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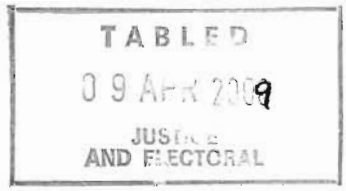
*Submission of the*
*Human Rights Commission on*




# CRIMINAL INVESTIGATIONS (BODILY SAMPLES) AMENDMENT BILL

*To the Justice and Electoral Committee*

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## 1. Introduction

1.1 This submission is made by the Human Rights Commission ('Commission'). Under the long title to the Human Rights Act 1993 (HRA) the Commission is responsible for the "better protection of human rights in New Zealand in general accordance with United Nations Covenants and Conventions on human rights."

1.2 To give effect to the role set out in the long title the Commission has a number of specific functions. The functions include the development of a national plan of action to promote and protect human rights[1].

1.3 In order to develop the plan of action the Commission undertook a nationwide consultation in 2003 to identify where New Zealanders felt their human rights were protected at present and where there was room for improvement. The findings, which were published in 2004[2], link the evidence from the consultation with the principles set out in the Universal Declaration of Human Rights (UDHR). Article 3 of the UDHR is the right to life, liberty and security of the person. Surveillance by the State of private citizens is part of the right to security.

1.4 During the consultation concerns were raised about the collection of DNA samples and the possibility that such samples could be used for purposes other than that for which they were obtained.[3] It also became clear that some of the groups (including Maori and young people) that experience greater threats to their security, had less confidence in the structures and agencies with responsibility for protecting that security[4].

1.5 The Commission applied a human rights approach in its analysis of the material in HRNZT. It uses the same approach to analyse proposed policy and legislation. A human rights approach consists of six elements:

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1 Section 5(2)(m) HRA 1993

2 *Human Rights in New Zealand Today: Nga Tika Tangata o Te Motu (HRNZT)* Human Rights Commission, Wellington (2004)

3 Supra fn 1, 116

4 Ibid. 126

- linking of decision making at every level to the relevant human rights standards;
- Identification of all the relevant human rights of all involved and, in the case of conflict, the balancing of the various rights to maximise respect for all rights and right-holders, favouring the most vulnerable if necessary;
- An emphasis on the participation of individuals and groups in decision-making;
- Accountability for actions and decisions, which allows individuals and groups to complain about decisions that affect them adversely;
- Non-discrimination among individuals and groups through the equal enjoyment of rights and obligations of all; and
- Empowerment of individuals and groups by allowing them to use rights as leverage for action and to legitimise their voice in decision making.

## 2. Summary of the Commission's concerns

2.1 The Bill is designed to enhance the ability of the police to solve crime by amending the Criminal Investigations (Bodily Samples) Act 1995 ('the Principle Act') to allow DNA samples to be collected without prior judicial approval if the police intend to charge a person with an offence. Once the person is charged, their DNA profile will be able to be matched against profiles from other unsolved crime scenes. The Bill would also increase the range of offences for which it is possible to collect DNA.

2.2 In principle the Commission is not opposed to the use of DNA matching to solve crimes but, given the potential impact on individual liberties, the way in which the information is obtained and the use to which it is put must be able to be justified. It should be done in the least intrusive way possible and there should be adequate safeguards to ensure that the information is used only for the purpose for which it has been collected.

2.3 The Commission's submission addresses the following issues:

- The right to freedom from unreasonable search and seizure and discrimination
- The lowered threshold which results from the increase in the range of offences and extension of s.24J to include people whom the police intend to charge
- The effect of the Bill on children and young people
- Adequacy of safeguards and the lowered accountability resulting from the fact that it will no longer be necessary to get judicial approval to obtain samples
- The possibility that the amendment could further undermine the confidence of some groups in the criminal justice system

## 3. The right to be free from unreasonable search and seizure

3.1 Section 21 of the New Zealand Bill of Rights Act 1990 (NZBoRA) is the "right to be secure against unreasonable search and seizure whether of the person, property or correspondence or otherwise". The right applies not only to the taking of the material but also to "the situation after the person or thing is taken into custody and for as long as that state or situation continues"[5]. Both the taking of the DNA and its retention and subsequent use therefore fall within the right to be free of unreasonable search and seizure.

3.2 A personal physical search or seizure in the context of law enforcement activity[6] will infringe an individual's expectation of privacy if it is "unreasonable"[7]. Whether this is the case will involve "balancing legitimate state interests against any intrusions on individual interests. It requires weighing relevant values and public

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5 Blanchard J *Alwen Industries v Comptroller of Customs* (1993) 1 HRNZ 574, 586 (HC)

6 A & P Butler, *The New Zealand Bill of Rights: A commentary* LexisNexis (2005) at 18.6.2. The authors suggest that s.21 does not confer a general right to privacy both because of the statutory context (it is found in the section of the Act which applies to the regulation of criminal procedure) and because the commentary in the White Paper specifically states that the draft Bill of Rights was never intended to confer a general guarantee of privacy.

7 Whether a search will be deemed unreasonable will vary. The Courts' interpretation of what is reasonable in this context has been described as "stable as quicksand": Ibid. 18.1.5.

interests."[8] That is, the individual's interest has to be balanced against legitimate government interferences aimed at giving effect to the collective interest in a number of matters, including law enforcement[9].

3.3 It is not just the community generally that has an interest in solving crime. Individual victims also have a right to expect that the State will endeavour to apprehend those responsible. Knowing that offenders will be apprehended is integral to an individual's sense of security. However, the Commission recognises that this is a situation where the balancing of rights is required.

3.4 In the Commission's opinion, the fact that the police simply have to *suspect* a person of a crime and *intend to charge* them (rather than having to obtain a conviction) before being able to collect a DNA sample prima facie infringes s.21 and is therefore unreasonable. It then becomes a question of whether this can be justified in terms of s.5 of the NZBoRA. That is, whether it amounts to "a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society".[10]

3.5 In deciding whether infringement of a right can be justified a number of issues are relevant including the significance of the right; the importance of the public interest of the intrusion on the right; the effectiveness of the intrusion in protecting the interests put forward to justify the limits in the particular case and the proportionality of the intrusion[11]. That is, whether what is suggested is proportionate to what is sought to be achieved, and/or whether substantially the same result could be achieved by less intrusive means.

3.6 Proportionality has been a significant factor in deciding the legitimacy of DNA

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8 *R v Grayson & Taylor* [1997] 1 NZLR 399,3 HRNZ 250 (CA) See also comments by the Canadian SC in *R v RC* [2005] 3 S.C.R 99, 2005 SCC 61 (the test is whether a DNA order would adversely affect the individual's privacy and security interests in an manner that is grossly disproportionate to the public interest)

9 A Butler "Regulatory Offences and the Bill of Rights" in Huscroft & Rishworth (eds) *Rights and Freedoms* (Brookers) 1995 at 357 paraphrasing Richardson J in *R v A* [1994] 1 NZLR 429, 437

10 Section 5 NZBoRA 1990

11 Butler supra fn 7 at 18.24

sampling in other jurisdictions which have grappled with the complexities of these issues. For example, in Germany one of the key elements in data protection legislation is "a strict constitutional commitment to the principle of proportionality"[12], and in Canada the Supreme Court in *R v RC*[13] held that retaining the DNA of a first time juvenile offender would be grossly disproportionate, noting that "the taking and retention of a DNA sample is not a trivial matter and, absent a compelling public interest, would inherently constitute a grave intrusion on the subject's right to personal and informational privacy"[14].

3.7 More recently the Grand Chamber of the European Court of Human Rights in *S. & Marper v the United Kingdom*[15] recognised that the core principles of data retention must be proportionate in relation to the purpose of collection. The Court concluded that

> *... the blanket and indiscriminate nature of the powers of retention of the fingerprints, cellular samples and DNA profiles of persons suspected but not convicted of offences ... fails to strike a fair balance between the competing public and private interests and ... the respondent State has overstepped any acceptable margin of appreciation in this regard. Accordingly, the retention at issue constitutes disproportionate interference with the applicants' right to respect for private life and cannot be regarded as necessary in a democratic society.*

3.8 The Bill was apparently inspired by the British regime[16] which has led to an increase in the solution of crime (from 24% to 43%)[17] but has been criticised as coming at a huge cost to personal liberty. This led the House of Lords' Select Committee on the Constitution to comment that while it did not wish to

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12 House of Lords (Select Committee on the Constitution) *Surveillance: Citizens and the State* (2009) at para 142

13 [2005] 3 SCR 99, 2005 SCC 61.

14 Ibid. As the individual concerned was only 13 at the time he committed the crime, the retention of the material was considered in light of the principles and objects of the youth justice regime.

15 30562/04 [2008] ECHR 1581 (4/12/08)

16 The Commission accepts that in the United Kingdom the situation differs as DNA data can be retained even if the person is not convicted.

17 The ECtHR in *S & Marper v UK* (supra fn 14) placed a caveat on similar statistics produced by the UK Government observing that the figures do not reveal the extent to which the link with crime scenes resulted in convictions of the person concerned or the number of convictions that were contingent on the retention of the samples of unconvicted persons.

"unreasonably entrench individual privacy at the expense of the State's legitimate interests" some change was necessary to redress the resulting imbalance as "much has affected privacy, but little has protected it."[18]

3.9 The interference with an individual's privacy must be proportionate to the risk faced. On balance the Commission considers that the potential infringement of s.21 is unlikely to be able to be justified given the threshold at which samples can be taken.

## 4. Potential for discrimination

5.1 The right to freedom from discrimination is central to a human rights approach. Non-discrimination is a non-derogable right which is explicitly referred to in most, if not all, of the major international instruments. If the amendment is allowed to proceed, it has the potential to discriminate both on the grounds of race and family status (given the likelihood of familial analysis being increasingly used).

5.2 The HRA 1993 makes it unlawful to discriminate against certain groups in a number of areas[19]. The prohibited grounds include race and ethnicity and family status. Family status is broadly defined and includes "being a relative of a particular person".

5.3 Discrimination may be direct or indirect. Direct discrimination involves different treatment that adversely impacts on one of the prohibited groups and is not subject to a specific exception or cannot be justified in terms of s.5 NZBoRA. Indirect discrimination is said to occur when an apparently neutral policy or practice has a disproportionate and negative impact on one of the groups identified in the HRA. Indirect discrimination allows a defence of good reason. To establish good reason the policy, practice or requirement must be necessary not simply reasonable.

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18 Supra fn 12 at 129

19 Section 21(1).

5.4 In New Zealand Maori are more likely to be apprehended than non-Maori.[20] As the legislation would apply to people who the police have good reason to suspect of committing a relevant offence and whom they intend to bring a complaint against, it is highly likely that Maori would be disproportionately represented among those whose DNA is taken.[21]

5.5 This possibility is further complicated by the recent introduction of familial testing[22]based on the genetic similarity of biological relatives. Familial DNA testing employs the use of DNA data bases and is based on matches between samples for full or partial hits. A full hit means that test has indentified the likely offender. A partial hit means a family member or relative of the person is likely to have committed the offence.

5.6 Research in other countries suggests that familial testing is not racially neutral. For example, in the United States the Hispanic and African American communities are subject to disproportionate arrest rates. As a result the DNA of Hispanics and Afro-Americans is more likely to be added to the databank system than that of other demographic groups and there is more likely to be a partial match once the sample is added to the database. Member of these groups are therefore more likely to be targeted by law enforcement agencies[23].

5.7 It is possible that where there is a partial match, family members could be either coerced into giving a sample (for example, being told they will be charged if they refuse to provide a sample) or detained on the suspicion of having committed an offence to allow the collection of their DNA. Familial testing could therefore infringe the right to be free from discrimination on the ground of family status as it

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20 *Over-representation of Maori in the criminal justice system: An exploratory report*, Department of Corrections (2007)

21 The Commission notes that the current scheme in the United Kingdom has been characterised as discriminatory as there are far more Afro-Caribbean males on the database than any other demographic: G Crossman et al. *Overlooked: Surveillance and personal privacy in modern Britain*. The Nuffield Foundation (2007) at 115

22 In 2008 police successfully used familial DNA testing to link Kevin Jarden to earlier unresolved crimes following the conviction of his brother. At the time lawyers and privacy advocates were concerned that the technique could result innocent people being routinely questioned over the misdeeds of relatives.

23 D Grimm "The Demographics of genetic surveillance: Familial DNA testing and the Hispanic Community" [2007] *Columbia Law Review* Vol.107:1164 at 1166

would allow the testing of people who were otherwise not guilty of a crime simply because of their relationship to a particular individual.

5.8 The ECtHR observed in *S & Marper*[24] that the possibility of familial testing as a way of identifying genetic relationships between individuals was enough to conclude that the retention of DNA samples interfered with the right to the private life of the individuals concerned.

5.9 Given that Maori are more likely to be apprehended than non-Maori, the Commission considers that effect of the Bill would be to discriminate against Maori both directly and indirectly[25].

## 6. The lowered threshold resulting from the increase in the range of offences and the criteria in s.24J

6.1 The Bill would expand the range of offences for which it is possible to collect DNA. By 2011 anyone facing an imprisonable offence could be forced to supply a DNA sample. The effect of the increase in offences would be to greatly increase the grounds on which DNA samples could be taken.

6.2 The Commission accepts that the offences in the Principal Act and those proposed in Schedule 3 can be justified but considers that extending the list by an Order in Council to include any offence that carries with it the possibility of imprisonment is excessive.

6.3 Clause 24J(1)(b) will allow the police to take a DNA sample from anyone whom they have *good cause to suspect* of committing a relevant offence and whom they *intend* to charge. This is the only authority required. The police will no longer have to obtain judicial approval to take a sample of a person's DNA.

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24 Supra fn 14 at para 75

25 The ECtHR in *Marper* specifically noted the comments by the Nuffield Council on Bioethics that social factors and policing practices lead to a disproportionate number of people from black and ethnic minority groups being stopped and arrested by the police and having their DNA profiles recorded. The Council had voiced concerns that because ethnic identity can be inferred from biological samples, it might reinforce racist views of propensity to criminality [at para 40]

6.4 The Commission considers that clause 24J is so vaguely worded it could be open to abuse. If the Bill is retained then the police should need to have good cause to believe that a person has committed an offence rather than simply suspecting that this is the case.

## 7. Children and Young people

7.1 New Zealand has ratified most of the major United Nations human rights treaties including the UN Convention on the Rights of the Child ('UNCROC'). In doing so the New Zealand government made a commitment to the United Nations and to the international community that it would undertake all appropriate legislative, administrative and other measures to implement the rights in the Convention[26].

7.2 The protections of the Convention apply to children and young people up to the age of 18. If the Bill proceeds in its present form, the right to take samples without a conviction will apply to young people under 18 and to those between the age of 14 and 16 (albeit with some greater protection). In other words, children and young people are actually being treated as adults in a situation where the rights of adults may be infringed.

7.3 Article 40 of UNCROC states that

> *Every child alleged as, accused of, or recognised as having infringed the penal law has the right to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, reinforcing the child's respect for the human rights and fundamental freedoms of others and taking into account the child's age* ***and the desirability of promoting the child's reintegration and the child assuming a constructive role in society*** *[emphasis added].*

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[26] Article 4. In addition, the Preamble to the Convention states that "the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection." Article 3 provides that in all actions concerning children by courts of law, the "best interests of the child shall be a primary consideration".

7.4 More specifically Article 16 of UNCROC stipulates that no child shall be subjected to arbitrary or unlawful interference with his or her privacy and has the right to the protection of the law against such interference.

7.5 The ability to take DNA samples off a young person between 14 and 16 is subject to a further protection that requires the young person to have committed an offence that carries a maximum term of imprisonment of seven years or more, or have one or more previous convictions or a resolution alternative to conviction imposed (such as diversion) or been the subject of a family group conference having admitted an offence before they can have a DNA sample taken.

7.5 Most children and young people who offend are dealt with by way of diversion or, if they appear before the Youth Court, are required to carry out obligations imposed on them by a plan formulated at a family group conference. The matter is usually finalised - if the young person has satisfactorily completed requirements of the diversion - by the police not prosecuting the offender or the Youth Court discharging the information under s.282 CYPF Act so that the charge is never deemed to have been laid. Children and Young people dealt with in this way have no criminal conviction and any identifying details are destroyed.

7.6 Restorative justice, alternative dispute resolution or diversion is recognised as an effective means of dealing with offending. One of the attractions of diversion is that the offender does not end up with a criminal conviction and his or her identifying details do not remain on the police record. If minor offenders currently dealt with by way of diversion know that their DNA will be retained they may be less inclined to accept diversion.

7.7 Under cl.26A, a young person's DNA (if they were under 17 at the time of conviction) will be removed from the databank "no later than 7 years after conviction" if the Youth Court has made an order under s.283 CYPF Act and the young person has not reoffended. If the Youth Court makes an order under s.282 CYPF Act or the young person has been offered diversion, then the DNA profile can be retained for up to 4 years.

7.8 If the Bill is enacted in its present form it will undermine the benefits of the youth justice system as youth advocates may be less willing to advise their clients to accept diversion and instead defend marginal cases. This would conflict directly with Art.40 UNCROC and the desirability of promoting the child's reintegration in society.

7.9 In Canada the Supreme Court noted[27] that by creating a separate criminal justice system for young persons, Parliament recognised the heightened vulnerability and reduced maturity of young persons and, consistent with Canada's international obligations, sought to extend to them enhanced procedural protections and to interfere with their personal freedom and privacy as little as possible. As a result the Court considered that a DNA order amounted to an unwarranted intrusion into a minor's right to privacy and security.

7.10 A similar approach is evident in the European Union where the ECtHR in *S v Marper* noted that[28]

> *... the retention of unconvicted person's data may be especially harmful in the case of minors given their special situation and the importance of their development and integration into society ... Drawing on the provisions of Article 40 of the United Nations Convention of the Rights of the Child of 1989 and the special position of minors in the criminal justice sphere, the Court considers that particular attention should be paid to the protection of juveniles form any detriment that may result from the retention by the authorities of their private data.*

7.11 The Commission considers that the proposal should be considered in relation to its impact on children and young people given their vulnerability, the importance of their development and reintegration in society and New Zealand's commitment to UNCROC. The right to take DNA samples in the situation outlined in the Bill should therefore not apply to young people under the age of 18 but most definitely not to those under 16.

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27 *R v RC* [2005] 3 S.C.R 99; 2005 SCC 61 at para 41

28 Supra fn 17 at para 124

## 8. Adequacy of safeguards & lowered accountability

8.1 Currently, DNA can only be collected with the consent of the person involved, with judicial approval or on a mandatory basis from people convicted of offences punishable by at least seven years' imprisonment or specified offences. The Bill would do away with this protection and confer authorisation on the police to take samples simply if they suspect someone of committing an offence and intend to charge them.

8.2 The proposed regime is therefore more intrusive than that which currently exists. Rather than having to obtain judicial approval (in the absence of consent or a conviction) the police will develop internal guidelines to ensure the powers they acquire under the Bill are not applied arbitrarily or unreasonably. This is a poor substitute for a system which requires an authority seeking a compulsion notice to justify their actions to a judge.

8.3 Most comparable jurisdictions provide the safeguard of judicial or some other form of independent approval before samples can be taken. The Attorney General has indicated that there were no special circumstances in New Zealand to justify departing from this position and the Commission agrees. Guidelines developed by the police themselves are an inadequate substitute for statutory safeguards and undermine the principle of transparency and accountability that are significant factors in a human rights approach.

## 9. The possibility of undermining the confidence of certain groups in the criminal justice system

9.1 During the consultation carried out by the Commission as part of the development of the National Plan of Action, it became clear that certain groups (such as young people and Maori) who were themselves vulnerable to threats to their security, had less confidence in the structures and agencies with responsibility for protecting that security.

9.2 The situation relating to young people and the possible effect of the proposed legislation on the youth justice system is outlined at 7.7 but a prominent criminal barrister has also suggested that people who are wrongly charged with offences and had DNA samples taken would have their confidence in the criminal justice system diminished.[29]

9.3 Human rights limit the power of the State and establish minimum standards of behaviour that can be expected of agencies such as the police. The legitimacy, stability and security of a State therefore depend on the extent to which it respects, promotes and fulfils the human rights of its people. The Commission would oppose a move which had the effect of undermining the confidence of some of the more vulnerable groups in New Zealand society in the aspects of the criminal justice system.

## 10. Conclusion

10.1 There is clearly a public interest in solving crime and holding people to account and, if necessary, punishing them for their actions is perfectly reasonable. While the Commission can see that there is a role for DNA sampling in the detection of crime, the changes proposed go too far.

10.2 As currently drafted, the Bill infringes the right to freedom from unreasonable search and seizure and increases the possibility of discrimination on the grounds of race and family status and impacts disproportionately on the rights of children and young people in contravention of New Zealand's international obligations

10.3 The Commission recommends that:

- The threshold for taking DNA samples should be limited to those situations where the police have *good cause to believe* that a person has committed an offence, rather than where they simply suspect this is the case;
- The range of offences should not be increased to all those carrying the risk of imprisonment and certainly not by Order in Council;

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29 Gary Gotlieb, *NZLawyer* 3/4/09 at 10

- Consideration should be given to the effects of familial testing;
- The regime should not apply at all to children and young people between 14 and 16.