomic Research with Māori* (Te Mata Hautū Taketake | Māori and Indigenous Governance Centre, October 2016).

<sup>101</sup> Issues Paper at [12.48].

<sup>102</sup> See for example the National Kaitiaki Group established under the Health (Cervical Screening (Kaitiaki)) Regulations 1995 to consider applications to disclose, use or publish information held on the National Cervical Screening Register that belongs to Māori women.

<sup>103</sup> Two further submitters commented on using anonymised profiles for research but did not express a view. Their comments are captured in the summary below.

research on the DNA databanks should be prohibited. Te Mana Raraunga noted that aggregate, de-identified data should still be reported as part of auditing and monitoring procedures to assess the impact of Police and ESR policies on Māori. However, this should only occur within the context of Māori governance, with Māori involvement in the analysis and interpretation of data. Karaitiana Taiuru submitted that no government department or organisation should be permitted to research or analyse DNA, given its tapu nature.

- 23.103 Several individuals were concerned about possibility of re-identifying anonymised profiles. Dennis McNevin pointed to recent scientific evidence that anonymised profiles can be re-identified by association with other genetic markers. The Public Defence Service (PDS) shared this concern, noting that DNA profiles should never be released if they cannot be truly anonymised.
- 23.104 Ethical and privacy concerns were raised by individuals, many of whom thought that DNA profiles should only be used for the purpose for which they were originally collected. Dennis McNevin submitted that broader use of DNA profiles for research purposes is unethical, even using anonymised profiles, as it allows researchers to “subvert the standard process of obtaining informed consent from research participants”. David Eccles similarly submitted that any research on individuals needs to be approved by a national ethics committee with a demonstration that every individual has provided their fully informed consent to their DNA being used. Other individuals raised a range of concerns regarding what they saw as inappropriate uses of anonymised profiles, including to generate profit, commercialise data, deny health insurance or develop biological agents to attack specific genomes.

#### ***Support for use of anonymised profiles***

- 23.105 The Privacy Commissioner, NZLS, the New Zealand Bar Association (endorsing NZLS’s submission in its entirety), ADLS, PDS, Police, Nessa Lynch, Carole McCartney, Aaron Amankwaa, Sue Petricevic and 15 other individuals supported the use of anonymised profiles for research purposes.
- 23.106 Most of these submitters supported a robust approval process involving the making of a formal application, ethics approval and final approval given by an independent body. The Privacy Commissioner noted the need for the ethics approval process to include consultation with representative groups including Māori. NZLS supported a “stringent research approval policy”, which should focus on data anonymisation irrespective of who will conduct the research, and that ethical oversight should take account of Māori research ethics. Nessa Lynch and another individual noted the need for ethics approval to be informed by the Treaty and tikanga Māori.
- 23.107 Several individuals favoured a model that requires the informed consent of people whose profiles are used, given the potential for anonymised profiles to be re-identified. Some submitters thought this should occur when a research proposal is contemplated and that full information about the research should be provided to the individual concerned. Carole McCartney and Aaron Amankwaa submitted that anticipated research should be explained to people when their DNA sample is taken (other than research on the efficacy and technical operation of the DNA databanks using anonymised data, which should not need their consent).

- 23.108 Some submitters submitted that research should only be for limited purposes. Carole McCartney and Aaron Amankwaa commented that, to preserve the legitimacy of the DNA databanks, research must not exceed the legally accepted function of DNA profiles — that is, it must fall within the ambit of facilitating the identification of potential suspects in unresolved offending or be associated with the databanks' efficacy and technical operation. One individual thought that profiles should not be available for government profiling or research, given the risk of discrimination, but that Māori DNA profiles should be made available to iwi/kaupapa Māori research institutions. Another individual thought that profiles should only be available for health research purposes and only with the informed consent of those people on the databank.
- 23.109 Police submitted that DNA profiles on the databanks should be available in anonymised form for approved research purposes.

### Approach to databank research in comparable jurisdictions

- 23.110 The approach to research on law enforcement DNA databanks in other jurisdictions is mixed.
- 23.111 England and Wales have the most permissive approach. Legislation permits the use of the National DNA Database (NDNAD) for “purposes related to” the prevention, detection, investigation or prosecution of criminal offending.<sup>104</sup> This has been interpreted as permitting the use of the NDNAD for research relating to that purpose. Guidance issued by the Home Office applies to all requests for access to DNA profiles for research purposes, and all requests must be authorised by the FIND Strategy Board.<sup>105</sup> Decisions are made on a case-by-case basis based on the “proportionality, necessity, impact on privacy and perceived value of the proposed research”.<sup>106</sup> Before making a final decision, the FIND Strategy Board must take advice from the Biometrics and Forensics Ethics Group. No consent is required from data subjects, and anonymisation of DNA profiles is not required in every case. We note, however, that concerns have been raised regarding this approach.<sup>107</sup>
- 23.112 Since the establishment of the NDNAD in 1995 to 2009, there were 46 requests to access profiles or bodily samples for research purposes.<sup>108</sup> Of these, 26 were approved.

<sup>104</sup> Police and Criminal Evidence Act 1984 (UK), s 64ZN. The Scottish DNA Database is not established in legislation. However, all DNA profiles on that database (except volunteers for mass screening) are exported to the United Kingdom's National DNA Database: Scottish Police Authority “Scottish DNA Database Statistics” <[www.spa.police.uk](http://www.spa.police.uk)>.

<sup>105</sup> See Home Office *Forensic Information Databases Service (FINDS): Process for Release from the Forensic Information Databases for Research Purposes* (FINDS-S-023 Issue 1, 16 June 2017); and Home Office *Forensic Information Databases Service: The Forensic Information Databases Strategy Board Policy for Access and Use of DNA Samples, DNA Profiles, Fingerprint Images, and Associated Data* (FINDS-SB-P-002 Issue 1, 7 June 2018). The FIND Strategy Board is vested with authority to approve third-party research requests under its governance rules issued by the Secretary of State pursuant to s 63AB(6) of the Police and Criminal Evidence Act 1984: Home Office *Governance Rules for the National DNA Database Strategy Board* (June 2014) at [8.1(e)].

<sup>106</sup> Home Office *Forensic Information Databases Service: The Forensic Information Databases Strategy Board Policy for Access and Use of DNA Samples, DNA Profiles, Fingerprint Images, and Associated Data* (FINDS-SB-P-002 Issue 1, 7 June 2018) at [8.7].

<sup>107</sup> See, for example, GeneWatch UK *Using the police National DNA Database – under adequate control?* (July 2006). GeneWatch note at 12 that a subject's consent is not required even though third-party researchers can use profiles, linked personal information and bodily samples in their research project.

<sup>108</sup> National DNA Database *Annual Report 2007–2009* (Home Office, 2009) at 38. From our research, this appears to be the last time that the number of research requests has been publicly reported. For further discussion of historical

Most requests were made by the Home Office or forensic science providers who sought to develop new techniques and services for routine casework or to improve the databank.<sup>109</sup> Six requests were made by external bodies (such as universities, the European Network of Forensic Science Institutes or private laboratories), of which it appears three were approved.<sup>110</sup> Examples of projects that have been granted approval include projects designed to find information about specific people on the databank(s), their alleles and geographic location to help reduce false matches; research using bodily samples and profiles into ethnic inferencing technologies outside the context of specific casework; and genetic research on the male Y chromosome.<sup>111</sup> Third parties have also requested, but been denied, access to records linked to the Police National Computer.<sup>112</sup>

23.113 In contrast, legislation in Australia, Ireland and Canada does not appear to authorise research on law enforcement DNA databanks. These jurisdictions operate under legislative frameworks that prescribe the permitted uses of the databanks.<sup>113</sup> However, legislation in Australia and Ireland does expressly permit the use of information on the databanks for statistical purposes. In Australia, legislation establishes a “statistical index”, which is an index of information that:<sup>114</sup>

- (a) is obtained from the analysis of forensic material taken from persons in accordance with this Part or under a corresponding law of a participating jurisdiction; and
- (b) has been compiled for statistical purposes; and
- (c) cannot be used to discover the identity of persons from whom the forensic material was taken.

23.114 Legislation in Ireland takes a similar approach, noting that:<sup>115</sup>

Nothing in this Act shall prevent a member of the staff of FSI from processing and using the information in the DNA Database System for statistical purposes and analysis provided the identity of the persons whose DNA profiles are entered in the System is not disclosed otherwise than in accordance with this Act.

23.115 In the United States, federal law similarly permits research using non-identifiable DNA profiles but only for the limited purposes of “a population statistics database, for

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research applications, see Christopher H Asplen *The Non-Forensic Use of Biological Samples Taken for Forensic Purposes: An International Perspective* (American Society of Law Medicine & Ethics, 2006) at 5–6.

<sup>109</sup> National DNA Database *Annual Report 2007–2009* (Home Office, 2009) at 39.

<sup>110</sup> There is some discrepancy in the data. The National DNA Database *Annual Report 2007–2009* (Home Office, 2009) at 39 reports that only one external request was permitted, whereas the GeneWatch Report, which is based on information obtained under the Freedom of Information Act 2000 (UK), lists that three external requests were approved: GeneWatch UK *Using the police National DNA Database – under adequate control?* (July 2006) at 5. This discrepancy may be caused by competing definitions of an ‘external’ request.

<sup>111</sup> GeneWatch UK *Using the police National DNA Database – under adequate control?* (July 2006) at 6–11.

<sup>112</sup> At 10.

<sup>113</sup> Criminal Justice (Forensic Evidence and DNA Database System) Act 2014 (Ireland), s 68; Crimes Act 1914 (Cth), s 23YDAE; and DNA Identification Act SC 1998 c 37, ss 4(b), 5.5(1)–6.4(4) and 7. The Australian legislation limits the use of DNA profiles unless the information cannot be used to discover the identity of any person, similar to the approach in New Zealand. However, it appears the function of this language is to accommodate the statistical index rather than to authorise research.

<sup>114</sup> Crimes Act 1914 (Cth), s 23YDAC definition of “statistical index”.

<sup>115</sup> Criminal Justice (Forensic Evidence and DNA Database System) Act 2014 (Ireland), s 69.

identification research and protocol development purposes, or for quality control purposes”.<sup>116</sup> Wider forms of research are therefore prohibited.

## RECOMMENDATIONS

### Restricting research on the proposed DNA databank

#### RECOMMENDATION

**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.

23.116 The new DNA legislation should clarify the position with respect to research on the proposed DNA databank.

23.117 We recommend that all external research should be prohibited. We think it is unlikely that Parliament intended, by the wording of sections 24R and 27, to authorise research on the DNA databanks, even using anonymised profiles.<sup>117</sup> In our view, the more likely interpretation of those sections is to authorise Police to use non-identifiable information for internal statistical research only, as is the case in Australia and Ireland.<sup>118</sup>

23.118 In any event, we do not support external research on the proposed DNA databank given the lack of informed consent by people to the use of their DNA information in this

<sup>116</sup> 42 USC § 14132(b)(3)(D). The approach taken within states varies, but as a state must comply with federal DNA database rules to gain access to that database, many state DNA databanks adopt the same or more restrictive databank rules. See David H Kaye “Behavioral Genetics Research and Criminal DNA Databases” (2006) 69 LCP 259 at 273–282.

<sup>117</sup> Parliamentary debates on the Criminal Investigations (Blood Samples) Bill 1994 indicate a desire to narrowly tailor the legitimate uses of DNA profiles. For example, Judith Tizard observed that a DNA profile should be used “only for the purpose for which it is collected ... to convict people who have committed serious crimes”: (10 August 1995) 549 NZPD 8630. Richard Northey explained that using DNA profiles for “purposes that are entirely unrelated to the purpose for which the material is being held” would constitute misuse of the databank(s): (10 August 1995) 549 NZPD 8637–8638. Examples given of non-justifiable unrelated uses of DNA profiles included granting access to academics, mining genetic data to reveal medical illnesses or behavioural traits and opening up the databank to insurance companies or employers: (10 August 1995) 549 NZPD 8630–8631 and 8637–8638. Related materials support this interpretation. For example, the advisory memorandum given to Cabinet stated that the limitations governing the use of DNA profiles meant that profiles could not lawfully be used for any other purpose “such as research or the detection of disease”: Office of the Minister of Justice “Memorandum for Cabinet Social and Family Policy Committee: Enforcement, Prosecution and Sentencing – Part G Obtaining Blood Samples from Certain Convicted Offenders for the Purpose of a DNA Databank” (July 1994) at [40].

<sup>118</sup> The Criminal Investigations (Blood Samples) Bill was prepared against the background of the draft Australian Model Forensic Procedures Bill (written by the Model Criminal Code Officers’ Committee) which authorised the use of non-identifiable DNA profiles on a “database for statistical purposes” (now the statistical index, as noted above). The provisions of the CIBS Act governing the use of the DNA profile databank appear to be modelled on the Wanganui Computer Centre Act 1976, which allowed law enforcement data to be used “for research or statistical purposes” where the data was disclosed in a non-identifiable format: s 27(2). During the Hansard debates on the original Criminal Investigations (Blood Samples) Bill 1994 (54-1), several Members of Parliament referred to the Wanganui Computer and the associated legislative framework. See, for example, (10 August 1995) 549 NZPD at 8637–8638; and (12 October 1995) 551 NZPD 9729.

way and given the impracticality of requiring Police to obtain such consent, either at the time of taking a DNA sample or later when research is proposed. While it may be accepted practice not to require consent in respect of non-identifiable information, in our view, it is inappropriate to treat DNA profiles in the same way as other forms of non-identifiable information given the risks identified in paragraph 23.98. Further, given the significance of the collection and use of DNA according to tikanga Māori discussed in Chapter 2, external research on the proposed DNA databank in the absence of consent would have tikanga implications, including on the personal mana of the donor and individual and collective responsibilities to protect whakapapa information.

- 23.119 Internal research conducted by or on behalf of Police should be permitted for limited purposes if approved by the DNA Oversight Committee in accordance with R192. Specifically, any research must relate to the purpose of the new DNA legislation, which 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.
- 23.120 This would include research on the efficacy of the proposed DNA databank (an area which, as we observe in Chapter 4, is in need of further research) and research on trends in policing practices in relation to the collection and use of DNA (such as research on the impact of the proposed DNA databank on Māori).
- 23.121 Overall, we consider these recommendations will:
- (a) clarify the law and enable information on the proposed DNA databank to be fully utilised to enhance the databank's performance and improve Police's operational policies and practices;
  - (b) promote public trust and confidence in the proposed DNA databank by ensuring that information on the databank is used only in connection with the purpose for which samples are obtained;
  - (c) minimise the risk of harm to those whose profiles are on the proposed DNA databank by:
    - (i) prohibiting external research, thereby mitigating privacy concerns related to the risk of re-identifying anonymised profiles;
    - (ii) restricting the type of research that may be conducted, thereby mitigating the risk of misuse of DNA profiles given the methodological concerns identified above; and
    - (iii) ensuring all research requests receive independent approval, thereby ensuring that ethical, privacy and other human rights concerns are properly considered; and
  - (d) ensure a central role for Māori in the approval of any research using Māori data through the approval function of the DNA Oversight Committee.

## Establishing a process to approve internal research

### RECOMMENDATION

#### 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).

- 23.122 New DNA legislation should require that internal research conducted by or on behalf of Police using the proposed DNA databank is subject to external oversight by the DNA Oversight Committee. To guarantee that internal research stays within permitted bounds, the DNA Oversight Committee should be vested with the power to approve or deny research proposals. Such an approach mirrors the powers of the FIND Strategy Board in England and Wales, discussed above. We consider this is appropriate given the ethical and privacy issues identified above and is consistent with the broad oversight role proposed for the DNA Oversight Committee in Chapter 5.
- 23.123 This recommendation will also ensure a central role for Māori in the approval of research involving Māori DNA, given our recommendations in Chapter 5 regarding the composition of the DNA Oversight Committee and the inclusion of a Māori caucus. We do not prescribe in detail how this oversight should be exercised nor how the DNA Oversight Committee or Māori caucus should operate. These matters should be determined by the DNA Oversight Committee itself. However, our recommendations would provide scope for the Māori caucus of the DNA Oversight Committee to perform a kaitiaki function in relation to Māori data. The DNA Oversight Committee would be able to have regard to the extent to which any research requests by or on behalf of Police facilitate a partnership approach to research, recognise and provide for tikanga Māori and address any impacts of the research on Māori.
- 23.124 In terms of practical arrangements, the DNA Oversight Committee could be supported in this role by EBPC. For example, EBPC could undertake a preliminary evaluation of all research proposals applying agreed frameworks, as it does currently with external research requests. The DNA Oversight Committee should be able to set its own process, however, by which it will consider any research requests. Any such process should be made publicly available, including being published online, along with a summary of any research proposals considered by the DNA Oversight Committee and the outcome of its considerations.
- 23.125 For the avoidance of doubt, access to and disclosure of information on the proposed DNA databank should not be considered “research” requiring approval of the DNA Oversight Committee if it is to:
- (a) satisfy statutory reporting requirements recommended in this Report;
  - (b) administer the databank; or
  - (c) permit the forensic services provider to conduct internal validation of analysis methods and other validation required to fulfil its responsibilities under new DNA legislation.
- 23.126 Reporting is discussed in Chapter 5, and administration of the databank is discussed in Chapter 7.

# Appendix 1

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## Terms of reference

The Law Commission will conduct a comprehensive review of the Criminal Investigations (Bodily Samples) Act 1995 (the Act). The Act provides the New Zealand Police with powers to collect, retain, and use DNA in criminal investigations. It also regulates two DNA profile<sup>1</sup> databanks that are maintained, on behalf of the Police, by the Institute of Environmental Science and Research (ESR).

The Act was the subject of significant amendments in 2003 and 2009. The purpose of this review is to determine whether the current legislation is fit for purpose and whether it is keeping pace with developments in forensic science, international best practice and public attitudes, in relation to the collection, retention and use of DNA in criminal investigations. The review will also examine whether the Act gives appropriate recognition to both law enforcement values and human rights, including the right to privacy.

The Law Commission's review will include (but not be limited to) an examination of the following areas and issues:

### Recognising public and individual interests

- Identification and assessment of the law enforcement benefits of the use of DNA in criminal investigations
- Whether human rights, including the right to privacy, are appropriately recognised
- The legal and ethical issues around the control and ownership of DNA
- Whether Māori interests, including in relation to tikanga Māori, are appropriately recognised.

### Recognising the broader context

- Recent and predicted scientific developments in the forensic analysis of DNA
- International agreements, obligations and best practice
- The relationship between the Act and regimes governing the collection, retention and use of other biometric information including fingerprints

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<sup>1</sup> It is important to note the distinction between a DNA *sample* and a DNA *profile*. A DNA *sample* means the actual physical sample of bodily/genetic material: for instance a sample of blood or saliva from a buccal swab. The information derived from the forensic analysis of the sample is a DNA *profile*. A DNA sample is also sometimes referred to as a "bodily sample". The Criminal Investigations (Bodily Samples) Act 1995 governs how DNA samples from blood or buccal swabs must be obtained. However, most genetic material can be used to obtain a DNA sample.



- The relationship between the Act and other related legislation including the Children, Young Persons and their Families Act 1989, the New Zealand Bill of Rights Act 1990, the Privacy Act 1993, the Health Information Privacy Code 1994, the Criminal Records (Clean Slate) Act 2004 and the Search and Surveillance Act 2012.

### **Improving legislative design**

- The scope, coverage and accessibility of the Act, with a view towards simplification and improving legislative design
- The checks and balances that protect the integrity of the databank regime
- The criteria for deciding from whom to collect a DNA sample. Procedural and technical matters including the requirements governing consent, the use of reasonable force, taking DNA samples from children, young persons and other vulnerable persons, retention of DNA samples and DNA profiles, reporting requirements, record keeping and information sharing with domestic agencies and foreign law enforcement agencies.

### **Review Process**

This review will be conducted by the Law Commission. The Commission will engage with interested parties in both the public and private sector during the review, and will carry out a public consultation process. The Commission will also establish an officials group and an expert advisory group to provide technical expertise and advice representing a range of perspectives.

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# Appendix 2

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## List of submitters

The Law Commission received 88 submissions on its Issues Paper, from 16 organisations and 72 individuals. Below we list the organisations along with the acronyms we use throughout this Report (where relevant). We also list those individuals who have agreed to be named in this Report.

In addition, we received comments from Chief District Court Judge Jan-Marie Doogue on behalf of the Judges of the District Court and Judge John Walker, Principal Youth Court Judge, with input from nine senior Youth Court Judges, including Ngā Kōti Rangatahi Judges.

### ORGANISATIONS

Auckland District Law Society Criminal Law Committee (ADLS)  
Human Rights Commission (HRC)  
Independent Forensic Practitioners Institute (IFPI)  
Independent Police Conduct Authority (IPCA)  
Innocence Project New Zealand  
Institute of Environmental Science and Research (ESR)  
New Zealand Bar Association  
New Zealand Law Society (NZLS)  
New Zealand Police  
Office of the Children's Commissioner (OCC)  
Privacy Commissioner  
Public Defence Service (PDS)  
Sensible Sentencing Trust  
Te Hunga Rōia Māori o Aotearoa | The Māori Law Society  
Te Mana Raraunga | Māori Data Sovereignty Network  
YouthLaw Aotearoa

### INDIVIDUALS

Dr Aaron Amankwaa  
Dr David Eccles  
Gavin English  
Associate Professor Nessa Lynch  
Professor Carole McCartney  
Professor Dennis McNevin  
Sue Petricevic  
Karaitiana Taiuru

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# Appendix 3

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## DNA statistics

1. This appendix summarises some key information about the collection of DNA samples, retention of DNA profiles on the DNA databanks and use of the DNA databanks in Aotearoa New Zealand. Most information is drawn from the statistics that Police reports on under section 76 of the CIBS Act or from information provided to us separately by Police and ESR.

### SIZE OF THE DNA DATABANKS

2. As of 30 June 2019, there were:<sup>1</sup>
  - 194,269 profiles on the DNA Profile Databank (DPD); and
  - 7,792 profiles on the Temporary Databank.<sup>2</sup>
3. Police is not required to report on the Crime Sample Databank (CSD) because it is not regulated by the CIBS Act. ESR has advised that, at 8 October 2020, there were 45,180 STR profiles on the CSD, as well as 401 Y-STR profiles. Most were single contributor crime scene profiles but 939 were mixed profiles. We discuss the difference between STR profiles, Y-STR profiles and mixed profiles in Chapter 6.

### GROWTH OF THE DNA PROFILE DATABANK

4. Table 1 demonstrates that the DPD has grown at a steady rate over the past 20 years, with approximately 10,000 new profiles being added every year since 2003.

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<sup>1</sup> 30 June 2019 is the latest date at which statistics were available when writing this Report, published in Ngā Pirihimana o Aotearoa | New Zealand Police *Annual Report 2018–2019* (November 2019).

<sup>2</sup> The precise number of profiles on the Temporary Databank is constantly changing as profiles are added, removed or transferred to the DNA Profile Databank. This figure is therefore a snapshot in time. However, the size of the Temporary Databank has remained fairly static since its establishment in 2009, due to its temporary nature.

TABLE 1: GROWTH IN THE NUMBER OF DNA PROFILES ON THE DPD

Reporting year	Net annual growth in profiles on DPD	Total number of profiles on DPD <sup>3</sup>	Total number of profiles on DPD as a percentage of general population <sup>4</sup>
2004/05	11,006	53,850	1.30
2005/06	9,722	63,572	1.52
2006/07	9,983	73,555	1.74
2007/08	11,620	85,175	2.00
2008/09	12,410	97,585	2.27
2009/10	11,758	109,343	2.51
2010/11	10,703	120,046	2.74
2011/12	8,955	129,001	2.93
2012/13	14,485	143,486	3.23
2013/14	8,558	152,044	3.38
2014/15	8,252	160,296	3.50
2015/16	5,776	166,072	3.56
2016/17	10,553	176,625	3.71
2017/18	9,394	186,019	3.85
2018/19	8,250	194,269	3.96

### COLLECTION OF DNA SAMPLES FROM KNOWN PEOPLE

5. Table 2 sets out the number of DNA samples obtained each year by method of collection (that is, the power under which the sample was requested or required). Table 2 illustrates the significant change in Police practice following the introduction, in 2009, of the power

<sup>3</sup> As at the end of the period under review, reported in accordance with s 76(1)(f) of the Criminal Investigations (Bodily Samples) Act 1995.

<sup>4</sup> Based on Statistics New Zealand's national population estimates for mean quarter ended June 2005 (4,130,200); June 2006 (4,180,300); June 2007 (4,221,600); June 2008 (4,257,700); June 2009 (4,298,000); June 2010 (4,348,200); June 2011 (4,383,200); June 2012 (4,407,300); June 2013 (4,439,000); June 2014 (4,498,300); June 2015 (4,578,400); June 2016 (4,670,000); June 2017 (4,758,500); June 2018 (4,834,900) and June 2019 (4,911,600): Tauranga Aotearoa | Stats NZ "Estimated Resident Population (Mean Quarter Ended) By Sex (1991+) (Qrtly-Mar/Jun/Sep/Dec)" <archive.stats.govt.nz>.

to require a sample from a person arrested or intended to be charged. Prior to 2009, most samples were collected from volunteers.

**TABLE 2: COLLECTION OF DNA SAMPLES BY METHOD OF COLLECTION**

Reporting year	Samples obtained from suspect by consent <sup>5</sup>	Sample required from suspect pursuant to compulsion order <sup>6</sup>	Sample required on arrest or intention to charge <sup>7</sup>	Sample required following conviction <sup>8</sup>	Sample provided by volunteer <sup>9</sup>
2004/05	-	50	N/A	1,655	9,352
2005/06	-	44	N/A	1,832	7,999
2006/07	-	51	N/A	2,115	7,921
2007/08	-	65	N/A	2,267	9,512
2008/09	-	47	N/A	2,681	9,982
2009/10	-	44	N/A	2,860	9,229
2010/11	341	47	7,700	2,340	4,709
2011/12	623	55	14,560	1,409	2,163
2012/13	545	64	12,050	985	958
2013/14	585	62	9,648	844	623
2014/15	737	60	11,209	677	1,186
2015/16	730	62	16,630	587	971
2016/17	656	65	15,363	642	379
2017/18	642	71	14,679	809 <sup>10</sup>	304
2018/19	623	66	13,056	599	291

<sup>5</sup> Police is not required to report on suspect samples obtained by consent. This information for 2010/2011 to 2018/2019 was provided separately by Police.

<sup>6</sup> Number of occasions on which a blood or buccal sample has been taken pursuant to a compulsion order, reported pursuant to Criminal Investigations (Bodily Samples) Act 1995, s 76(1)(ca) and (cb).

<sup>7</sup> Number of occasions on which a bodily sample has been taken under Part 2B, reported pursuant to Criminal Investigations (Bodily Samples) Act 1995, s 76(1)(eb).

<sup>8</sup> Number of occasions on which a blood or buccal sample has been taken pursuant to a databank compulsion notice, reported pursuant to Criminal Investigations (Bodily Samples) Act 1995, s 76(1)(cc) and (cd).

<sup>9</sup> Number of occasions on which a blood or buccal sample has been taken with the consent of a person given in response to a databank request, reported pursuant to Criminal Investigations (Bodily Samples) Act 1995, s 76(1)(a) and (ab).

<sup>10</sup> Increase due to sampling under the Returning Offenders (Management and Information) Act 2015.

6. By 30 June 2019, the composition of profiles on the DPD was as follows:<sup>11</sup>
- 37 per cent obtained on arrest or intention to charge.
  - 49 per cent obtained by consent (either as a volunteer sample or a suspect consent sample).
  - 14 per cent obtained following conviction.
  - 0.2 per cent obtained pursuant to a suspect compulsion order.

### SNAPSHOT OF OFFENCES FOR WHICH SAMPLES ARE OBTAINED

7. Police does not report on the offences in respect of which DNA samples are obtained or profiles are added to the DPD or Temporary Databank. However, Police provided the Commission with data on the offences in respect of which a DNA sample was collected in a three-month period between April and June 2016. Table 3 contains a breakdown of the collection method and offence type.

TABLE 3: SAMPLE COLLECTION BY OFFENCE TYPE, APRIL–JUNE 2016			
Category of offending	Sample required on arrest or intention to charge	Sample required following conviction	Percentage of total (rounded)
Violence (not including sexual offending)	1,760	28	42%
Dishonesty/property	1,343	22	32%
Drug	453	11	11%
Driving	281	9	7%
Sexual (including all categories of sexual offending)	186	5	4%
Overseas conviction	0	110	3%
Other	83	0	2%
Total	4,106	185	101%

<sup>11</sup> Based on data reported pursuant to s 76(1)(f) of the Criminal Investigations (Bodily Samples) Act 1995 in Ngā Pirihimana o Aotearoa | New Zealand Police *Annual Report 2018–2019* (November 2019) at 168.

## ETHNICITY OF PEOPLE SAMPLED AND ON THE DPD

8. Police is required to report on the ethnicity of people sampled on arrest or intention to charge under Part 2B of the CIBS Act.<sup>12</sup> Ethnicity information is self-identified. Over the past nine reporting periods, the breakdown in ethnicity of people sampled on arrest or intention to charge ranged between:<sup>13</sup>
  - 38–41 per cent Māori;
  - 38–42 per cent European;
  - 11–13 per cent Pacific peoples; and
  - 6–10 per cent other ethnicity or ethnicity not specified.
9. This broadly reflects the ethnicity breakdowns for offenders recorded by Police and for apprehensions recorded by Statistics New Zealand.<sup>14</sup>
10. While Police does not report on the ethnicity of people who volunteer a sample or who provide a suspect sample or a sample following conviction, a review of information provided by Police on the ethnicity of profiles added to the DPD between 2012 and 2018 identified that the ethnic breakdown is very similar to the ethnic breakdown of samples obtained under Part 2B of the CIBS Act.<sup>15</sup> This suggests that profiles are being transferred to the DPD in roughly the same ethnic proportions as they are being collected.

## CHILDREN AND YOUNG PEOPLE

11. Police is not required to report on the total number of samples obtained from children and young people. However, it does report on the number of samples required from young people on arrest or intention to charge.<sup>16</sup> This information shows that, since 2010, Police has obtained between approximately 300 and 750 samples from young people each reporting year. This equates to 3–6 per cent of the total number of samples obtained on arrest or intention to charge.
12. Police also provided us with information on the number of profiles added to the DPD from children and young people for each reporting year ending 30 June 2012 to 30 June

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<sup>12</sup> Criminal Investigations (Bodily Samples) Act 1995, s 76(2).

<sup>13</sup> Police collect ethnicity data for Asian, European, Indian, Latin American, Māori, Middle Eastern, Native African, Pacific peoples, Other, and Unknown. See Ngā Pirihimana o Aotearoa | New Zealand Police *Annual Report 2010–2011* (October 2011) at 113; Ngā Pirihimana o Aotearoa | New Zealand Police *Annual Report 2011–2012* (October 2012) at 95; Ngā Pirihimana o Aotearoa | New Zealand Police *Annual Report 2012–2013* (October 2013) at 113; Ngā Pirihimana o Aotearoa | New Zealand Police *Annual Report 2013–2014* (October 2014) at 131; Ngā Pirihimana o Aotearoa | New Zealand Police *Annual Report 2014–2015* (October 2015) at 153; Ngā Pirihimana o Aotearoa | New Zealand Police *Annual Report 2015–2016* (October 2016) at 155; Ngā Pirihimana o Aotearoa | New Zealand Police *Annual Report 2016–2017* (November 2017) at 143; Ngā Pirihimana o Aotearoa | New Zealand Police *Annual Report 2017–2018* (October 2018) at 148; and Ngā Pirihimana o Aotearoa | New Zealand Police *Annual Report 2018–2019* (November 2019) at 169.

<sup>14</sup> Based on Ngā Pirihimana o Aotearoa | New Zealand Police “Unique Offenders (demographics)” (2020) <policedata.nz> and rates of apprehension reported up to 30 June 2014, available at Tatauranga Aotearoa | Stats NZ “Annual Apprehensions for the latest Fiscal Years (ANZSOC)” <nzdostat.stats.govt.nz>. See also discussion in Chapter 2 on Māori over-representation in rates of conviction in the criminal justice system.

<sup>15</sup> See Issues Paper at [11.73]–[11.74].

<sup>16</sup> Criminal Investigations (Bodily Samples) Act 1995, s 76(2).

2018. This information is shown in Table 4.<sup>17</sup> During this time, the definition of young person was restricted to people aged between 14 and 17 years. The definition was expanded on 1 July 2019 to include people aged 17 years.

**TABLE 4: PROFILES FROM CHILDREN AND YOUNG PEOPLE ADDED TO THE DPD BY ETHNICITY, 2012–2018**

Reporting year	European		Māori		Pacific peoples		Other/not specified		Total
	Count	Percentage	Count	Percentage	Count	Percentage	Count	Percentage	
2012/13	80	20%	226	67%	49	12%	3	1%	398
2013/14	60	22%	169	63%	33	12%	6	2%	268
2014/15	68	22%	214	68%	30	9%	4	1%	316
2015/16	89	18%	319	65%	75	15%	9	2%	492
2016/17	80	18%	308	68%	54	12%	14	3%	456
2017/18	44	21%	148	70%	18	9%	1	0%	211
<b>Total</b>	<b>421</b>	<b>20%</b>	<b>1,424</b>	<b>67%</b>	<b>259</b>	<b>12%</b>	<b>37</b>	<b>2%</b>	<b>2,141</b>

## DATABANK MATCHES

- Police is required to report on the number of matches between the CSD and profiles on the DPD and Temporary Databank. These are set out in Table 5 below.

<sup>17</sup> While this information does not distinguish between profiles from children and profiles from young people, we considered it unlikely that many profiles were obtained from children, given the narrow circumstances in which a sample from a child can be obtained, as discussed in Chapter 21. Police has since confirmed that only five profiles were obtained from children. Table 4 represents a snapshot in time and was dependent on court outcomes then available.



TABLE 5: DATABANK MATCHES<sup>18</sup>

Reporting year	Matches between crime scene profiles and profiles from samples collected on arrest or intention to charge <sup>19</sup>	Matches between crime scene profiles and profiles from samples collected following conviction or from a volunteer <sup>20</sup>	Total number of reported matches	Total matches as a proportion of the total number of profiles on the DPD <sup>21</sup>
2004/05	N/A	1,996	1,996	3.7%
2005/06	N/A	1,904	1,904	3.0%
2006/07	N/A	2,185	2,185	3.0%
2007/08	N/A	2,176	2,176	2.6%
2008/09	N/A	1,922	1,922	2.0%
2009/10	N/A	1,753	1,753	1.6%
2010/11	808	506	1,314	1.1%
2011/12	1,497	1,134	2,631	2.0%
2012/13	1,007	324	1,331	0.9%
2013/14	1,087	1,952	3,039	2.0%
2014/15	1,417	951	2,368	1.5%
2015/16	1,901	740	2,641	1.6%
2016/17	2,427	918	3,345	1.9%
2017/18	1,911	588	2,499	1.3%
2018/19	1,815	651	2,466	1.3%

<sup>18</sup> Police is not required to report on the number of matches between crime scene profiles and profiles on the DNA Profile Databank obtained under Part 2 (suspect samples that are transferred to the DPD on conviction).

<sup>19</sup> This refers to the number of occasions on which a DNA profile derived from a bodily sample taken under Part 2B matched with unidentified DNA information obtained from the scenes of offences under investigation or otherwise in respect of which a conviction or further conviction is yet to be obtained: Criminal Investigations (Bodily Samples) Act 1995, s 76(1)(ed).

<sup>20</sup> This refers to the number of occasions on which a DNA profile obtained from evidence at the scene of an offence or in connection with an offence is matched with a DNA profile on the DNA profile databank obtained under a Part 3 procedure: Criminal Investigations (Bodily Samples) Act 1995, s 76(1)(h).

<sup>21</sup> These proportions are calculated from figures reported by Police in its annual reports (number of matches and total number of profiles on the DNA profile databank for each reporting year). See also Table 4 in Chapter 11 of the Issues Paper.

# Appendix 4

## DNA databanks in other jurisdictions

TABLE 6: DNA DATABANKS IN OTHER JURISDICTIONS

Country	Databank and date established	Databank indices	Databank administrator	Oversight	Establishing legislation
Australian Commonwealth <sup>1</sup>	National Criminal Investigation DNA Database (NCIDD) Established 2001	<ul style="list-style-type: none"> <li>- Crime scene</li> <li>- Serious offenders</li> <li>- Suspects</li> <li>- Volunteers (limited purposes)</li> <li>- Volunteers (unlimited purposes)</li> <li>- Unknown deceased persons</li> <li>- Missing persons</li> <li>- Statistical</li> </ul>	Australian Criminal Intelligence Commission	Distributed oversight model including Commonwealth Ombudsman and Office of the Australian Information Commissioner	Crimes Act 1914 (Cth)
England & Wales	National DNA Database (NDNAD) Established 1995	<p>One database. Contains profiles from all UK law enforcement forces.</p> <p>For England and Wales, NDNAD includes DNA profiles from arrested people, offenders, volunteers and crime scenes.</p>	Home Office	Forensic Information Databases Strategy Board (previously the National DNA Database Strategy Board)	Police and Criminal Evidence Act 1984

<sup>1</sup> Each state and territorial jurisdiction in Australia has its own DNA database. The National Criminal Investigation DNA Database (NCIDD) enables police to check and compare profiles across jurisdictions. Most of the state and territorial databanks are index systems similar to the NCIDD, except for Northern Territory. See Crimes (Forensic Procedures) Act 2000 (NSW); Crimes Act 1958 (Vic); Police Powers and Responsibilities Act 2000 (Qld); Criminal Investigation (Identifying People) Act 2002 (WA); Criminal Law (Forensic Procedures) Act 2007 (SA); Forensic Procedures Act 2000 (Tas); Crimes (Forensic Procedures) Act 2000 (ACT); and Police Administration Act 1978 (NT).

Country	Databank and date established	Databank indices	Databank administrator	Oversight	Establishing legislation
Scotland	Scottish DNA Database <sup>2</sup> Established 1995	Contains profiles taken from people on arrest, offenders, volunteer profiles and crime scene profiles.	Police Scotland	Biometrics Commissioner (established under the Scottish Biometrics Commissioner Act 2020)	Not established in statute <sup>3</sup>
Ireland	DNA Database System Established 2015	Database is separated into two divisions. Investigation division contains: <ul style="list-style-type: none"> <li>- Crime scene</li> <li>- Reference (suspects, offenders, volunteers)</li> <li>- Elimination (garda síochána)</li> <li>- Elimination (crime scene investigators)</li> <li>- Elimination (prescribed persons)</li> </ul> Identification division contains: <ul style="list-style-type: none"> <li>- Missing and unknown persons</li> </ul>	Forensic Science Ireland (an associated office of the Department of Justice and Equality)	DNA Database System Oversight Committee	Criminal Justice (Forensic Evidence and DNA Database System) Act 2014
Canada	National DNA Data Bank Established 2000	<ul style="list-style-type: none"> <li>- Crime scene</li> <li>- Convicted offenders</li> <li>- Victims</li> <li>- Voluntary donors</li> <li>- Missing persons</li> <li>- Relatives of missing persons</li> <li>- Human remains</li> </ul>	Royal Canadian Mounted Police	National DNA Data Bank Advisory Committee	DNA Identification Act 2000 (Canada)

<sup>2</sup> All profiles on the Scottish DNA Database (except volunteers for mass screens) are exported to the National DNA Database (NDNAD). See Scottish Police Authority “Scottish DNA Database Statistics 2019/2020” <[www.spa.police.uk](http://www.spa.police.uk)>.

<sup>3</sup> Authority to collect and retain DNA is prescribed in the Criminal Procedure (Scotland) Act 1995, ss 18–19; and the Criminal Justice (Scotland) Act 2003, s 56.

# Appendix 5

## Proposed matching rules

Table 7 below summarises the matching rules for the proposed DNA databank recommended throughout this Report.

TABLE 7: MATCHING RULES FOR INDICES ON THE PROPOSED DNA DATABANK							
	Crime scene index	Offenders index	Pre-conviction index	Elimination index	Missing and unidentified index	Unidentified deceased index	Relatives index
Crime scene index	Yes	Yes	Limited <sup>1</sup>	Limited <sup>2</sup>	No	No	No
Offenders index	Yes	Yes	Yes	No	Yes	No	No
Pre-conviction index	Limited <sup>1</sup>	Yes	Yes	No	Yes	No	No
Elimination index	Limited <sup>2</sup>	No	No	No	No	No	No
Missing and unidentified index	No	Yes	Yes	No	Yes	Yes	Yes
Unidentified deceased index	No	Yes	Yes	No	Yes	Yes	Yes
Relatives index	No	No	No	No	Yes	No	Yes

<sup>1</sup> For suspect samples on the pre-conviction index, limited to comparisons to the crime scene profile(s) for which the suspect sample was obtained unless a court permits a one-off databank search against all the profiles on the crime scene index (see Chapters 8 and 18). For a sample obtained on arrest or intention to charge, limited to a one-off databank search against all the profiles on the crime scene index if permitted pursuant to a court order (see Chapter 18).

<sup>2</sup> Limited to comparisons to the crime scene profile(s) for which the elimination sample was obtained (see Chapters 9 and 17).