

Release of DNA Issues Paper - Q&As

WHAT IS THE LAW COMMISSION?

The Law Commission is an independent Crown entity. Its function is to keep New Zealand's law under review, and to make recommendations for the reform and development of the law.

WHY IS THE LAW COMMISSION REVIEWING THE LAW ABOUT DNA IN CRIMINAL INVESTIGATIONS?

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

There were significant changes to the Act in 2009, including giving Police the power to take DNA samples without pre-approval from a Judge from any individual they arrested or intended to charge with an imprisonable offence. At the time, the Government signalled that the Ministry of Justice would review the effectiveness and efficiency of these amendments. In July 2016, the Minister of Justice referred the CIBS Act to the Law Commission for a comprehensive review of its operation.

WHAT IS THE SCOPE OF THE LAW COMMISSION'S REVIEW?

Our terms of reference ask us to determine whether the CIBS Act is keeping pace with developments in forensic science, international best practice and public attitudes and whether it gives appropriate recognition to law enforcement values and human rights, including the right to privacy. Considering whether the use of DNA in criminal investigations is regulated in a way that is constitutionally sound requires ensuring that the regime is consistent with the principles of the Treaty of Waitangi and New Zealand Bill of Rights Act and that any intrusions upon tikanga and privacy are minimised.

In preparing this issues paper, we became aware that there are significant gaps in the CIBS Act. We also became aware of several broader issues that fall outside our terms of reference. These are:

- The use of non-DNA based forensic sciences in criminal investigations (for example fingerprint, ballistic, and bite mark).
- The presentation of expert scientific evidence in court. There are growing concerns, including whether judges and juries are well-placed to understand and make decisions based on highly complex scientific information and probabilities.

- The use of DNA in non-criminal investigations, for example, missing persons and disaster victims.

In the issues paper, we put forward some options for reform to address the gaps in the CIBS Act and broader issues that we have identified in relation to the use of DNA in criminal investigations.

WHAT ARE THE KEY ISSUES WITH THE CURRENT LAW?

- The purpose of the CIBS Act is unclear and the structure is confusing.
- The science is continually developing and these developments raise human rights, Treaty of Waitangi, ethical and tikanga issues as well as issues around informational privacy that need to be addressed.
- The CIBS Act is not sufficiently comprehensive, for instance it does not regulate the databank of crime scene profiles (the Crime Sample Databank) that is maintained on behalf of Police by ESR. Nor does the Act specifically address issues such as:
 - whether Police can analyse an item discarded by a suspect to get a DNA profile (indirect sampling);
 - whether Police can search the DNA databank containing identified profiles (the known person databank) for close matches to DNA left at crime scenes – indicating that it may have been a close relative of the person on the known person databank at the crime scene (familial searching); or
 - whether Police can analyse DNA left at a crime scene in order to predict the person's appearance or ethnicity (forensic DNA phenotyping).
- There is no independent oversight.

WHAT ARE THE KEY PROPOSALS FOR REFORM?

These are the two main proposals for reform in this issues paper:

- 1) The CIBS Act should be repealed and replaced with simpler and more comprehensive legislation.
- 2) A public agency that is independent of Police and ESR should be given oversight functions in relation to the use of DNA in criminal investigations. Oversight functions could be an extension of an existing agency's role (such as the Privacy Commissioner), or a new agency could be created (such as a multi-disciplinary oversight committee, an advisory ethics group and/or a specialist Commissioner).

An important feature of any oversight regime in New Zealand will be to provide a central role for Māori. That is because Māori are currently over-represented in the criminal justice system and are more likely to be adversely affected by use of discretionary powers, forensic DNA phenotyping, familial searching, research utilising the DNA databanks, and retention of DNA samples and DNA profiles. In those circumstances, the Treaty principles of active protection, equity, rangatiratanga and partnership indicate that Māori should have an active role in all governance decisions.

WHAT DOES THE LAW COMMISSION SAY ABOUT -

1. Police requesting people to consent to giving a DNA sample

Informed consent is a central concept in Part 2 of the CIBS Act. A police officer must attempt to obtain a suspect sample by consent prior to applying for an order to compel a suspect to give a sample. Further, there are very detailed rules around the information that must be given to a suspect, both verbally and in writing. There are additional protections in the Act if the suspect is a child or young person. Police may also seek a sample by consent under Part 3 so that the profile can be uploaded to the known person databank. Nonetheless we are concerned that suspects may not always be in a position to provide “free and informed consent”. The three main reasons for this are:

- (a) the inherent power imbalance between the suspect and the requesting officer;
- (b) the complexity and volume of information that needs to be provided to the suspect; and
- (c) the difficulty of obtaining appropriate legal advice.

2. Who Police should be obtaining DNA samples from: should Police have a universal databank of everyone in New Zealand?

Establishing a universal databank containing the DNA profiles of everyone in New Zealand could address the risks inherent in broad discretionary powers and negate the need to use controversial forensic analysis techniques such as forensic DNA phenotyping, mass screening, indirect suspect sampling and familial searching. Therefore a universal databank may minimise the impact of the DNA regime on minority groups, including Māori.

However, some commentators argue that while a universal databank may appear fairer it simply masks existing bias. As one commentator says “it is unrealistic to expect that a “neutral” database policy, layered over an unequal criminal justice system, will eliminate the systemic bias.” In addition, a universal databank increases the risk of a false positive match, and potentially breaches individual and collective privacy rights, as well as being practically difficult to establish.

No country anywhere in the world has a universal databank.

3. Indirect DNA sampling

The CIBS Act does not address indirect suspect sampling. This is when a DNA sample relating to a suspect is obtained by police officers through a secondary source, for example, from a personal item belonging to the suspect, such as a toothbrush.

The relationship between indirect suspect sampling and the suspect regime in the CIBS Act is not clear. Furthermore, there is some doubt as to whether a police officer can currently obtain a search warrant to seize a suspect’s personal belongings for the purpose of DNA profiling. Additional doubt arises where a police officer may wish to seize a DNA sample that has been collected for a medical purpose (such as a suspect’s newborn blood spot card). There is also legal uncertainty around collecting and analysing items found in public places (such as a cup thrown in a rubbish bin by a suspect).

We propose that this is one of the areas where the courts and/or an oversight body could have an active role.

4. How much genetic information Police should be able to analyse: should Police use full genome sequencing?

The CIBS Act does not limit how crime scene samples can be analysed for genetic information, or the type of research that can be conducted using the DNA profile databank in an anonymised form.

At present, DNA samples are only analysed to the extent needed to generate a DNA profile containing a limited amount of personal identity information. That profile does not consist of the person's entire genome (that is, the complete set of genetic information contained in DNA). In humans, this consists of all three billion base pairs, written out in sequence.

However, a person's DNA sample, containing their entire genome, is still collected and retained by the State, albeit briefly. How the samples are dealt with is therefore very important for maintaining public trust. Further, the current international trend is towards including more and more information in DNA profiles. There are sound scientific reasons for this trend, but there are also significant privacy implications. No other biometric data can reveal anywhere near the amount of personal information that is contained in a DNA molecule. This means that, while DNA can be a powerful tool in criminal investigations, its use raises significant privacy concerns far beyond those associated with the use of other biometric data, such as fingerprinting.

5. Forensic DNA phenotyping, including ethnic inferencing

Forensic DNA phenotyping is when DNA found at a crime scene is analysed to predict aspects of the physical appearance of the person who left the sample, such as hair or eye colour. This may include inferring the person's ethnicity. In our view, ethnic inferencing may amount to discrimination under the New Zealand Bill of Rights Act 1990. It also raises practical and ethical concerns, Treaty of Waitangi and tikanga issues, and issues around informational privacy.

Ethnic inferencing is the only form of forensic DNA phenotyping that has been used by Police in New Zealand. It has been used 11 times in cases where there were no other leads.

We propose a permissive but conservative approach to forensic DNA phenotyping. We also explore a variety of options involving the courts and/or an oversight body having a statutory role in considering whether forensic DNA phenotyping, including ethnic inferencing, is appropriate in any given case.

6. What crimes Police should use DNA to solve

The original objective of the CIBS Act was to identify and prosecute serious sexual and violent offenders. In the issues paper we question whether this narrow focus remains appropriate.

It is a common misconception is that DNA is central to almost all sexual assault investigations. This is not the case. Research suggests that, in the vast majority of rape cases, the alleged offender was previously known to the complainant. Where there is a clear suspect from the start, there is no need to search the known person databank for an investigative lead. There may also be little point in obtaining a DNA sample from the suspect unless the complainant underwent a medical examination shortly after the

incident. If there was no medical examination, DNA profiling would not assist in resolving the case. Furthermore, in many cases of sexual offending there is no dispute as to whether sexual contact occurred. The issue is consent. Again, in those circumstances, DNA profiling would usually be of limited relevance.

There are similar misconceptions around investigations into serious violent offending. Often identity is known at the outset, and the case will turn on whether the alleged offender intended to cause the resulting injuries. These misconceptions are sometimes attributed to the so-called “CSI effect”.

From the information we do have, it is plain that DNA profiling may be particularly effective when investigating property offending. Of the DNA profiles currently on the Crime Sample Databank, 76 per cent relate to non-suspect volume crime cases. This is the term used by Police to describe cases involving general theft, burglary or vehicle crime (unlawful taking of, and/or theft from, vehicles) where no suspect sample is available for comparison. This may seem surprising, but it makes sense. The central question in property crime investigations is often: who committed the offence? Commonly, complainants have no idea as to the answer.

We consider that the objective of the CIBS Act should be broader than the original objective of serious sexual and violent offending to include identifying and prosecuting offenders for a range of serious crimes, including serious property offending. In our view, a seriousness threshold is necessary to recognise the fact that DNA profiling comes at a constitutional cost, with a risk of inconsistency with the New Zealand Bill of Rights Act, the Treaty of Waitangi, privacy and tikanga.

7. Familial searching

Familial searching is when a scientist compares the Crime Sample Databank and the known person databank and looks for near matches. A near match may indicate that a close relative of the person on the known person databank was responsible for the crime scene sample. We consider that this technique is likely discriminatory on the basis of family status, and has the potential to disproportionately impact on Māori, who are currently overrepresented in the criminal justice system and on the known person databank. It also impacts on collective privacy. We explore whether its use may, nevertheless, be justified in limited circumstances.

Police policy is to only use familial searching as a last resort to investigate serious offences. Since 2004, 101 familial searches have occurred in 60 cases.

Like forensic DNA phenotyping, familial searching is an investigative tool that raises concerns about human rights, Treaty rights, privacy and tikanga, and its use is potentially controversial. Therefore we consider that it would be best for Parliament to decide whether to prohibit or permit familial searching.

Different countries take different approaches. The UK and Australia have a similar approach to New Zealand. Familial searching is prohibited in Canada.

8. How long Police retain DNA profiles

The rules governing the retention periods are very complex. However, the majority of DNA profiles are retained indefinitely. Given that DNA profiles contain information about identifiable people, it is important that there is transparency around destruction and security of retention of DNA profiles. Indefinite retention raises questions around the

consistency of the DNA regime with the clean slate law which aims to limit the effect of an individual's historical convictions. It also raises questions around consistency with the youth justice principles, which focus on rehabilitation and reintegration.

There are different rules relating to the retention of DNA profiles from young people, including shorter retention periods in some cases. However, the 2009 changes to the CIBS Act resulted in the DNA profiles of more young people being retained, even in situations where the Youth Court has discharged charges against them. This seems at odds with the rehabilitative focus of the youth justice regime. It is also important to consider how to address the disproportionate impact that the DNA regime has on Māori children and young people. Of the profiles held on the known person databank that are from children and young persons, approximately 67 per cent are from Māori children and young persons. This is inconsistent the Youth Crime Action Plan that Police and other agencies are responsible for delivering. Two of the three key strategies are to reduce escalation and provide early and sustainable exits from the criminal justice system for young persons. A particular focus of the Plan is on rangatahi Māori who have come to the attention of Police.

We suggest an independent oversight body could be given the task of overseeing the retention of profiles on case files and on the Crime Sample Databank and known person databank. This would provide reassurance to the public, as well as upholding the information privacy principles and the principles of rangatiratanga, equity and partnership under the Treaty of Waitangi.

9. Oversight of the Police DNA databank system

These are the two main proposals for reform in this issues paper:

- (a) The CIBS Act should be repealed and replaced with more comprehensive legislation.
- (b) A public agency that is independent of Police and ESR should be given oversight functions in relation to the use of DNA in criminal investigations. Māori should have a central role in oversight. Oversight functions could be an extension of an existing agency's role (such as the Privacy Commissioner), or a new agency could be created (such as a multi-disciplinary oversight committee, an advisory ethics group and/or a specialist Commissioner).

Many countries have established independent bodies to oversee the operation of DNA profile databanks and the use of DNA in criminal investigations more generally. This provides a measure of public accountability and transparency, whilst also enabling legislation to be flexible enough to accommodate continuing scientific change. In the issues paper, we look at the oversight framework in comparable jurisdictions, and emphasise that an important feature of any oversight regime in New Zealand will need to be providing a central role for Māori. That is because Māori are currently over-represented in the criminal justice system and are more likely to be adversely affected by use of discretionary powers, forensic DNA phenotyping, familial searching, research utilising the Crime Sample databank and known person databank and retention of DNA samples and DNA profiles. In those circumstances, the Treaty principles of active protection, equity, rangatiratanga and partnership indicate that Māori should have an active role in all governance decisions.

10. Use of DNA profiles collected by Police for other purposes, such as for research

The CIBS Act does not prohibit the disclosure of information on the known person databank (or the Crime Sample Databank) in anonymised form. Neither does the Privacy Act 1993.

This raises a number of issues:

- (a) Can DNA profiles really be “anonymised”?
- (b) What is the impact of the crime science and Māori data sovereignty movements on potential uses of this DNA information?
- (c) How can research avoid the risks of inadvertently exacerbating racial stereotypes?
- (d) How can regulation ensure Māori participation in decision-making concerning Māori data?

Police policy currently requires any application to use the known person databank for research purposes to be approved or reviewed by an ethics committee, preferably a New Zealand committee. Our understanding is that Te Ara Tika – Guidelines for Māori Research Ethics, which provides a framework for addressing Māori ethical issues within the context of decision-making by ethics committees, is widely used by New Zealand committees. However, Police external research policy does not apply to Police internal research and, because of the way the external policy is worded, it is not immediately apparent whether it would apply to agencies working in collaboration with Police, such as ESR, the Evidence Based Policing Centre or the New Zealand Institute of Crime Science. This highlights the need to ensure that Māori have a central role in decision-making about use of the DNA profile databanks.

WHO DID THE LAW COMMISSION TALK TO IN PREPARING THIS ISSUES PAPER?

In preparing this issues paper, the Commission has engaged with a wide range of stakeholders. We held frequent meetings with New Zealand Police and ESR, the two agencies that use the CIBS Act on a daily basis. We established two advisory groups, one of experts and one of officials, with whom we met twice. Our Māori Liaison Committee convened a subcommittee to consult with us. We attended the Australian and New Zealand Forensic Sciences Symposium in 2016. We met with more than 30 other interested parties, including academics specialising in law and social sciences, and experts from Australia, Canada and the United Kingdom. We also launched a publicly available educational website, which included scenarios to introduce the current legislation, highlighted some of the issues we saw arising and invited general comment.

HOW CAN PEOPLE HAVE THEIR SAY?

The Issues Paper is available online at <https://lawcom.govt.nz/our-projects/use-dna-criminal-investigations>. We want to know what you think about the issues covered in this paper. Do you agree or disagree with the way the issues have been articulated? Are there additional issues you think should be considered? Please also explain the reasons for your views.

Submissions or comments (formal or informal) on our issues paper should be received by **31 March 2019**.

You can email your submission to dna@lawcom.govt.nz.

You can complete your submission online at dna-consultation.lawcom.govt.nz.

You can post your submission to

DNA Review
Law Commission
PO Box 2590
Wellington 6140

WHAT HAPPENS NEXT?

The Law Commission will consider submissions, and work on researching and drafting recommendations for government about the law on the use of DNA in criminal investigations.

WHEN WILL THE FINAL REPORT BE PUBLISHED? THEN WHAT?

The Law Commission's final report in late 2019 will make recommendations to the government about the law on the use of DNA in criminal investigations. The Government will consider the recommendations and decide whether to implement them. If it decides to implement them, it will draft an amendment Bill. When that Bill is referred by Parliament to a Select Committee the public will have another opportunity to have a say on the proposed amendments.