

Report of the

ATTORNEY-GENERAL

under the New Zealand Bill of Rights Act
1990 on the Criminal Investigations (Bodily
Samples) Amendment Bill

*Presented to the House of Representatives pursuant to
Section 7 of the New Zealand Bill of Rights Act 1990
and Standing Order 261 of the Standing Orders of the
House of Representatives*

1. I have considered this Bill for consistency with the New Zealand Bill of Rights Act and conclude that it appears to be inconsistent with the right against unreasonable search and seizure affirmed by s 21 of that Act.
2. In summary:
 - 2.1 The Bill provides Police with the power to take DNA databank samples from persons charged with a broad range of offences and, from 2011, any imprisonable offence. As such, the power proposed by the Bill represents a substantial expansion of the current scheme under which such samples are taken only from certain convicted offenders.
 - 2.2 The taking of DNA samples is, both by virtue of the collection process (buccal (inner cheek) swabs or fingerprick blood samples) and the intimate character of genetic information, properly regarded as an invasive search of the person. The right against unreasonable search and seizure requires that, before such a sample can be taken:
 - 2.2.1 There must be a specific and sufficient basis for taking the sample from the person concerned; and
 - 2.2.2 Absent emergency or other special circumstances, there must be prior independent approval of the taking of the sample, most commonly by judicial warrant.
 - 2.3 However, the Bill permits the taking of such samples including, where necessary, with reasonable force, regardless of whether or not Police have any reason to suspect a given charged person with previous offending or whether that previous offending is of a nature for which DNA databank evidence may be evidentially useful. Further, the proposed power is able to be exercised by any Police constable without judicial warrant or other independent approval.
 - 2.4 Safeguards of this kind are found in many other jurisdictions which operate DNA databank sampling schemes, including New South Wales, Victoria, the Australian Commonwealth, Canada, the United States, Germany, Japan and the Netherlands. The only comparable schemes to that proposed in the Bill are those in the United Kingdom, which has operated without such safeguards and is currently under review after being held to breach the European Convention on Human Rights, and in South Australia and Tasmania.
 - 2.5 I have carefully considered whether the power can be regarded as justified and therefore reasonable in terms of s 21. I note, particularly, that the proposed will very likely result in increased rates of identification and prosecution of offender. However, and noting that many comparable jurisdictions operate DNA databank schemes within these safeguards and the lack of any special circumstances in New Zealand to justify a different approach, it is not possible to conclude that there is a sufficient rationale for their omission here. Further, and given

the lack of any statutory constraint, I do not consider that the proposal that Police develop internal guidelines for the exercise of these powers or the possibility that the powers will be interpreted restrictively by the courts provides a sufficiently clear or reliable substitute for statutory safeguards.

The Bill

3. The apparent inconsistency with the Bill of Rights Act arises from cl 7 of the Bill, which amends the Criminal Investigations (Bodily Samples) Act 1995 to provide that Police may, without consent or judicial warrant and, where necessary, with the use of reasonable force, take DNA databank samples from persons charged with a broad range of offences and (from 2011) with any imprisonable offence. Samples are retained for up to two years or, if the charged person is convicted, for 10 years. The Bill provides certain limited exceptions for young people.
4. The Bill also amends the current scheme for the taking of investigative samples with judicial authorisation from uncharged suspects to lower the threshold for such samples and to allow investigative samples, which can currently only be used for investigation of a particular suspected offence, to be used for databank comparison.
5. The stated objectives of the Bill are to increase the size of the DNA databank and thereby to increase the potential for matching DNA found at crime scenes with sampled persons and the consequent identification and prosecution of offenders.¹

Right against unreasonable search and seizure

6. The taking of a sample of buccal cells and/or blood amounts to a search and seizure within the meaning of s 21 of the Bill of Rights Act,² which provides:

“Everyone has the right to be secure against unreasonable search and seizure, whether of the person, property or correspondence or otherwise.”
7. Section 21 broadly requires that, where there is a search of the person or property of an individual:³

¹ Explanatory note, 2.

² See, among others, *R v Shaheed* [2002] 2 NZLR 377 (CA); *R v SAB* [2003] 2 SCR 678.

³ See, generally A Butler & P Butler *The New Zealand Bill of Rights Act: A Commentary* (2005) 566ff, following *Hunter v Southam* [1984] 2 SCR 145 and also United Nations Human Rights Committee *General Comment No. 16: The right to respect of privacy, family, home and correspondence, and protection of honour and reputation* (Art. 17), [7]:

“... the protection of privacy is necessarily relative. However, the competent public authorities should only be able to call for such information relating to an individual's private life the knowledge of which is essential in the interests of society as understood under the Covenant.”

Hunter is also followed in the White Paper *Towards a Bill of Rights for New Zealand* (1985 AJHR A6) 105-106.

- 7.1 Such intrusion must occur only if justifiable by a sufficient countervailing public interest;
- 7.2 Where the purpose of the intrusion is the collection of evidence for a criminal investigation, there must be specific and sufficient grounds for searching the particular person or property;
- 7.3 Absent special circumstances, for example where for particular reason there is a substantially reduced expectation of privacy or where urgency does not permit, such intrusion should occur only with prior and independent authorisation, most commonly in the form of a search warrant or other judicial order.
8. These requirements are also found in the protection of personal privacy under art 17 of the International Covenant on Civil and Political Rights⁴ and in the broader constitutional principle of the rule of law.⁵
9. These principles involve the striking of a balance between the right of every person against unreasonable intrusion, on the one hand, and the legitimate needs of law enforcement and other agencies, on the other.

The nature of DNA samples

10. There is broad acceptance that the taking of DNA samples is a substantial intrusion into personal privacy given the intimate nature of genetic information. The Supreme Court of Canada has observed, in a passage since cited by a unanimous decision of the Grand Chamber (Full Court) of the European Court of Human Rights (“ECtHR”), that:⁶
- “Unlike a fingerprint, it is capable of revealing the most intimate details of a person’s biological makeup. ... 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.”
11. A dissenting view was, however, expressed in the United Kingdom proceeding which led to the ECtHR decision. Both the Court of Appeal and the House of Lords held that the largely unrestricted regime for the taking and retention of DNA databank samples on arrest did not constitute an unjustified restriction on the European Convention right to privacy.⁷

⁴ See Human Rights Committee, above n 3, [8].

⁵ See Law Commission *Search and Surveillance Powers* (NZLC R97, 2007) 41 & 43.

⁶ *R v RC* [2005] 3 SCR 99, [27]; noted *S and Marper v United Kingdom* (Apps 30562/04 & 30566/04, 4 December 2008), [54].

⁷ *LS, R (on application of) v South Yorkshire Police (Consolidated Appeals)* [2004] UKHL 39 (retention of samples not an interference with privacy; taking of samples a justified interference); *Marper & Anor, R (on the*

12. I have carefully considered those views. I conclude, however, that the better view is that of the Supreme Court of Canada, the United States courts and the ECtHR, as:
- 12.1 The express right against unreasonable search and seizure in s 21 of the Bill of Rights Act is drawn from the Canadian Charter and parallels the right provided for in the United States Constitution.⁸ The decisions from these jurisdictions are therefore more directly relevant than decisions based on the more general right to privacy.
- 12.2 The ECtHR decision which effectively reversed the United Kingdom decisions is the unanimous decision of a full court. Further, and as noted below, the decision is grounded in the practice of the European Convention states parties in the context of which the United Kingdom scheme was anomalous.
13. While the reduction of a DNA sample to a more limited DNA “profile” which excludes much of the personal information reduces the intrusion upon privacy, the privacy interest remains substantial by reason of the special character of DNA material and, further, the prospect that technological improvements may permit more extensive use.⁹ Finally, it has not been generally accepted that DNA samples are equivalent to the taking of fingerprints.¹⁰
14. The use of DNA material for databank comparison purposes, as distinct from investigation of a particular suspected offence, also necessarily constitutes a broader intrusion into privacy.
15. In light of the breadth of that intrusion, if it is to be consistent with the s 21 right, the taking of DNA databank samples must be subject to substantial substantive and procedural safeguards. Both the Canadian Supreme Court and the ECtHR have stressed the necessity for “clear, detailed rules” to provide “sufficient guarantees against the risk of abuse and arbitrariness”.¹¹

Safeguards in the taking of DNA samples

16. That conclusion is borne out by practice in comparable jurisdictions:

application of) v Chief Constable of South Yorkshire & Anor [2002] EWCA Civ 1275 (retention a proportionate interference).

⁸ See Canadian Charter of Rights and Freedoms, s 8, *Towards a Bill of Rights for New Zealand*, above n 3, and the United States Constitution, Fourth Amendment and decisions cited at n 12 below.

⁹ See *Marper*, above n 6, [70]-[76] and also *R v SAB* [2003] 2 SCR 678.

¹⁰ See *Van der Velden v Netherlands* (ECtHR App 29514/05, 2006); *Marper*, above n 6, [86]; Steinhardt “Privacy and Forensic DNA Data Banks” in Lazer (ed) *DNA and the Criminal Justice System: The Technology of Justice* (2004) 173, 186.

¹¹ *Marper*, above n 6, [99]. See, similarly, Human Rights Committee, above n3, [8]: “...relevant legislation must specify in detail the precise circumstances in which such interferences may be permitted”.

- 16.1 In Canada and the United States, where there is a similar protection of the right against unreasonable search and seizure, it appears that DNA databank samples can only legitimately be taken from convicted serious offenders, as the expectation of privacy of such persons is subject, as a result of their convictions, to an objectively determined contrary public interest. The taking of samples from suspects for databank purposes is inconsistent with the search and seizure right.¹²
- 16.2 In most states party to the European Convention on Human Rights, which provides more limited protection against search and seizure, DNA databank regimes appear to operate under judicial supervision and subject to restrictive criteria. In its December 2008 decision in *Marper*, as noted above, the ECtHR noted that Austria, Belgium, Finland, France, Germany, Hungary, Ireland, Italy, Luxembourg, the Netherlands, Norway, Poland, Spain and Sweden) all restricted the collection of DNA samples to specific circumstances and/or serious offences.¹³ It also appears that few, if any, Convention member states other than the United Kingdom permit the taking of samples without judicial warrant.¹⁴
- 16.3 Although there is not a similar right against unreasonable search and seizure in Australia, it is noteworthy that the Australian federal DNA databank scheme and those in place in the two most populous states, New South Wales and Victoria, all apply similar substantive and procedural protections.

Conclusion

17. In considering whether the power is justified and therefore reasonable in terms of s 21,¹⁵ I note that:
- 17.1 The power will undoubtedly result in increased rates of identification and prosecution of offenders;
- 17.2 The Bill provides controls over the term for which databank samples can be retained and restrictions on unauthorised use; and

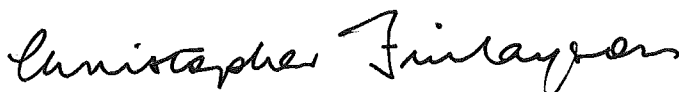
¹² See *SAB*, above n 9, [50] (noting that suspect sample permissible as to be used only for specific investigation) and *R v Rodgers* [2006] 1 SCR 554, [36]-[44] (contrasting convicted offender and suspect regimes) and *United States v Kincade*, 379 F 3d 813, 833-36 (9th Cir. 2004) and, for example, Carnahan "The Supreme Court's Primary Purpose Test: A Roadblock to the National Law Enforcement DNA Database" (2004) 83 Nebraska L Rev 1, 36-37 respectively.

¹³ Above n 6, [46].

¹⁴ See Williams and Johnson *Forensic DNA Databasing: A European Perspective: Interim Report* (2005) and Asplen "International Perspectives on Forensic Databases" (2006).

¹⁵ In the context of s 21, the issue of justification falls to be considered in determining whether the search or seizure is reasonable and not as a matter of demonstrable justification under s 5: see *Cropp v Judicial Committee* [2008] 3 NZLR 774 (SC), [33], holding that an unreasonable search cannot be justified.

- 17.3 The Explanatory Note to the Bill indicates that Police are to formulate operational guidelines for the exercise of the powers provided for in the Bill.¹⁶ It may also be anticipated that the exercise of the powers may be subject to limitation through challenges to the admissibility of evidence or other remedies.
18. Against these considerations, however:
- 18.1 With the exception of the United Kingdom decisions, which have now been effectively reversed by the ECtHR, there appears to be a consensus in jurisdictions which provide for a right against search and seizure that DNA sampling regimes must be subject to strict substantive and procedural safeguards; and
- 18.2 DNA databanks appear to operate successfully in the many comparable jurisdictions which apply such substantive and procedural safeguards.
19. I can find no basis on which to conclude that New Zealand differs from either of these positions to such a degree that these safeguards are unnecessary.
20. I do not consider it possible to rely upon either the intended Police guidelines or the necessarily after the fact remedies that may be available through the courts, as it has been emphasised both in New Zealand and more broadly that intrusive search regimes require express, external and prior safeguards.
21. For these reasons, I conclude that this Bill appears inconsistent with the Bill of Rights Act.



Hon Christopher Finlayson
Attorney-General

¹⁶ Above n 1, 18.