

**Hon Andrew Little**  
Minister of Justice

**Proactive Release – Criminal Investigations (Bodily Samples) Amendment Regulations 2019**

Date of issue: 15 August 2019

The following documents have been proactively released in accordance with Cabinet Office Circular CO (18) 4.

Some information has been withheld on the basis that it would not, if requested under the Official Information Act 1982 (OIA), be released. Where that is the case, the relevant section of the OIA has been noted and no public interest has been identified that would outweigh the reasons for withholding it.

No.	Document	Comments
1.	<b>Criminal Investigations (Bodily Samples) Amendment Regulations 2019</b> <i>Cabinet paper</i> Office of the Minister of Justice 18 July 2019	Released in full.  Note that the copies of the regulations and commencement orders provided to Ministers with this paper have been withheld in accordance with section 61 of the Legislation Act 2012 and section 9(2)(h) of the Official Information Act 1982 to maintain legal professional privilege.  The legislative instruments are publicly available from <a href="http://www.legislation.govt.nz">www.legislation.govt.nz</a> .
2.	<b>Criminal Investigations (Bodily Samples) Amendment Regulations 2019</b> <i>Cabinet minute</i> Cabinet Office Meeting date: 23 July 2019	Released in full.

Chair, Cabinet Legislation Committee

## **Criminal Investigations (Bodily Samples) Amendment Regulations 2019**

### **Proposal**

1. This paper seeks authorisation for submission to the Executive Council of the Criminal Investigations (Bodily Samples) Amendment Regulations 2019.

### **Executive Summary**

2. The Criminal Investigations (Bodily Samples) Act 1995 (the Act) is the legislation that governs the taking of bodily samples from suspects and convicted persons, and by consent, for the DNA profile derived from that sample to be stored on the DNA profile databank to assist Police in identifying offenders.
3. The Criminal Investigations (Bodily Samples) Regulations 2004 prescribe the forms to be provided to people from whom samples are to be taken.
4. In 2004, fifteen words required by the Act were inadvertently omitted from Form 6 in the Regulations, relating to consent samples for the DNA profile databank. This paper proposes that those words now be included in the form to ensure full legal compliance with the Act.

### **Policy**

5. There is no new policy to be implemented by these Amendment Regulations. Their purpose is simply to ensure that the words required by the Act are included in the Regulations.

### **Background**

6. In late 2018 the Law Commission, which is reviewing the Act, identified the absence of the words "**The results of the analysis** [of the bodily sample] **may result in you being charged with a criminal offence**", from Form 6, despite being required to be included in the prescribed information in that form by section 31(b)(v) of the Act.
7. Form 6 has never contained those required words. The relevant Regulations came into force on 15 April 2004.
8. It does not necessarily follow that the affected DNA profiles would be inadmissible in criminal proceedings. That would be a matter for the Courts to determine in individual cases, taking into account (among other things):
  - 8.1. it is heavily implicit from the other information in Form 6 (and thus POL 788 – the Police form which includes the Form 6 information) that providing a bodily sample may result in the person giving the sample being charged in the future;

- 8.2. those people giving samples were informed by other information in the form that Police would store their DNA profiles to use them in criminal investigations, by comparing with other profiles. Identifying (and on rarer occasions, eliminating) suspects can be the only reason for comparing DNA profiles. Thus, the other information that is currently in the form may cure the deficiency;
- 8.3. in addition to Form 6/POL 788, Police use another (non-prescribed form) to record the information provided orally to the person requested to give a bodily sample for Form 6 purposes. That complementary form includes a tick-box record of all the verbal information provided by Police to the person – it includes a record that the Police have told the person that he or she may be charged with a criminal offence resulting from the sample being analysed and information derived from the analysis.
9. Therefore, despite the deficiency in Form 6, a court may find that informed consent was given to take the sample, or even if not, that exclusion of the DNA evidence would be disproportionate to the impropriety, meaning the DNA evidence would still be admissible.
10. For these reasons, I do not propose to pursue retrospective validating legislation at this time. Putting aside the undesirability of such legislation from a policy and constitutional perspective, a definitive court decision that such profiles are otherwise inadmissible in evidence would be desirable before considering any such legislative step.
11. However, Form 6 in the Regulations should obviously be amended as soon as possible to comply with the specified prescribed information requirements in the Act. The Police agree with that approach.

### **Timing and 28-day rule**

12. No waiver of the 28-day rule is sought. The Criminal Investigations (Bodily Samples) Amendment Regulations 2019 will come into force on 1 September 2019.

### **Compliance**

13. The proposals in this paper appear to be consistent with:
- 13.1. the principles of the Treaty of Waitangi;
  - 13.2. the rights and freedoms contained in the New Zealand Bill of Rights Act 1990 or the Human Rights Act 1993;
  - 13.3. the principles and guidelines set out in the Privacy Act 1993 (if the regulations raise privacy issues, indicate whether the Privacy Commissioner agrees that they comply with all relevant principles);
  - 13.4. relevant international standards and obligations;
  - 13.5. the Legislation Guidelines (2018 edition), which are maintained by the Legislation Design and Advisory Committee.

### *Statutory requirements*

14. These regulations are made pursuant to section 80 of the Act – in particular section 80(e) relating to prescribing forms and section 80(h) providing for such matters as are contemplated by or necessary for giving full effect to the Act and its due administration.

### **Regulations Review Committee**

15. I do not consider there are any grounds for the Regulations Review Committee to draw the regulations to the attention of the House.

### **Certification by Parliamentary Counsel**

16. The draft regulations were certified by the Parliamentary Counsel Office as being in order for submission to Cabinet.

### **Impact Analysis**

17. The Treasury Regulatory Quality Team has determined that the decisions sought in this paper are not subject to the Regulatory Impact Analysis requirements on the basis that they will have no or minor impacts on businesses, individuals, or not-for-profits.

### **Publicity**

18. Because these Regulations concern technical compliance, no publicity is planned.

### **Proactive release**

19. Once the regulations are approved by Cabinet and notified in the Gazette, I propose to proactively release this paper on the Ministry of Justice's website in whole, subject to redactions as appropriate and equivalent to those under the Official Information Act 1982.

### **Consultation**

20. The New Zealand Police, Crown Law and Te Puni Kōkiri have been consulted on the contents of this paper. The Department of the Prime Minister and Cabinet and the Treasury have been informed.

### **Recommendations**

I recommend that the Cabinet Legislation Committee:

- 1 **Note** that Form 6 in the Criminal Investigations (Bodily Samples) Regulations 2004 needs to be amended to include fifteen words required by the Criminal Investigations (Bodily Samples) Act 1995;
- 2 **Agree** that the required words be added by the Criminal Investigations (Bodily Samples) Amendment Regulations 2019;
- 3 **Authorise** the submission to the Executive Council of the Criminal Investigations (Bodily Samples) Amendment Regulations 2019;

- 4 **Note** that the Criminal Investigations (Bodily Samples) Amendment Regulations 2019 will come into force on 1 September 2019.

Authorised for lodgement

Hon Andrew Little  
**Minister of Justice**

RELEASED BY THE MINISTER OF JUSTICE



# Cabinet Legislation Committee

## Minute of Decision

*This document contains information for the New Zealand Cabinet. It must be treated in confidence and handled in accordance with any security classification, or other endorsement. The information can only be released, including under the Official Information Act 1982, by persons with the appropriate authority.*

### Criminal Investigations (Bodily Samples) Amendment Regulations 2019

**Portfolio**                      **Justice**

On 23 July 2019, the Cabinet Legislation Committee:

- 1        **noted** that Form 6 in the Criminal Investigations (Bodily Samples) Regulations 2004 needs to be amended to include fifteen words required by the Criminal Investigations (Bodily Samples) Act 1995;
- 2        **agreed** that the required words be added by the Criminal Investigations (Bodily Samples) Amendment Regulations 2019;
- 3        **authorised** the submission to the Executive Council of the Criminal Investigations (Bodily Samples) Amendment Regulations 2019 [PCO 22214/3.0];
- 4        **noted** that the Criminal Investigations (Bodily Samples) Amendment Regulations 2019 will come into force on 1 September 2019.

Vivien Meek  
Committee Secretary

**Present:**

Hon Chris Hipkins (Chair)  
Hon Andrew Little  
Hon David Parker  
Hon Stuart Nash  
Hon Kris Faafoi  
Hon Ron Mark  
Hon Tracey Martin  
Hon Julie Ann Genter  
Hon Eugenie Sage  
Michael Wood MP (Senior Government Whip)

**Officials present from:**

Officials Committee for LEG

**Hard-copy distribution:**

Minister of Justice