In Confidence

Office of the Minister of Justice

Chair, Cabinet Legislation Committee

Government Response to Te Aka Matua o te Ture | Law Commission Report: *The Use of DNA in Criminal Investigations* | *Te Whakamahi i te Ira Tangata i ngā Mātai Taihara*

Proposal

1. This paper seeks approval of the Government Response to the report of 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.*

Executive Summary

2. Te Aka Matua o te Ture | Law Commission (the Law Commission) was asked to review the Criminal Investigations (Bodily Samples) Act 1995 (the CIBS Act) and the use of DNA in criminal investigations in 2016. The report was tabled in the House of Representatives in November 2020 and the Government is required to formally respond by 24 May 2021.

3. The Law Commission identified several issues with the current regime and found that the CIBS Act is no longer fit for purpose. The report recommended reform of the DNA regime, as the CIBS Act:

    - does not recognise or provide for tikanga Māori or the Crown's responsibility under the Treaty of Waitangi, despite the regime's significant impact on the rights and interests of Māori
    - does not adequately protect privacy and human rights even though the regime is intrusive by nature
    - has gaps, resulting in uncertain legal standing
    - has legislative design issues, making it difficult to understand and apply, and
    - does not provide for adequate independent oversight and governance.

4. I consider the combined effect of these issues may contribute to the erosion of trust and confidence in the criminal justice system and could potentially lead to unjust outcomes.

5. After reflecting on the Law Commission report, I agree that reform is required. I propose the Government accepts its key recommendations for the creation of a new Act and the establishment of an independent oversight body.

6. Most of the remaining recommendations are operational in nature and would be worked through as part of a comprehensive policy and legislative process.

7. I therefore propose tabling the attached response (Attachment 1) to the Law Commission report. I will take further advice on the scope and scale of this work and consider where it might fit within the Government's work-programme of current and planned reforms.

Background

8. DNA analysis is an important law enforcement tool. It can help confirm the involvement of a known suspect in specific crimes, identify suspects in unsolved crimes, link unsolved crimes to an unidentified offender, and eliminate individuals as suspects. Outside of criminal investigations, it is also used to support identification of missing persons and the deceased for Disaster Victim Identification scenarios.

9. For DNA analysis to be as effective as possible, the regime that supports it must be robust, transparent and trusted by the community.

The Law Commission report and the Government Response

10. In 2016, the Law Commission was asked to conduct a review of the CIBS Act and the overall use of DNA in criminal investigations to determine if the legislation was fit for purpose. The resulting report is the product of a comprehensive review and extensive consultation. The report finds that the CIBS Act is no longer fit for purpose and recommends reform.

11. In November 2020, I tabled the Law Commission report on the use of DNA in criminal investigations in the House of Representatives. In accordance with Cabinet Office circular CO (09)1, the Government has 120 days to respond to the report. This means the Government Response will need to be tabled no later than 24 May 2021.

Development of the DNA regime

12. The CIBS Act was enacted in 1995 to regulate the collection and use of DNA in criminal investigations. In 2003 and 2009, the CIBS Act was amended, resulting in the expansion of DNA collection criteria. Since then, the use of DNA in criminal investigations has increased. According to Police's Annual Report of 2019-2020, over 200,000 people now have a profile in the DNA profile databank.

13. The 2009 amendments in particular widened the scope for collection of samples to 'all imprisonable offences' and provided the power for Police to require DNA samples at the time of arrest, or when intending to charge an individual, without judicial approval.[1]

14. These amendments prompted a report under section 7 of the New Zealand Bill of Rights Act 1990 (NZBORA) from the Attorney-General, who stated that the lack of statutory safeguards was inconsistent with the right to be secure against unreasonable search or seizure.[2] In 2015, the Attorney-General reaffirmed this position when the DNA databank compulsion notice regime was extended to returning offenders.[3]

Developments in forensic science

15. Since the 1990's, DNA technology has developed rapidly in ways that were not anticipated or provided for in the CIBS Act. As technology permits DNA to reveal more information from tiny traces, poor-quality or mixed samples,[4] the regime becomes more intrusive, raising questions relating to the rule of law, privacy, human rights, and tikanga Māori.

16. The CIBS Act is now outdated as forensic science continues to advance, which is occurring alongside the rapid advancement of surveillance and biometric technologies. These developments are also set against a backdrop of public discourse that continues to pose questions about the impact of institutional bias on search and surveillance.

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1 The power is outlined in the CIBS Act, part 2B

2 https://www.justice.govt.nz/assets/Documents/Publications/BORA-Criminal-Investigations-Bodily-Samples-Amendment-Bill.pdf

3 The Attorney-General presented a section 7 report on the Returning Offenders (Management and Information) Bill 2015. https://www.justice.govt.nz/assets/Documents/Publications/bora-returning-offenders-bill.pdf

4 Mixed samples refer to samples that contain multiple people's DNA in it. Approximately half of crime scene samples are mixed. Environmental Science and Research can use software to determine the likely number of donors and their likely respective DNA profiles

The Law Commission's findings

17. The report is comprehensive and presents a well-balanced review of the CIBS Act and the overall DNA regime. It includes 193 recommendations, outlining numerous issues with the status quo.

The report recommends reform that can be summarised by two proposals

18. At a high-level, I consider that most of the recommendations relate to two key proposals for a new, fit-for-purpose regime that, if implemented, would address many of the issues raised by the report. These proposals are to:

    - create new, modern and comprehensive legislation for DNA, and
    - provide for adequate governance and oversight of the regime.

19. Most of the recommendations outline what a new Act should include, how adequate governance and oversight could operate, and provide operational detail to address the gaps and issues in the current regime.[5]

20. This includes recommendations relating to a new, centralised DNA databank to house all profiles that are currently spread across three databanks. Establishing this databank would also involve amending current regulations that relate to sampling, storing and retaining DNA profiles, and special rules to improve safeguards around the collection and retention of DNA of children and young people.

The report's findings can be summarised into five areas of concern

21. The Law Commission's findings can be summarised into five areas of concern that lead to the two proposals outlined above. These five areas are that the CIBS Act:

    - does not recognise or provide for tikanga Māori or the Crown's responsibility under the Treaty of Waitangi, despite the regime's significant impact on the rights and interests of Māori
    - does not adequately protect privacy and human rights even though the regime is intrusive by nature
    - has considerable gaps, resulting in uncertain legal standing
    - has legislative design issues making it difficult to understand and apply, and the way it interacts with other legislation unclear, and

[5] A few recommendations relate to considerations that were outside of the scope for the Law Commission review, such as improving oversight of the use of other forms of biometric data and forensic science techniques

- does not provide for adequate independent oversight and governance.

22. Detail about these five areas can be found in appendix one.

Assessment of the Law Commission's findings and recommendations

23. After consideration of the Law Commission's findings, I propose tabling the attached response to the Law Commission report. This response agrees with the Law Commission's overall position that reform of the DNA regime is required but notes that further work would be needed on the operational detail.

The report makes a case for reform, though further work would be needed on operational detail

24. I believe the report makes a compelling case as to why reform of the DNA regime is required, including creating a new Act and providing for strengthened oversight and governance structures.

25. Most of the Law Commission's 193 recommendations relate to the operational detail of how a new DNA regime could work. These recommendations are important, as they give effect to high-level principles and form the structure that demonstrates how a new Act and adequate governance will deliver outcomes.

26. However, the DNA regime is technically and operationally complex. Some agencies are concerned about the operationalisation of the report's recommendations. For example, if rules around the collection and analysis of DNA become too restrictive, it may impact the effectiveness of DNA as an investigative tool and impede its ability to bring justice for victims.

The report's findings highlight concerns with the status quo

27. The findings in the report highlight that there could be risks to the Crown and to individuals associated with the status quo. This has not yet been fully quantified, however there are issues associated with:

    - the regime's failure to reflect the Crown's responsibilities under the Treaty of Waitangi – which could, conceivably, form the basis for a Waitangi Tribunal claim and potentially undermine the Māori-Crown relationship

    - the intrusions on people's individual rights – particularly in the context of a legislative framework that the Law Commission considers is lacking or has inconsistent protections in place, which could potentially lead to claims for breaches of the New Zealand Bill of Rights Act 1990 and/or the Human Rights Act 1993

- rapid advances in forensic science that may increase the potential for inappropriate reliance on DNA in criminal proceedings – which could, in the worst-case scenarios, result in wrongful convictions, and

- practices of DNA collection and use occurring without direct statutory basis.

28. I consider the combined effect of these issues may contribute to the erosion of trust and confidence in the criminal justice system and could potentially lead to unjust outcomes.

29. These issues may be exacerbated by the fact that this regime mainly impacts vulnerable and marginalised population groups. For example, people with brain and behaviour issues are disproportionately represented in the criminal justice system as both victims and defendants.[6] This may increase the possibility that injustices go unchallenged or undetected.

A comprehensive policy and legislative process is recommended

30. I have considered whether it would be feasible to address the findings identified in the report through discrete legislative amendments or operational guidance. I reached the conclusion that this would not offer a realistic, cost-effective or long-term alternative.

31. Therefore, I believe the detailed provisions would be best addressed in the context of a comprehensive policy and legislative process. When this work progresses, it will be important to balance the rights of victims with the rights of defendants.

Timing of the Government Response and future work

32. The Cabinet Office circular CO (09) 1 sets out processes for responding to Law Commission reports. It requires the Government to present a formal response to the House within 120 working days from when I tabled the report. This means I am required to present the Government Response no later than 24 May 2021.

33. Reform in this area will require a considerable amount of work. Its priority will need to be considered in the context of the many other important issues to address in the Justice portfolio, for example, criminal justice reform and alcohol reform. I will take further advice on the scope and scale of this work and consider where it might fit within the work-programme of current and planned projects.

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6 Office of the Prime Minister's Chief Science Advisor report, *What were they thinking? A discussion paper on brain and behaviour in relation to the justice system in New Zealand*

Consultation

34. New Zealand Police, Crown Law, Oranga Tamariki, Te Arawhiti, the Office of the Privacy Commissioner, the Human Rights Commission, Environmental Science and Research, and the Law Commission have been consulted in developing this paper.

Treaty implications

35. This paper has no implications for the Treaty of Waitangi. Once reform is progressed, however, there are likely to be improved outcomes for Māori from justice and tikanga perspectives. I expect that the policy and legislation development will be conducted following early consultation with Te Arawhiti and in accordance with its Māori engagement framework, as well as the guidance set out in Cabinet circular CO (19) 5.

Financial implications

36. This paper has no financial implications.

Human rights

37. This paper has no human rights implications, although human rights considerations will be integral to the development of policy proposals and the legislative drafting for a new DNA regime.

Legislative implications

38. This paper has no legislative implications. Future changes to the DNA regime will require new legislation, and legislative implications of those proposed changes will inform further advice to Cabinet.

Regulatory impact analysis

39. A regulatory impact analysis is not required as this paper poses no financial or legislative implications.

Gender and ethnicity implications

40. This paper has no gender implications. However, men (particularly Māori men) are more likely to be involved in the criminal justice system as defendants, and Māori women are disproportionately represented as victims. Therefore, further work on the DNA regime will have substantial implications for both men and women in different ways.

Disability perspective

41. This paper has no implications for people with disabilities. However, the report highlights there is significant work to be done to provide for disability considerations within the DNA regime. This will need to be worked through as part of a comprehensive policy and legislative processes.

Publicity

42. I propose to release a media statement announcing the Government Response on the day that it is presented to the House of Representatives.

43. The Law Commission will publish the Government Response on its website.

Proactive Release

44. I propose to proactively release this paper in full, within 30 business days of the decision.

Recommendations

45. The Minister of Justice recommends that the Cabinet Legislation Committee:

1. **note** that the report of 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* was presented to the House of Representatives on 27 November 2020;

2. **note** that Te Aka Matua o te Ture | Law Commission made 193 recommendations relating to reform for the DNA regime;

3. **approve** the Government Response, Attachment 1, which:

    a. accepts the overall findings of the report

    b. agrees with the recommendation that a new Act is required for the DNA regime

    c. agrees with the recommendation to establish an independent oversight body, and to generally strengthen oversight and governance structures for the regime

    d. states that the operational detail of the regime will be determined as part of a comprehensive policy and legislative process

    e. notes that reform will be considered alongside other priorities;

4. **note** that the Government Response must be presented to the House of Representatives no later than 24 May 2021;

5. **invite** the Minister of Justice to present the Government Response to the House of Representatives during the week of 17 May 2021, before the House adjourns.

Authorised for lodgement

Hon Kris Faafoi

Minister of Justice

Appendix one: The Law Commission report's key findings

1. This appendix sets out more detail on the key findings in the Law Commission report.

Area one: the legislation does not recognise or provide for tikanga Māori or the Crown's responsibility under the Treaty of Waitangi despite the regime's significant impact on the rights and interests of Māori

2. The report highlights that the DNA regime has significant impacts on the rights and interests of Māori in several ways, and that failing to provide for these aspects is out of step with best practice for modern legislation.

3. Firstly, DNA has particular significance in te ao Māori. DNA, or te ira tangata, has been described by the Waitangi Tribunal as the ultimate taonga, as it contains whakapapa (genealogy) information. This engages the Crown guarantee to Māori of tino rangatiratanga under the Treaty.

4. The Crown also has an obligation arising from the Treaty principles of active protection and equity, to actively protect DNA as a taonga, and to address the disproportionate representation of Māori in the criminal justice system (including as victims of crime), and correspondingly, in the DNA regime.

5. Since 2009, Māori have provided between 38-41 per cent of all DNA samples obtained on arrest or intention to charge. This means that Māori are not only disproportionately impacted by DNA sampling, but also that there could be discriminatory impacts of specific analysis techniques and methods. Māori are also disproportionately represented as victims of crime, which could mean that the DNA regime's uncertain legal standing would disproportionately affect Māori from a victim's perspective (see area three).

6. DNA also gives rise to rights and responsibilities according to tikanga Māori. DNA sampling can impact on the mana, tapu and wairua of an individual but also engages tikanga relating to the collective, particularly due to the whakapapa information DNA contains, not only about an individual but about their tīpuna (ancestors), living relatives and future descendants. It also engages other collective responsibilities such as whanaungatanga and kaitiakitanga.[7]

[7] Whanaungatanga relates to the rights and responsibilities to the collective. Kaitiakitanga refers to guardianship, and in the context of DNA, means ensuring the safety of the whakapapa revealed in DNA

7. The engagement of collective rights and responsibilities can increase the impact of certain practices and techniques under the regime, such as familial searching,[8] close genetic sampling[9] and ancestry inferencing.[10]

Area two: The Criminal Investigation (Bodily Samples) Act does not adequately protect privacy and human rights

8. The CIBS Act does not accommodate or protect privacy and human rights in the same way that other legislation in the intelligence and surveillance space do,[11] and the report highlights issues around many of the regime's current practices.

9. Due to the intimate and sensitive nature of genetic information, DNA sampling has been broadly accepted to be a substantial intrusion into personal privacy, thereby engaging both the right to be secure against unreasonable search or seizure (which protects an individual's reasonable expectation of privacy), under section 21 of the NZBORA and wider privacy values.[12] These are related to bodily integrity, bodily autonomy and the protection of personal information for the individual and their familial connections.

10. The Court of Appeal has also noted that retention of DNA profiles on the databanks enables ongoing monitoring by the state.[13] The effects of the regime may also have discriminatory impacts, engaging the right to freedom from discrimination under section 19(1) of the NZBORA.[14]

11. Some DNA analysis techniques, such as familial searching and phenotyping,[15] also have significant impacts on privacy and human rights of individuals, as well as for collective groups.

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8 Familial searching uses databank searching to find 'near matches' rather than a direct match. A near match might indicate that a close genetic relative of the known person was the source of the DNA found at the crime scene. This analysis technique has been used in New Zealand 99 times between 2004-2019.

9 Close genetic sampling uses a DNA sample from close relative of a suspect to look for a 'near match' to a crime scene sample, determining likelihood of a suspect's DNA matching a crime scene sample. It is rarely used in New Zealand.

10 Ancestry inferencing is the only type of phenotyping currently available in New Zealand. See footnote 15.

11 The Intelligence and Security Act 2017 and the Search and Surveillance Act 2012 have purpose statements that refer to consistency with human rights and the wider New Zealand statute, such as the Privacy Act 2020. Internationally, protections of human rights are also recognised. For example, the NZ intelligence community's Ministerial Policy Statement on Cooperation with overseas public authorities explicitly lists NZ's human rights obligations under domestic and international law.

12 See the Attorney-General's 2009 section 7 report, p. 4, citing international Court rulings

13 R v Toki [2017] NZCA 513, [2018] 2 NZLR 362 at [24

14 Section 19(1) affirms the right to freedom from discrimination based on prohibited grounds, which include race, familial status and age

15 Phenotyping involves analysing someone's DNA to predict the likely physical characteristics of that individual, including their hair colour, eye colour or likely ancestry. In the future, this technique might also reveal age and health status.

The CIBS Act 2009 amendments that lead to the section 7 report

12. The report notes that Police now obtain most samples under the mechanism of DNA sampling at arrest or intention to charge, in accordance with the 2009 amendments. In 2018/19, 13,056 samples were taken in this context, compared to 689 samples obtained under the suspect sampling regime and 599 samples obtained following conviction.

13. These amendments prompted a report from the Attorney-General under section 7 of the NZBORA, as well as concerns raised by the former Privacy Commissioner.[16] The Law Commission also argues that the low offence threshold for collecting DNA contributes to a regime that is not reasonable or proportionate. Parliament passed the 2009 amendments, noting that Police would develop internal guidelines to aid in the protection of individuals' rights and that the Courts would apply a strict interpretation to the exercise of these powers.

14. Police have since developed internal guidelines. The Courts play an active role in determining the reliability of DNA in proceedings at the trial stage, and in relation to the suspect sampling and compulsion regimes of the CIBS Act, whether a sample has been collected and retained in a manner consistent with the NZBORA or the Privacy Act 2020. However, as DNA sampling pursuant to the arrest or intention to charge regime occurs without judicial approval, the accountability mechanism of judicial orders is bypassed in most sampling.

15. The Law Commission questions whether these mechanisms are sufficient, citing rule of law concerns relating to scientific advances and the Attorney-General's 2009 section 7 report:

> *"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".17*

The treatment of children and young people

16. The report devotes an entire chapter to the treatment of children and young people under the regime and emphasises that current practices for collecting samples, obtaining informed consent and the retention of DNA information conflict with some Youth Justice principles in the Oranga Tamariki Act 1989.[18] The Law Commission also points out that these practices could be inconsistent

16 The Privacy Commissioner's Submission to the Justice and Electoral Committee on the Criminal Investigations (Bodily Samples) Amendment Bill (6 April 2009).

17 https://www.justice.govt.nz/assets/Documents/Publications/BORA-Criminal-Investigations-Bodily-Samples-Amendment-Bill.pdf

18 Considerations and principles relevant to youth justice are set out in s4A(2), s5 and s208 of the Oranga Tamariki Act 1989

with the NZBORA and special protections under the United Nations Convention on the Rights of the Child.

17. Notably, in the Court case *Police v FG,*[19] the Court ruling advocated for legislative change in the DNA regime to ensure that children and young people's rights are respected.

The volunteer sampling scheme

18. The report also brings attention to the DNA volunteer sampling scheme. Currently, Police can use their discretion to request volunteer samples by consent from any adult. That person does not need to be a suspect or have been convicted of any offence. These samples are used to increase the population of the DNA databank, thereby increasing the chances of identifying suspects. The samples remain on the databank indefinitely unless consent is withdrawn. Almost half of the samples currently on the databank are from volunteers.

19. The Law Commission questions whether volunteer sampling is reasonable or necessary for law enforcement purposes, in the absence of a relevant conviction or individualised suspicion that a person has committed a qualifying offence and given the other available methods of populating the DNA databank.

20. The report also highlights that few volunteers withdraw their consent and concludes this could mean the volunteers do not have a full understanding of the consequences or the ongoing nature of what they have consented to.

Area three: The regime has extensive legislative gaps

21. Many areas of core practice in the current DNA regime are not regulated or are inadequately regulated by the CIBS Act, such as:

    - crime scene sampling and the Crime Sample Databank
    - elimination sampling
    - indirect sampling
    - mass screening
    - DNA analysis techniques
    - the role of the forensic service provider
    - the way DNA profiles are used, and

19 *Police v FG [2020] NCYC 328*

- the use of DNA to identify missing/unidentified people.

22. Key areas one and two above (denoting deficiencies relating to the Treaty of Waitangi, tikanga Māori, privacy, and human rights) can also be categorised as legislative gaps in the context of modern, legislative best practice, as demonstrated by the Legislative Design Advisory Committee (LDAC) guidelines and other legislation.

23. Practice within these areas is currently guided by: Court precedent, indirectly through other legislation (e.g. Search and Surveillance Act 2012), Police instructions/manuals, and the Forensic Services Agreement between Police and the forensic service provider, Environmental Science and Research (ESR).

24. The result is a regime with legal fragmentation and uncertainty around the lawfulness of some current practices, which is a significant concern both for law enforcement and those who interact with the criminal justice system, defendants and victims alike.

Area four: The Criminal Investigations (Bodily Samples) Act is outdated, inconsistent, difficult to understand and apply, and has unclear interactions with other legislation

25. The CIBS Act has become outdated due to rapid scientific advances, and successive amendments have resulted in complexity and inconsistencies. The net effect is a regime that is difficult to understand and apply, contrary to LDAC guidelines.

26. The report also highlights that the CIBS Act has unclear interactions with other legislation, including the Evidence Act 2006, the Search and Surveillance Act 2012, the Oranga Tamariki Act 1989 (the OT Act), the Coroners Act 2006 and the Privacy Act 2020.

27. The report cites the CIBS Act's interface with the OT Act as an apt example of this. For instance, the CIBS Act counteracts the 'clean slate' intent of a section 282 discharge order under the OT Act by allowing the DNA profile from a child or young person to be retained on the DNA databank for four years[20] after such an order (if the charge was proven). The retained profiles can then be continually searched against crime scene profiles of unsolved crimes.

20 Or longer, if subsequent section 282 discharge orders are made

Area five: The regime does not have adequate governance or independent oversight

28. The regime has some oversight and accountability mechanisms in place, but the report highlights the inadequacy of the status quo. Many of the internal accountability mechanisms are non-statutory and exist as agreements or policies developed for, and by, ESR (the forensic service provider) and Police. These are not publicly available, undermining the transparency of the regime.

29. There is no oversight from an independent body that is exclusively dedicated to the regime, as is identified internationally to be best practice. Instead, the regime operates under a model of 'distributed oversight,' where oversight is spread across various external bodies.

30. Statutory bodies that exercise some oversight of the DNA regime as part of their broader functions include the Independent Police Conduct Authority, the Privacy Commissioner, the Human Rights Commission, and the Criminal Case Review Commission. These external authorities receive few complaints relating to the DNA regime.

31. The judiciary also performs several important oversight functions for the regime. Their roles include determining challenges relating to admissibility of DNA evidence in court proceedings, judicial reviews of the exercise of discretionary powers under the CIBS Act and issuing compulsion orders for the regime.

32. However, the Law Commission report indicates that these functions have either been under-utilised or undermined by amendments. For example, the report notes only two known examples of judicial review taking place. Moreover, with the introduction of DNA sampling on arrest or intention to charge without judicial approval, the accountability mechanism of judicial orders is bypassed in most sampling.

33. Reporting requirements are also inconsistent across the regime, leading to a fragmented data picture and concern that the regime's impact on Māori is not adequately monitored.