TOWARDS A DNA DYSTOPIA? HUMAN RIGHTS CONCERNS UNDER THE CRIMINAL INVESTIGATIONS (BODILY SAMPLES) AMENDMENT ACT 2009

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Introduction

It has been described as "critical in the fight against the escalating rate of crime" in New Zealand,[1] a move which will "save more victims than probably any other single piece of legislation".[2] It has also been called "an absolute prizewinner for how badly put together legislation can be"[3] and "much worse than it could or should be".[4] Even before it was passed into law, the Criminal Investigations (Bodily Samples) Amendment Act 2009 (CIAA) managed to divide opinion as few other law-and-order statutes have done. The Act was passed into law on 28 October 2009 and received Royal Assent on 2 November 2009. Its first phase (see below) came into force on 6 September 2010. Yet the important consequences of the amendment – its impact on police investigation and crime-fighting, its implications for the civil liberties and privacy rights of New Zealand citizens, its potential conflict with New Zealand's obligations under international law – are still yet to be fully determined. The Act makes significant changes to the DNA sampling and profiling regime established under the original Criminal Investigations (Bodily Samples) Act 1995, altering the authority and procedure for the New Zealand police to take DNA samples from criminal suspects and store their genetic profiles on the National DNA Database (NDD). The fear from some quarters is that, whatever its

[1] Hon Simon Power "Parliament Passes DNA Law" (press release, 28 Oct 2009).
[2] (14 Oct 2009) 658 NZPD 7072-7073 (Chester Borrows).
[3] (10 Feb 2009) 652 NZPD 1119 (Clayton Cosgrove).
[4] (27 Oct 2009) 658 NZPD 7489 (Charles Chauvel).

touted benefits for police, the expansion of New Zealand's DNA regime under the new legislation imports with it a "host of ethical and human rights concerns" which have not been adequately addressed.[5]

1. Opposition to the Amendment

Even before it passed into law, the CIAA attracted considerable criticism from opposition MPs and interested parties. Select Committee submissions from organisations such as the Human Rights Commission, the Privacy Commissioner and Amnesty International, for example, contended that the proposed extensions of New Zealand's DNA regime were "a step too far".[6] Perhaps the strongest indictment, however, came from the government's own Attorney-General, Hon Christopher Finlayson MP, whose report on the Act's consistency with the New Zealand Bill of Rights Act 1990 (NZBORA) pursuant to s 7 of the Act found the proposed legislation to be inconsistent with New Zealand's human rights protections.[7] In the face of the lobby-group opposition and the Attorney-General's reservations, the Act was nonetheless passed by the House with the support of a large parliamentary majority – 108 votes in favour, and only 14 against.[8] Yet those 14 Green and Māori Party MPs who opposed the legislation were consistently forceful in their objections, and even the Labour Party – which ultimately supported the Act –

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[5] (27 Oct 2009) 658 NZPD 7493 (Rahui Katene).

[6] Privacy Commissioner "Supplementary Submission by the Privacy Commissioner to the Justice and Electoral Committee, Criminal Investigations (Bodily Samples) Amendment Bill" at 4. Amnesty International, for instance, was also concerned that insufficient reasons had been provided 'to justify the mandatory collection of DNA on such a scale, and from people who are currently innocent of a crime'. 'No justificatory material', it noted, had been provided 'to support the view that this expansion of powers is necessary in a democratic society' – Amnesty International "Submission to the Justice and Electoral Committee, Criminal Investigations (Bodily Samples) Amendment Bill" at 4-5.

[7] Attorney-General, Report under the New Zealand Bill of Rights Act 1990 on the Criminal Investigations (Bodily Samples) Amendment Bill (2009) [Attorney-General's Report].

[8] (27 Oct 2009) 658 NZPD 7506.

raised reservations about the extension of the DNA collection regime, observing that the amendment created "legislative changes that take us outside the New Zealand Bill of Rights Act".[9]

2. Concerns of Political Expediency

Underlying many of the concerns about the CIAA can be discerned a fear that the Act represents a mere "knee jerk" reaction to perceived law-enforcement issues rather than a principled approach to the expansion of police powers. Law-and-order statutes are notorious for pandering to popular sentiment – the need for a government to be perceived as "tough on crime" – rather than rationally considering the best way to address the problem of criminal offending. That suspicion is heightened by the fact that the CIAA legislation comprised part of the National government's "100 Days" Post-election Action Plan of legislative reform.[10] During the 2008 electoral campaign, the National Party had promised to "bolster the tool kit of the police" in order to take a harsher stance on law-and-order issues, including an expansion of New Zealand's DNA regime.[11] The fact that the Act was essential to upholding the Party's electoral promises – "another key plank in the Government's law and order package" – played an undeniable role in motivating the Act's expedited passage.[12] The risk, therefore, is that the civil liberties and privacy implications of the expanded DNA regime were not properly considered in the race to pass the legislation into law. The risk is that with every successive extension of police powers in this area, "we become committed to them in turn, tak[ing] us progressively further away from the alternative approaches that were equally possible at an earlier stage" – making it imperative that legal developments such as the new Act be properly considered before

[9] (10 Feb 2009) 652 NZPD 1123 (Lianne Dalziel).
[10] Criminal Investigations (Bodily Samples) Amendment Bill 2009 (14-1) (explanatory note) at 1.
[11] (10 Feb 2009) 652 NZPD 1117 (Simon Power).
[12] (10 Feb 2009) 652 NZPD 1131 (Richard Worth).

further action is taken.[13]

3. **Scope of Paper**

The focus of this paper is thus to address what may not have been properly considered in the drive to push through the legislation: to assess whether the CIAA can achieve its stated aims in a manner proportionate with its potential incursions upon New Zealanders' rights to privacy, autonomy and equality – complex issues of civil liberties and the relationship between the citizen and the State. As Māori Party MP Te Uroroa Flavell observed during the Bill's First Reading in the House in February 2009, "the positive benefits of convicting serious offenders sit alongside a host of worrying issues that we cannot and must not ignore".[14] The civil liberties issues are significant and worthy of thorough consideration – international experience indicates the perils of ignoring human rights in the effort to clamp down on criminal offending. Yet, this paper shall contend, the risks to the individual rights associated with new DNA regime are ultimately not as severe as some parties have depicted them to be. The new DNA regime has the potential to operate in a proportionate manner, consistent with New Zealand's existing human rights and privacy legislation, as well as enhancing the ability of New Zealand police to track down and convict serious criminal offenders. To ensure that this occurs, however, the appropriate safeguards must be put in place, and the present lack of independent oversight of the DNA regime provides the greatest cause for concern. The National DNA Database is already a reality; what is important, in the words of a

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[13] Human Genetics Commission *Nothing to Hide, Nothing to Fear: Balancing Individual Rights and the Public Interest in the Governance and Use of the National DNA Database* (Nov 2009) at 21. Micahel Lynch and Ruth McNally have termed the phenomenon "biolegality" whereby, they say, "developments in biological knowledge and technique are attuned to requirements and constraints in the criminal justice system, while legal institutions anticipate, enable and react to those developments" – Michael Lynch and Ruth McNally *DNA, Biolegality and Changing Conceptions of Suspects* (conference paper prepared for the ESCR Genomics Forum, University of Edinburgh, Oct 2008) at 5.

[14] (10 Feb 2009) 652 NZPD 1130 (Te Uroroa Flavell).

report by the UK Human Genetics Commission (HGC), is that we consider and enforce the appropriate "conditions of acceptability" for having a forensic DNA database.[15]

A. Background

1. DNA Matching and Crime-Fighting – The Previous DNA Regime

The New Zealand DNA regime itself is nothing new – the original Criminal Investigations Act, passed in 1995, established a regulatory regime for the collection and retention of DNA profiles by police which was apparently only the second such regime to be established in the world.[16] The issue at stake today is thus not the propriety of DNA collection itself, but how far the legislative regime is gradually expanding, at an increasing potential cost to New Zealanders' civil liberties. The expansion of power granted to police under the new amendment Act, the Attorney-General noted in his NZBORA compliance report, "represents a substantial expansion of the current scheme".[17]

To understand why that expanded power has generated concern in some quarters, one must first understand how the existing DNA regime works. DNA profiles derive from two separate sources of samples, and it is the conjunction of these two sources which gives DNA profiling its functionality.[18] Firstly, crime-scene profiles are commonly derived from biological samples collected at crime scenes,

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[15] Human Genetics Commission, above n 13, at 3.

[16] See (10 Feb 2009) 652 NZPD 1117; "ESR and DNA – A Partnership that Seeks the Truth" Institute of Environmental Science and Research <http://www.esr.cri.nz/competencies/forensicscience/dna/Pages/default.aspx>. The UK NDNAD, the first DNA database in the world, was also established in 1995 – see Select Committee on the Constitution, House of Lords, *Surveillance: Citizens and the State* (2nd Report of Session 2008-09, Vol 1, 6 Feb 2009) at 43.

[17] Attorney-General's Report, above n 7, at 2.

[18] Human Genetics Commission, above n 13, at 26.

in the form of blood, hair, semen, skin, saliva, or sweat traces often invisible to the naked eye – as little trace material nowadays as a nose smudge left behind on a window.[19] Secondly, DNA samples known as "subject samples" can be obtained from individuals – criminal suspects, volunteers, convicted offenders.[20] Matches between the crime-scene profile and a subject profile – the numerical code derived from a subject sample – can determine if a subject was present at the scene of a crime. Matches can thus help police narrow the focus of their investigations, and DNA matches are also frequently adduced in court as often strongly probative evidence pointing to an individual's guilt (although a fresh DNA sample must be taken from the accused to be adduced in court as evidence).[21] The ability to collect DNA subject samples, however, can be useful to the police not only in respect of crimes currently under investigation. Once a person's DNA profile is added onto the National DNA Database (NDD), it can be compared against unknown DNA from unsolved crime scenes (stored on another database, the Crime Sample Database (CSD)).[22] A subject DNA profile can also be compared against DNA samples from future crime scenes when they are later entered onto the CSD.[23] The ability to take and compare DNA samples is thus of undoubted utility to police in conducting investigations into criminal offending both past and present – matching NDD profiles against the CSD has already provided police with intelligence links for more than 13,000 cases, and reportedly results in about 90 identifications between individuals and

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[19] "How Forensic Scientists Use DNA" Institute of Environmental Science and Research <http://www.esr.cri.nz/competencies/forensicscience/dna/Pages/forensicuseofDNA.aspx>.

[20] Human Genetics Commission, above n 13, at 26-27; Nuffield Council on Bioethics *The Forensic Use of Bioinformation: Ethical Issues* (Sept 2007) at 9-10.

[21] See Criminal Investigations (Bodily Samples) Act 1995, s 71A.

[22] "How the ESR Uses DNA to Fight Crime" Institute of Environmental Science and Research <http://www.esr.cri.nz/competencies/forensicscience/dna/Pages/fightingcrime.aspx>.

[23] The CSD is also matched against itself in order to identify any links between unsolved cases – Ibid.

unsolved crimes every month.[24]

2. Authority Required to Obtain Samples – Previous Law

Thus both crime-scene samples and subject samples are necessary for DNA profiling to be useful to the police, but the ease of obtaining samples from the two sources is far from equivalent. Taking a DNA sample from a crime scene involves little legal or ethical difficulty (although the practical difficulties for forensic scientists may be considerable if DNA traces are small, mixed or degraded).[25] Obtaining DNA samples from subjects, on the other hand, is much more controversial. Prior to the passage of the CIAA in November 2009, when requiring a subject sample for a particular criminal investigation, police could obtain a suspect's DNA only with the consent of the individual involved or with judicial approval through a suspect compulsion order or juvenile compulsion order (the so-called "Part 2 suspect regime").[26] The High Court could issue such an order only if satisfied that police had "good cause to suspect" that the suspect had committed an indictable offence.[27] The requirement of a judicial warrant was designed to ensure a degree of independent oversight in light of the fact that police were intruding on a person's privacy and bodily autonomy before any charges had been laid or proven in court.

If, on the other hand, police wished to take a suspect DNA sample not for the purposes of a current investigation but for comparison against unsolved crime-scene samples, the requirements were even more stringent. Police had to wait until the subject was not only charged but convicted in court of a "relevant offence" specified in a schedule to

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[24] "The DNA Databank: A Crime-Solving Tool" Institute of Environmental Science and Research <http://www.esr.cri.nz/competencies/forensicscience/dna/Pages/DNADatabankasacrime-solvingtool.aspx>.

[25] Human Genetics Commission, above n 13, at 62; Nuffield Council on Bioethics, above n 20, at 19.

[26] Criminal Investigations (Bodily Samples) Amendment Bill 2009 (14-1) (explanatory note) at 14.

[27] See Criminal Investigations (Bodily Samples) Act 1995, s 6.

the Act before they could issue a databank compulsion notice compelling the convicted offender to give a DNA sample.[28] A "relevant offence", generally, was an offence punishable by more than seven years' imprisonment, but also included a number of lesser offences supposedly indicating a propensity for more serious offending (or offences for which offender DNA is often left at the scene of the crime).[29] Thus the only circumstances in which police could obtain a DNA subject sample for entry onto the DNA databank without consent or judicial approval were narrowly restricted by both the requirement that the subject be already convicted and the threshold severity of a "relevant offence". Yet even those narrowly circumscribed powers proved powerful in practice – leading to the acquisition of 100,000 DNA profiles (subject and crime-scene) by October 2009.[30]

3. Changes under the CIAA

The new CIAA expands the police powers to collect and store DNA by making two fundamental changes to the DNA regime:[31]

1. It alters the "suspect regime" so that police may now take a DNA sample for the purposes of a current investigation without prior judicial approval, and allows police to use that sample for matching against unsolved crime-scenes prior to a suspect's conviction; and
2. It significantly widens the range of offences which trigger the authority of the police to take a DNA sample for matching against unsolved-crime scenes.

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[28] Ibid, ss 29 & 39.

[29] Criminal Investigations (Bodily Samples) Amendment Bill 2009 (14-1) (explanatory note) at 15.

[30] Simon Power, above n 1, at 2; Environmental Science and Research, above n 24. Of those, however, more than 8,000 are outstanding crime-scene profiles relating to unsolved crimes, including 595 cases of sexual assault and 397 of homicide – Criminal Investigations (Bodily Samples) Amendment Bill 2009 (14-1) (Regulatory Impact Statement) at 5.

[31] Simon Power, above n 1, at 3.

This expansion is set to take place in two distinct stages. The first stage of implementation, Part 1 of the Amendment Act, is now effective. Part 1 implements the first change listed above by inserting a "new Part 2B" into the principal Act to complement the existing "Part 2 suspect regime". The new "Part 2B regime" – referred to by the Police Association as the "arrestee regime"[32] – allows police, without prior judicial approval, to compel a DNA sample from every person they merely *intend* to charge with one of the "relevant offences" listed in the Act. This means that police can now compel a DNA sample from an individual even before he or she is charged with an offence, and thus will lead to situations where police will compel a DNA sample from someone who is ultimately never charged or convicted. The Part 2B arrestee regime also allows police to enter the profile derived from a suspect's DNA sample onto a temporary databank (the new "Part 2B temporary databank") for matching against the CSD as soon as charges are brought – unlike the old regime, police need no longer wait until a conviction is entered before undertaking this task.[33] The second stage of implementation, Part 2 of the Amendment Act, is still to come into force by a subsequent Order in Council, expected to occur in late 2011.[34] Part 2 of the Amendment Act relates to the second fundamental change listed above – when implemented, it will do away with the concept of a "relevant offence" altogether, allowing police to take a DNA sample without prior judicial approval from anyone they intend to charge with *any* imprisonable offence.

What becomes clear from the above is that the CIAA also blurs the former distinction made between DNA samples taken for the purpose of a current criminal investigation and DNA samples taken to match against unsolved crime-scene profiles on the CSD. Previously, investigative samples taken under a suspect compulsion order could be

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[32] New Zealand Police Association "Submission to the Justice and Electoral Committee, Criminal Investigations (Bodily Samples) Amendment Bill" at 2.
[33] See Criminal Investigations (Bodily Samples) Act 1995, new s 24P.
[34] Criminal Investigations (Bodily Samples) Amendment Bill 2009 (14-1) (explanatory note) at 2; (27 Oct 2009) 658 NZPD 7487 (Nathan Guy).

used only for the investigation of that particular offence; if the offender was subsequently convicted, a fresh DNA sample had to be taken by police for the purpose of databank comparison.[35] Under the new "arrestee regime", however, a DNA sample taken from a suspect in the course of an investigation can be transferred directly from the temporary DNA databank onto the permanent National DNA Database if the offender is subsequently convicted, without the need for a fresh DNA sample to be taken.[36] Unlike the United Kingdom, however, which has implemented similar threshold standards for DNA collection to the expanded New Zealand regime, in our country the DNA samples of people ultimately not convicted will be destroyed once charges against them are dropped or they are acquitted.[37] Thus in this respect the expanded New Zealand regime can be distinguished from the issues surrounding conviction and DNA retention which has given rise to legal and ethical objections in the UK – an issue that will be discussed in more detail below.

The two-stage process was apparently not the government's first preference for implementation of the new regime, and indeed raised concerns for the police that it "potentially undermines and frustrates the policy intent".[38] The staggered implementation resulted from the recognition of the need to afford the Institute of Environmental Science and Research (ESR) time to adjust to the increased workload, as well as adjusting for the significant costs involved in the new regime in light of New Zealand's current fiscal situation.[39] Tellingly, however, Minister of Justice Hon Simon Power also recognised that the expansion "raises issues that are worthy of public debate", and that staged implementation provides an opportunity "to gather more robust information about full implementation" – perhaps an concession that even the government is less than certain about the full ramifications of

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[35] Attorney-General's Report, above n 7, at 3.
[36] Ibid at 3.
[37] See Criminal Investigations (Bodily Samples) Act 1995, new s 60A.
[38] New Zealand Police Association, above n 32, at 3.
[39] See (10 Feb 2009) 652 NZPD 1117 (Simon Power); Criminal Investigations (Bodily Samples) Amendment Bill 2009 (14-1) (explanatory note) at 1.

its proposed course of action.[40]

B. Proportionality And Public Safety: a Rights Balancing Exercise

In order to analyse the potential impact of the CIAA upon individuals' civil liberties and right to privacy, it is necessary to ascertain the problems which the new regime purports to address. In New Zealand, as in other Western liberal societies, human rights are never considered absolute, and must invariably be subject to competing rights as well as the wider public interest, a balance between personal liberty and the overall common good.[41] Of course, the NZBORA itself recognises that rights may be subject "to such limits prescribed by law as can be demonstrably justified in a free and democratic society".[42] The promotion of public safety *can* undoubtedly provide a justification for limiting human rights – the protection of the public from criminal behaviour is one of the State's primary obligations – but there is always a balance to be struck along the spectrum of societal safety and individual rights.[43] The State must always have good reason to gather

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[40] (10 Feb 2009) 652 NZPD 1117 (Simon Power).

[41] Human Genetics Commission, above n 13, at 47; Nuffield Council on Bioethics, above n 20, at 31-32.

[42] New Zealand Bill of Rights Act 1990, s 5. The need to balance the public interest proportionally against human rights is also required by the UN Declaration on the Human Genome and Human Rights, art 9 of which says that "in order to protect human rights and fundamental freedoms, limitations to the principles of consent and confidentiality may only be prescribed by law, for compelling reasons within the bounds of public international law and the international law of human rights". See also art 8(2) of the European Convention on Human Rights (ECHR), a similar qualifying provision for measures "necessary in a democratic society".

[43] Human Genetics Commission, above n 13, at 9; Nuffield Council on Bioethics, above n 20, at xiii. In *R v Chief Constable of South Yorkshire Police, ex parte S & Marper* [2004] UKHL 39, [2004] 1 WLR 2196, for instance, Lord Steyn at [3] called the taking of DNA samples "a reasonable and proportionate response to the scourge of serious crime".

sensitive personal information about its citizens, particularly those who have not yet been proven guilty of any crime.[44] Although some civil libertarians decry any measures to increase police powers of investigation as a move towards a "genetic surveillance state",[45] ultimately one must decide whether the incursion into citizens' rights to privacy, autonomy and equality may be proportionally justified by the interests of the police and the greater good of protecting society through enhanced law enforcement.[46]

The public-safety justification for expanding the police powers for compelling DNA samples was that the former regime did not allow the police to obtain a sufficient number of subject profiles to match against all outstanding crime-scene profiles. By substantially expanding the "pool" of subject profiles held in the database, the likelihood is increased of finding a match with an unsolved (or future) crime-scene profile on the CSD.[47] Simon Power, in introducing the legislation, estimated that even the first stage of implementation would result in an additional 218 convictions from 2010 to 2011, while full implementation would result in approximately 445 extra convictions.[48] Thus the legislation aims to "contribute to increasing public safety and public confidence in the justice system"; it is, supporters say, an "essential investigative tool" in policing, a "powerful tool in the toolbox for police and the justice sector".[49] The Act will, it is hoped, result in "more victims vindicated" by removing repeat low-level

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[44] Human Genetics Commission, above n 13, at 9.

[45] Privacy Commissioner, above n 6, at 3; I Steward "New Law Used to Tackle 8000 Old Cases" *The Press* (Christchurch, 29 Oct 2009).

[46] Attorney-General's Report, above n 7, at 4; Human Genetics Commission, above n 13, at 29. One might observe that the maintenance of a high degree of public safety is a prerequisite for the enjoyment of other civil liberties – an individual's right to privacy becomes a somewhat academic consideration for the victim of a serial killer murdered because of failure by the government to protect its citizens from harm.

[47] Criminal Investigations (Bodily Samples) Amendment Bill 2009 (14-1) (explanatory note) at 2, 13, 15.

[48] (10 Feb 2009) 652 NZPD 1118 (Simon Power).

[49] Criminal Investigations (Bodily Samples) Amendment Bill 2009 (14-1) (explanatory note) at 2.

offenders from society before their offending can escalate to more serious criminal behaviour, and by removing serious offenders before they can strike again.[50]

1. Need for Caution in Expansion

Yet notwithstanding the legitimate aim of the legislation, one must always be careful not to create injustices as one attempts to eliminate other injustices. Just as "surveillance state" scaremongering contributes little to an informed public debate, neither should concerns about human rights intrusions be derided and dismissed as a "Big Brother conspiracy theory".[51] To strike a proportionate balance, the Act must advance its objective in "the most effective, efficient and targeted way possible, with the necessary safeguards".[52] Thus although human rights are not inviolable, they should be affected to the least extent necessary. An example where the appropriate balance has not been struck – one which may provide a salutary warning to New Zealand – is the UK National DNA Database (NDNAD). The European Court of Human Rights (ECtHR) recently condemned the NDNAD in *S and Marper v United Kingdom*[53], ruling that it "fails to strike a fair balance between the competing public and private interests", and thus violates the UK's human rights obligations under arts 8 and 14 of the European Convention of Human Rights to respect private and family life.[54] Interestingly, although New Zealand's DNA database is at present much smaller as a percentage of population than the UK's (in the UK, over 5 million people – more than New Zealand's entire population –

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[50] (14 Oct 2009) 658 NZPD 7066 (Simon Bridges).
[51] (27 Oct 2009) 658 NZPD 7490 (Chester Borrows).
[52] (10 Feb 2009) 652 NZPD 1132 (Jacinda Ardern).
[53] *S and Marper v The United Kingdom* Applications nos. 30562/04 and 30566/04, 4 Dec 2008 (ECtHR) at [118]. The decision was described by UK Human Rights group Liberty as "one of the most strongly worded judgments that Liberty has ever seen from the Court of Human Rights" – "DNA Database 'Breach of Rights'" *BBC News* (4 Dec 2008) <http://news.bbc.co.uk/2/hi/uk_news/7764069.stm> .
[54] Ibid at [125]. See also arts 8 and 14 of the European Convention on Human Rights.

are on the National DNA Database) its "hit rate" in identifying criminal offenders is reportedly higher than the UK's.[55] This suggests that New Zealand's database is already operating relatively efficiently compared to its larger overseas counterparts, and that expansion of the NDD may result in little increased benefit.[56] Police must be careful to ensure that the NDD expansion does not, as Lianne Dalziel noted, merely "flood the system with a lot of irrelevant data, which will not produce anything of any merit".[57]

C. Privacy: the Nature of DNA And Informational Privacy

The primary basis of objection to the expansion of New Zealand's DNA regime is that it represents an ever-greater intrusion into New Zealanders' right to informational privacy – "the fact that *genetic* information is on *police* records is a novel conjunction, giving novel possibilities that must be treated as such".[58] Informational privacy, which concerns the right to keep private information reasonably regarded as intimate or sensitive, is generally defended both as an abstract value and because of the specific harms that can result from its violation. As the Nuffield Council on Bioethics observes, even if no specific harm results from a breach of privacy, "the unauthorised use

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[55] Human Genetics Commission, above n 13, at 4; (10 Feb 2009) 652 NZPD 1132 (Jacinda Ardern). The UK's NDNAD is currently the largest in the world *per capita*, but the US CODIS database is actually the largest in respect of the absolute number of samples – Select Committee on the Constitution, House of Lords, above n 16, at 43.

[56] Likewise, GeneWatch in the UK has observed that DNA detections in the UK have stabilised at around 20,000 a year, despite increasing numbers of profiles being added to the database – Human Genetics Commission, above n 13, at 53.

[57] (10 Feb 2009) 652 NZPD 1124 (Lianne Dalziel). Analysis from the UK shows that from 2003-2009, while ten times the number of subject profiles was added to the NDNAD compared to crime-scene profiles, the number of matches rose by only 14%, suggesting that nine out of ten subject samples were redundant – Human Genetics Commission, above n 13, at 75.

[58] Human Genetics Commission, above n 13, at 44. See also Barry Steinhardt "Privacy and Forensic DNA Databanks" *DNA and the Justice System: The Technology of Justice* (ed. David Lazer) (MIT Press, Cambridge Mass, 2004).

of such sensitive personal information might be seen as undermining the inherent dignity of human beings".[59] The right to privacy is also an important check on both the power of the State and the private sector to intrude into the private lives of citizens.[60] A report of the House of Lords Select Committee on the Constitution in 2009 expressed concern in respect of the UK NDNAD that "the huge rise in surveillance and data collection by the State and other organisations risks undermining the longstanding traditions of privacy and individual freedom, which are vital for democracy".[61] Effectively, the New Zealand Privacy Commissioner noted, the DNA database represents a "state-run collection of intimately personal information".[62] Particular concerns arise in respect of biological samples because of the quantity and quality of private information they contain. However, if handled with the appropriate oversight and safeguards, however, it is possible to minimise the potential for this large quantity of personal information to be misused or abused.

1. DNA vs. Fingerprints

Supporters of DNA profiling frequently liken the procedure to a "modern-day fingerprint" to try and make the idea more publicly palatable.[63] Fingerprinting has been used by police since the 1800s to identify offenders at crime scenes, and the intrusion into informational privacy which fingerprinting entails has been generally accepted in New Zealand and other Western countries as proportional and

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[59] Nuffield Council on Bioethics, above n 20, at 33.

[60] Amnesty International, above n 6, at 4. See also Viktor Mayer-Schönberger "Strands of Privacy: DNA Databases, Informational Privacy, and the OECD Guidelines" *DNA and the Justice System: The Technology of Justice* (ed. David Lazer) (MIT Press, Cambridge Mass, 2004).

[61] Henry Porter and Afua Hirsch "The House of Lords Report: A Devastating Analysis" *The Guardian* (London, 6 Feb 2009).

[62] Privacy Commissioner, above n 6, at 4.

[63] Criminal Investigations (Bodily Samples) Amendment Bill 2009 (14-1) (explanatory note) at 13.

appropriate.[64] Both fingerprints and DNA possess three key characteristics – particularity, variability and stability – that make them highly effective as unique markers of individual identity, able to distinguish an individual with near certainty from the population as a whole.[65] The analogy between fingerprinting and DNA profiling, however, is technically accurate but also somewhat misleading. Although both are used in effectively the same manner by police, the comparison obscures the fact that a person's DNA contains a significant amount of private information which a fingerprint does not.[66] The Attorney-General himself observed that "it has not been generally accepted that DNA samples are equivalent to the taking of fingerprints".[67] Advances in genetic technology have meant that samples from very small bodily traces can now be used to obtain DNA, meaning that DNA profiling now "provides more possibilities to obtain suspect identification evidence from crime scenes than traditional fingerprinting".[68]

2. The Unique Nature of DNA: Genetic Exceptionalism

The key issue for privacy advocates is that along with this identification function, samples of DNA can also provide a wide amount of additional information about the individual to whom it belongs. An individual's DNA, it has been said, "is not the same as

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[64] Human Genetics Commission, above n 13, at 17-18; Nuffield Council on Bioethics, above n 20, at 39. A dedicated Fingerprint Branch was first established at Scotland Yard in London in 1901.

[65] Human Genetics Commission, above n 13, at 16.

[66] Nuffield Council on Bioethics, above n 20, at 8.

[67] Attorney-General's Report, above n 7, at 5. In fact, fingerprinting is still the most commonly used method of identification, and in one respect at least fingerprint profiling is still more reliable as a marker of individual identity than DNA, as fingerprints are 100% unique where DNA is not, and fingerprints can also distinguish between identical (monozygotic) twins where DNA cannot. This means, statistically, that DNA cannot distinguish between one pair of individuals in every 250 births – Institute of Environmental Science and Research, above n 19.

[68] Criminal Investigations (Bodily Samples) Amendment Bill 2009 (14-1) (Regulatory Impact Statement) at 1.

many other more mundane pieces of information we are obliged to divulge"; rather, it contains the "very essence of that individual".[69] Every sample of a person's DNA contains the entire genetic blueprint for that person's character, and can potentially reveal information of "profound personal significance to the individual" which ought to be treated with a considerable expectation of privacy.[70] A person's DNA, the Human Genetics Commission has observed, is "personal to them – it can be both identifying and revealing – and its use by others can constitute a harmful interference in their private life".[71] This idea – that genetic information is uniquely different from other forms of personal information – has been termed "genetic exceptionalism".[72] Our ability to "read" a person's genetic blueprint is limited only by our current level of technological capacity: the more technology advances, the more genome sequencing is allowing us to identify the function of particular protein-coding genes and their correlation with real-world phenotypic characteristics.[73] This "identity revealing" function of DNA could be used to determine a person's physical traits: their height, physical build, hair and eye colour, even their likely ethnic background.[74] Even more intimately, DNA can reveal a person's

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[69] Human Genetics Commission, above n 13, at 44.

[70] Human Genetics Commission, above n 13, at 46.

[71] Ibid at 9.

[72] Australian Law Reform Commission *Essentially Yours: The Protection of Human Genetic Information in Australia* (Vol 1, 2003) at [3.41]; Nuffield Council on Bioethics, above n 20, at 29.

[73] The current rate of technological advancement is startling too – the first human genome was only fully sequenced in 2003, but private companies are now offering individuals the opportunity to have their genome presented to them on a flash drive for only US$399 – "Top 10 Medical Breakthroughs 2008" *Time Magazine* <http://www.time.com/time/specials/2008/top10/article/0,30583,1855948_1863993_1864000,00.html>.

[74] "Frequently Asked Forensic DNA Questions" Institute of Environmental Science and Research <http://www.esr.cri.nz/competencies/forensicscience/dna/Pages/DNAfaq.aspx>. Scientists are presently working on identifying a gene sequence, known as the *MC1R* gene, which codes in 84% of cases for red-headedness – Nuffield Council on Bioethics, above n 20, at 21.

genetic predisposition to certain diseases and conditions – from lactose intolerance to prostate cancer – and thus their potential health and life expectancy in the future. [75] Most controversially, scientists have also posited that DNA analysis may indicate a genetic propensity or susceptibility to certain behavioural characteristics – intelligence, risk-taking, extroversion/introversion, even sexuality.[76] The more DNA samples police have in their possession – especially from persons who haven't been convicted or even charged with an offence – the greater the risk of misuse of the exceptional nature of genetic information for inappropriate and harmful purposes.

3. Privacy Protections and DNA

As the Supreme Court of Canada recognised in *R v RC*,[77] because, "unlike a fingerprint, [DNA] is capable of revealing the most intimate details of a person's biological make up", the collection of DNA samples, "absent a compelling public interest, would inherently constitute a grave intrusion of the subject's right to personal and informational privacy".[78] New Zealand is obliged at international law to protect the right to privacy by virtue of its commitment to the International Covenant on Civil and Political Rights (ICCPR). The right to informational privacy is not explicitly recognised under the NZBORA, although s 21 (to be discussed below) establishes a more specific right to maintain one's private affairs from unreasonable

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[75] Human Genetics Commission, above n 13, at 46. Moreover, as the Economic and Social Research Council (ESRC) Genomics Network has observed, the necessary privacy of the information is increased by the fact that much of this information may be unknown even to the individual concerned – cited by Human Genetics Commission, above n 13, at 46.

[76] Nuffield Council on Bioethics, above n 20, at 87. The UK law reform organisation JUSTICE has described DNA as 'the most intimate medical data an individual may possess' – JUSTICE "Keeping the Right People on the DNA Database: Science and Public Protection" (response to Home Office Consultation, July 2009) at 2.

[77] *R v RC* 2005 SCC 61, [2005] 3 SCR 99.

[78] Ibid at [27]; also cited by the European Court of Human Rights in *S and Marper*, above n 55, at [54].

search and seizure.[79] Most generally, informational privacy is protected in New Zealand by the "Information Privacy Principles" of the Privacy Act 1993, with which both the police and the ESR are bound to comply.[80] Although the principles are broadly drafted, they place general limits on what the police can do with the DNA database – selling the information to third parties, for example, would clearly fall outside the scope of use "for a lawful purpose connected with a function or activity of the agency" under Privacy Principle 1.[81] Privacy Principles 10 and 11, which require that an agency shall not, except in exceptional circumstances, use or disclose information for any purpose other than that for which it was collected, would also prohibit the police from using the NDD to reveal particular characteristics about an individual unless a demonstrable link could be shown to the databank's purpose in investigating and resolving criminal offences. [82] The Act itself also provides restrictions on what constitutes legitimate use of the DNA databank, prohibiting *a priori* the possibility of police lawfully using the NDD for non-operational purposes. Section 27 of the Act provides that information on the database can only be disclosed "for the purpose of forensic comparison in the course of a criminal investigation by the Police" or "for the purpose of administering the DNA databank".[83]

4. Remedies and the Risk of Accidental Breach

But what if those controls on informational privacy are breached by police, especially in the absence of any constitutional recognition of a right to informational privacy in the NZBORA? A number of remedies are potentially available to aggrieved individuals. A complaint can be made under the Privacy Act to the Privacy Commissioner (or

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[79] Article 17 of the International Covenant on Civil and Political Rights says that "[e]veryone has the right to privacy".
[80] Privacy Act 1993, s 6.
[81] Ibid. It would also constitute a breach of art 4 of the Universal Declaration on the Human Genome and Human Rights, that "the human genome in its natural state shall not give rise to financial gains".
[82] Ibid.
[83] Criminal Investigations (Bodily Samples) Act 1995, s 27(1)(a)&(c).

the Ombudsman), with a possible appeal to the Human Rights Review Tribunal (HRRT) at the discretion of the Director of Human Rights Proceedings.[84] The remedial powers of those bodies are significant too: the Privacy Commission can refer the matter to the HRRT to make a declaration, issue an order for specific performance or restraint, or even award damages for "humiliation, loss of dignity, and injury to the feelings of the aggrieved individual" – likely to be the kind of damage suffered by an individual whose privacy is breached by misuse of the DNA databank, rather than direct pecuniary loss.[85] Since the 2004 Court of Appeal decision in *Hosking v Runting*, a breach of informational privacy can also potentially sound in common law civil damages where a "reasonable expectation of privacy" and "highly offensive" publication can be established.[86] Finally, the Criminal Investigations (Bodily Samples) Act 1995 itself establishes a number of criminal offences to protect against the misuse of DNA samples, including offences of gaining or attempting to gain access to a DNA databank, disclosing any information stored on the databank, or gaining or attempting to gain access to or use a DNA sample.[87] One concern, however, is that these remedies can really only apply *ex post facto* – by which time the damage caused by a leak of an individual's private genetic information may already have been done. The more samples collected, the greater the risk of misuse of DNA occurring

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[84] Privacy Act 1993, ss 67, 68, 82.

[85] Ibid, ss 74, 77, s 88(1)(c). Again, this is required under the UN Declaration on the Human Genome and Human Rights, art 8 of which says that "every individual shall have the right, according to international and national law, to just reparation for any damage sustained as a direct and determining result of an intervention affecting his or her genome".

[86] *Hosking v Runting* [2005] 1 NZLR 1 (CA).

[87] Criminal Investigations (Bodily Samples) Act 1995, s 77(2)(d). The CIAA now also provides the same protection in respect of the new Part 2B temporary databank (see s 28). In the UK, a specific criminal offence of "DNA theft" was created in 2004 at the recommendation of the Human Genetics Commission – see Human Tissue Act 2004 (UK), s 45 – for taking or having an individual's biological sample with the intention to analyse their DNA without their consent. In Australia, it is an offence to recklessly or intentionally cause matching that is not permitted – see Crimes Act 1914 (Cth), s 23YDAF.

before the person involved has a chance to become aware of and prevent the breach of privacy. Although one might generally trust the police to abide by their legal obligations to use the databank appropriately (as the Police Association points out, perhaps the greatest safeguard is that "it is difficult to imagine any credible scenario where police would have any interest in investigating (for example) a suspect's hereditary disorders"), a greater risk is posed by the increased likelihood of accidental breach of privacy.[88] Even in the past few years, instances have occurred in New Zealand of private information held by government departments being inadvertently released into the public domain, and again the potential for accidental privacy breaches of the DNA databank is only likely to increase as the regime is systematically expanded.[89]

5. DNA Profiles in Practice: Limited Risk of Exposure

Many of the concerns about interference with informational privacy, however, fail to recognise one significant point about the way that the DNA profiling regime operates: DNA profiling should not be confused with full genome sequencing. A distinction has to be made between the DNA *sample* taken from a subject and the DNA *profile* that is extracted as a result, and in this respect those who liken the DNA regime to the "21st-century fingerprint" are perhaps more correct. When the ESR uses a DNA sample to produce a DNA profile for storage on the database, it uses only a very small portion of the individual's total DNA – approximately 0.001% of the entire

[88] New Zealand Police Association, above n 32, at 10.

[89] Consider, e.g., the incident in Auckland in 2008 where a Department of Corrections folder entitled "High Risk/High Profile Offenders – Pending New Zealand Parole Board Hearings" containing private information about serious criminal offenders, including their post-release addresses and other personal information, was discovered near a park bench in Auckland – Patrick Gower "Police Still Trying to Retrieve 'Top Secret' File" *NZ Herald* (Auckland, 20 June 2008) http://www.nzherald.co.nz/blogging/news/article.cfm?c_id=1501095&objectid=10517325.

genome.[90] To distinguish a person's genetic identity, the ESR's Identifiler testing system examines only a very limited number of sites (known as "loci") on a person's DNA for the frequency of 15 markers known as "short tandem repeats", and these sites do not contain any hereditary identifiers or other information of an intimate nature.[91] The regions of DNA which show the greatest variability from person to person – and thus function most effectively to identify individual offenders – are the non-coding sections of DNA which bear no relation to an individual's phenotypic makeup (their appearance, medical predispositions, etc).[92] The DNA profile stored on the NDD consists of no more than a string of numbers used to identify and distinguish the individual from everyone else – effectively, therefore, little more than a genetic fingerprint.[93]

The potential for damage to be done to an individual's privacy by police abuse or accidental disclosure, and accordingly the risk as increasing numbers of DNA profiles as are created, is thus relatively minimal – the limited information stored makes it difficult for profiles to reveal private or sensitive information. The technical nature of the DNA profile, moreover, means that it "can be deciphered by only a small group of specialist scientists".[94] Apart from linking a unique sequence of numbers to a named individual on the police records, the most that can be deduced from a DNA profile on the NDD is the sex

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[90] (14 Oct 2009) 658 NZPD 7066 (Moana Mackey).

[91] "Current DNA Techniques" Institute of Environmental Science and Research <http://www.esr.cri.nz/competencies/forensicscience/dna/Pages/currenttechniques.aspx>; Nuffield Council on Bioethics, above n 20, at 6.

[92] Human Genetics Commission, above n 13, at 9, 27.

[93] The Human Genetics Commission gives an example of what a person's DNA profile would look like when stored on a DNA databank, to give an indication of how technical and unrevealing it truly is – a typical profile looks something like this (each discrete number representing the number of short tandem repeats found at each locus on the DNA): "X Y 18 27 38 38 10 58.2 21 28.2 13 23 10.2 19 11 19 2 5 14 23 11.2 21" – Ibid at 20.

[94] Nuffield Council on Bioethics, above n 20, at xv; (10 Feb 2009) 652 NZPD 1118 (Simon Power).

of the individual concerned.[95] Whilst it is not completely inconceivable that this last feature could raise embarrassment for transgender persons or perhaps those with hereditary sex-chromosome abnormalities such as Klinefelter's syndrome (a condition in which a person possesses an extra male sex chromosome, XXY, which would show up in their DNA profile), the risk to privacy in this respect is hardly sufficient to justify opposing the retention of DNA profiles.[96] The only other aspect of investigatory profiling which has raised cause for concern is familial profiling – analysis of an individual's DNA profile can reveal the existence, and even the degree, of a biological relationship between two subject samples.[97] The practice, which has apparently already been conducted in New Zealand, allows the police to use a close but not identical match between a crime-scene profile and a subject DNA profile as a basis for investigating family members of the subject on the assumption that one of them may provide an identical match.[98] Familial searching has the potential to be highly intrusive – the revelation of previously unknown or unsuspected biological relationships (such as a paternity link) could have, the HGC noted, "profound and destabilising consequences for the individuals involved".[99] Again, however, although it is theoretically possible that police could inadvertently reveal a previously unknown genetic relationship, the risk to privacy is minimal provided police exercise appropriate discretion in making their inquiries. As the Nuffield Council on Bioethics observes, the public fear of revealing such

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[95] Institute of Environmental Science and Research, above n 74.

[96] Nuffield Council on Bioethics, above n 20, at 19, 21.

[97] Human Genetics Commission, above n 13, at 28.

[98] However, as with other DNA profiles, the resulting evidence is not admissible in court without a further DNA sample taken from the offending relative – Criminal Investigations (Bodily Samples) Act 1995, s 71. In the UK, statistics indicate that over 100 familial searches were conducted in 2006 alone – Nuffield Council on Bioethics, above n 20, at 78.

[99] Human Genetics Commission, above n 13, at 46. See also *S & Marper v United Kingdom*, above n 55, at [75], which held that the ability to identify genetic relationships between individuals 'is in itself sufficient' to conclude that retention interferes with the right to private life under art 8 of the European Convention.

unknown family connection perhaps has more to do with the sensitivity of the issue than the true extent of the risk.[100]

6. DNA Sample Retention

If DNA profiles only were retained, therefore, the limited nature of the information available should allay many of the concerns people possess about police collecting and storing their DNA. DNA *samples*, however – the biological material which allows access to an individual's genetic blueprint – can potentially risk causing greater harm, such as the risk of insurance companies obtaining genetic information to identify genetic predisposition to disease and deny insurance coverage on that basis, or unethical research into behavioural genetics (such as the so-called study of "criminogenics").[101] Where a sample is obtained under the new Part 2B arrestee regime, the bodily sample must be destroyed "as soon as practicable after a DNA profile is obtained from it" – specified as two months after the sample was taken if the person is not charged, or straight away if the charges are withdrawn or the person is acquitted.[102] Privacy Principle 9, which says that an agency is "not to keep personal information for longer than necessary" supports the necessity of that destruction.[103] However, an individual's

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[100] Nuffield Council on Bioethics, above n 20, at 78.

[101] Ibid at 79, 82; Human Genetics Commission, above n 13, at 81.

[102] See Criminal Investigations (Bodily Samples) Act 1995, new s 60A. Those provisions are also subject to s 61, however, which allow an application to the High Court to extend the 24-month retention period under Part 2 and the 2-month sample retention period under Part 2B. DNA *profiles* entered onto the temporary database must also be removed if a conviction does not result.

[103] Most European jurisdictions require the destruction of samples following DNA profiling – in Germany, for instance, the police must show a likelihood that someone will reoffend before a sample can be retained – and, following the ECtHR ruling in *S v Marper*, the UK government has also proposed destroying biological subject samples once the DNA profile has been obtained – Nuffield Council on Bioethics, above n 20, at 52, 100; Genewatch UK "Home Office Drags its Feet on DNA Database Removals" (press release, 7 May 2009). In Australia, likewise, it is an offence to record or retain any identifying information about a person obtained from forensic material after

informational privacy will continue to be at greatly increased risk for as long as the DNA sample is retained, and individuals must ultimately rely upon the good faith of police and the Police Commissioner to ensure that samples will be destroyed by the appropriate deadline. In the UK, it was estimated in a 2000 report that as many as 50,000 profiles may have been unlawfully retained when they should have been destroyed because no conviction resulted.[104] The Privacy Commissioner has raised concerns about one agency controlling both ends of the system, from the investigation of crimes scenes to the control of the database.[105] Given that the police are effectively the sole guardians of people's private genetic information, attention will need to be paid to ensure that the police comply with the proper use and sample destruction provisions contained in the Act. On an individual level, the Privacy Act at least allows citizens under Informational Privacy Principle 6 to obtain confirmation of whether or not the police hold personal information about them, which would empower them to monitor whether the police have properly destroyed their DNA sample by the required date. The Privacy Commissioner has also suggested that her audit function be strengthened to allow her to conduct specific audits of the databank's operation on a regular basis (at present this can only be done on request from police themselves).[106] This would be a highly prudent measure to ensure a further degree of independence of oversight to uphold the Act's obligations on police to ensure sample destruction is carried out properly and efficiently.

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the material is required to be destroyed – see Crimes Act 1914 (Cth), s 23YDAG.

[104] Her Majesty's Inspector of Constabulary "Under the Microscope: Thematic Inspectation Report on Scientific and Technical Support" (2000) at [2.23].

[105] Privacy Commissioner "Submission by the Privacy Commissioner to the Justice and Electoral Committee, Criminal Investigations (Bodily Samples) Amendment Bill" at 5-6. In Australia, the Commonwealth Attorney-General's Department has commented that 'in essence, such a proposal means that the decision when to destroy material is left entirely in the hands of the police' – cited by the Australian Law Reform Commission, above n 72, at 1075.

[106] Ibid at 5. See Privacy Act 1993, s 13(1)(b) in respect of the Commissioner's powers to audit the activities of an agency.

7. Privacy and Public Confidence

Finally, even though in actual fact the risk of abuse of people's private genetic information may be low given the limited information retained in a DNA profile and the strict requirements for the destruction of samples, one final consideration in this respect is simply the public perception. A stated objective of the new CIAA is to "contribute to increasing … public confidence in the justice system", but the new arrestee regime may in fact have the contrary effect – the Privacy Commissioner expressed concern in her Select Committee submission that expansion of the NDD may jeopardise its value and utility by undermining the public trust in the police and government.[107] The HGC notes that regardless of the actual procedure involved, many people feel "in some ineffable way" that their genetic information is an intimate and private matter with which the state should not interfere.[108] If the public at least *believes* that retention of their genetic information on a government database infringes their right to privacy, this could have serious practical consequences for public support and cooperation, and thus for police investigatory practice.[109] In an attempt to shield their privacy by resisting police retention of their DNA, citizens might conceivably become less co-operative with police investigations, and treat police and the government with increased suspicion and mistrust (a particular concern in respect of minority groups in New Zealand – see below).[110] It is not unknown, moreover, for individuals to attempt to guard their privacy by cheating the system – the very first DNA case in England, the Pitchfork case, resulted in the true offender being initially eliminated from police investigations into the murder/rape of two 15-year-old girls because he successfully

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[107] Criminal Investigations (Bodily Samples) Amendment Bill 2009 (14-1) (explanatory note) at 2; Ibid at 3.

[108] Human Genetics Commission, above n 13, at 47. A study conducted by the HGC showed that 52% of people surveyed did not trust the police to keep their DNA profile information private – Human Genetics Commission, above n 13, at 89.

[109] Ibid at 93.

[110] Ibid at 56.

substituted another man's DNA blood sample in place of his own.[111] As the UK Human Genetics Commission notes, "the [DNA databanks], and the effective prosecution of criminal justice more generally, depend on the trust, confidence and support of [private] citizens", and care must to be taken to ensure that this public trust is not eroded by perceived police abuses of their expanded powers.[112]

At base, most objections to the expansion of DNA profiling under the privacy rubric are founded on the idea that the government keeping more information on file about its citizens represents a greater intrusion by the State into the lives of ordinary citizens. As noted above, the idea of 'genetic exceptionalism' causes many to mistrust the concept of a DNA databank without considering how it operates in practice. Because the genetic information stored on the NDD is no more than a string of numbers allowing a person's unique identity to be determined (and none of their phenotypic characteristics or genetic predispositions), arguments based on the abstract right to protect personal information from the State's retention on a database are not particularly apposite. More concerning is the risk of abuse associated with the collection and potential retention of bodily DNA samples, which allow access to a much wider range of personal and intimate information, and the risk for those samples to be misused or leaked to third parties. Provided, however, that oversight is maintained by the Police Commissioner, the Privacy Commissioner, and perhaps by private citizens themselves under the Privacy Act to ensure that samples are properly destroyed, the risks of such harms arising should not give cause for undue alarm.

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[111] See *R v Pitchfork & Kelly* [2009] EWCA Crim 963; C Walker and I Cram "DNA Profiling and Police Powers" *Criminal Law Review* (July 1990) at 478-93, 480. The deception was only discovered when a woman overheard a colleague, Ian Kelly, boasting that he had substituted his DNA for Pitchfork's – "Forensic Cases: Colin Pitchfork, First Exoneration Through DNA" Explore Forensics <http://www.exploreforensics.co.uk/forenisc-cases-colin-pitchfork-first-exoneration-through-dna.html>.

[112] Human Genetics Commission, above n 13, at 10.

D. Autonomy: the Right Against Unreasonable Search And Seizure

The second key concern in respect of civil liberties intrusions under the new CIAA regime is related to informational privacy, but also distinct from it: an issue one can classify under the broad category of autonomy, personal privacy, or freedom from legal restraint. It was this concern which provided the basis of the Attorney-General's ruling that the CIAA is inconsistent with the NZBORA, in particular the right against unreasonable search and seizure under s 21.[113] Section 21 of the NZBORA says that "[e]veryone has the right to be secure against unreasonable search or seizure, whether of the person, property, or correspondence or otherwise". Concerns also arise about the potential for the NDD regime to interfere with the "due process" of criminal justice and the presumption of innocence.

Some opponents have attacked the CIAA on the grounds that the physical act of forcibly taking a DNA sample from a criminal suspect is "unreasonable" because such forcible sampling amounts to the legal authorisation of a "gross assault" on that person.[114] This is technically correct – in the absence of appropriate legal justification, the most minor touching of another person constitutes assault – but such an alarmist claim distracts from the real concerns in this area.[115] In fact, the procedure for taking a DNA sample is now as simple as taking a buccal (i.e. mouth) swab with a cotton swab known as a Q-tip rubbed against the inner cheek – a much less intrusive (and cheaper) means of sampling than the previous use of blood samples.[116] The sample can

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113 Attorney-General's Report, above n 7. Similarly, Privacy Principle 4, concerning the "Manner of Collection of Personal Information", says that personal information shall not be collected by an agency by means that "are unfair" or "intrude to an unreasonable extent upon the personal affairs of the individual concerned" – Privacy Act 1993, s 6.

114 See, e.g., (27 Oct 2009) 658 NZPD 7496 (Metiria Turei); Walker & Cram, above n 111, at 493.

115 See Crimes Act 1961, s 2.

116 See Criminal Investigations (Bodily Samples) Act 1995, new s 48A. In the UK, the use of buccal swabs was re-classified in 1994 as a "non-intimate"

be self-administered, takes only a matter of seconds and – according to the Police Association at least – "is far less invasive than brushing one's teeth".[117] The DNA sample may still also be taken by fingerprick blood sample, but, since the person concerned has the opportunity to elect which method is used, the buccal swap is likely to become the preferred option. Thus, although the procedure for taking DNA samples has been admitted to involve a "certain intrusiveness", it really amounts to little more than a minor physical inconvenience.[118] Ultimately, the worst "assault" that could occur is if police are required to use force to hold a suspect down in order to take a fingerprick sample (if the suspect does refuse and reasonable force is required to take the sample, new s 48A(5) prescribes that the sample taken must be a fingerprick sample). Police are already authorised to use reasonable force when searching a suspect who has been taken into lawful custody and to take any money and property off them, for example, and the collection of a DNA sample represents no greater an intrusion on bodily autonomy.[119] Moreover, samples can only be taken by a "suitably qualified person", a further measure to ensure that the

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means of sample taking under the Criminal Justice and Public Order Act 1994 – Human Genetics Commission, above n 13, at 30.

117 New Zealand Police Association, above n 32, at 10.

118 (14 Oct 2009) 658 NZPD 7066 (Simon Bridges). New sections 24M and 24N also require oral and written information to be given to a person from whom a bodily sample is to be taken, in order to ensure that the suspect is fully informed of the reasons and procedure for taking a bodily sample, which accords with Privacy Principle 3 of the Privacy Act requiring that individuals be informed, among other things, of the fact that the information is being collected, the purpose for which it is being collected, the law under which collection is so authorised and the agency collecting the information – see Privacy Act 1993, s 6.

119 See Policing Act 2008, s 37(3). Moreover, the Police Annual Report 2008/09 indicates that during that period, on only one occasion did reasonable force have to be used to compel compliance with a suspect compulsion order – New Zealand Police Association *Police Annual Report 2008/09* (30 June 2009) <http://www.police.govt.nz/sites/default/files/resources/2009-Annual-Report-Full-Version_e-version1.1.pdf>.

person taking the sample does not overstep the bounds of proper procedure.[120] The real concerns around the CIAA procedure are thus not so much with the potential for it to countenance physical assault by police in taking buccal samples, as with the clear intrusion it represents on a person's right to autonomy and freedom for State interference – particular as protected by s 21 of the NZBORA.

1. Reasonable Search/Demonstrable Justification

The intrusiveness of the procedural power conferred on police by the CIAA to take samples from a person's body clearly amounts to a "search and seizure of the person" for the purposes of s 21 of the NZBORA.[121] As was recognised in *R v Jefferies*, such a physical search of the person "is a restraint on freedom and an affront to human dignity".[122]The question is whether that search can be considered "reasonable", under both s 21and the test of demonstrably justified limitations under s 5 (although, of course, s 4 of the NZBORA means that no provision of the CIAA will be affected by inconsistency with s 21. The potential might remain, however, for certain provisions to be interpreted in an NZBORA-consistent way by the courts).[123] To be considered reasonable, as noted above, the intrusion must be justified

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[120] See Criminal Investigations (Bodily Samples) Act 1995, s 49A(1); and s 2(1) for the definition of a "suitably qualified person". Interestingly, however, s 79 of the Act provides an indemnity for people taking samples – no proceedings can lie against a person in respect of the taking of a fingerprick sample by force, except on grounds of negligence.

[121] In *R v SAB* 2003 SCC 60, [2003] 2 SCR 678, the Supreme Court of Canada held that the seizure of a blood sample for DNA analysis was a seizure for the purposes of s 8 of the Charter of Rights and Freedoms.

[122] *R v Jeffries* [1994] 1 NZLR 290 at 300.

[123] Attorney-General's Report, above n 7, at 6. There remains an unresolved debate about whether the test for reasonableness needs to be conducted twice under both s 21 and s 5 of the NZBORA in such circumstances. Entry into that particular debate is beyond the scope of this paper, and so the two issues will be treated herein as synonymous.

by a sufficient countervailing public interest.[124] More specifically, the right against unreasonable search and seizure means that two key principles must be satisfied before a DNA sample can be lawfully taken: [125]

1. There must be a specific and sufficient basis for taking the sample from the person concerned; and
2. Absent emergency or special circumstances, there must be lawful authorisation for the taking of the sample (up until now, by judicial warrant).

2. Conflict with NZBORA and Human Rights Standards

The new arrestee regime removes the requirement of prior judicial approval by the High Court, and thus appears to severely derogate from the second principle above in the absence of special circumstances. Such special circumstances, the Attorney-General notes, could include situations where there is a substantially reduced expectation of privacy – such as convicted offenders already in prison, perhaps.[126] Yet the police will now be able to take a DNA sample from any suspect without having to seek prior judicial authority even in the absence of extenuating "special circumstances".[127] This appears to directly cut across existing NZBORA protections under s 21 and the general principle that searches and seizures will be conducted pursuant

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[124] Andrew Butler & Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (LexisNexis NZ, Wellington, 2005) at 566.

[125] See, for example, the discussion in *R v Grayson & Taylor* [1997] 1 NZLR 399.

[126] Attorney-General's Report, above n 7, at 4.

[127] In fact, prior judicial authorisation has not been a necessity since 2003, when the Labour government's Criminal Investigations (Bodily Samples) Amendment Act 2003 removed that requirement, but this has become a much more concerning issue in light of the police's new power to take samples from mere suspects, and for a broader range of offences.

to judicial warrant,[128] as well as overseas jurisprudence (and may even go more deeply to the basic constitutional principle of the rule of law).[129] In the US, the EU and Canada, the courts have said that a failure to include judicial oversight of the power of physical compulsion is a breach of their relevant human rights standards, although those instruments give the courts power to invalidate legislation in a way that the NZBORA does not. In New Zealand this means that if the CIAA confers a power of search and seizure without judicial authorisation then that power must ultimately stand, yet experience overseas still provides an insight into how other countries perceive the legality of similar regimes. Moreover, the potential exists for litigation to be brought against New Zealand at an international level under the Optional Protocol to the ICCPR if an individual believes our DNA regime violates New Zealand's human rights obligations. In Canada – from whose Charter of Rights and Freedoms many of the provisions of the NZBORA such as s 21 are drawn – DNA databank samples can only be taken from convicted serious offenders – it has been held that it is the fact of a person's conviction which gives rise to a public interest contrary to their ordinary expectation of privacy and autonomy.[130] DNA samples taken from suspects can only be used for specific investigations, and their storage on the database has been considered inconsistent with the right against unreasonable search and seizure under s 8 of the Canadian Charter.[131]

Moreover, the ability of police to collect bodily evidence from people legally considered innocent, without approval of the courts and on the basis of suspicion alone, raises concerns about the proper process of justice and the presumption of innocence. It is a fundamental tenet of our criminal justice system that an accused is legally innocent until

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[128] See s 198 of the Summary Proceedings Act 1957. Exceptions to this principle do exist, however, such as under s 18 of the Misuse of Drugs Act 1975.

[129] See Law Commission *Search and Surveillance Powers* (NZLC R97, 2007) at 41, 43.

[130] *R v Rodgers* 2006 SCC 15, [2006] 1 SCR 554 at [36]-[44]; Attorney-General's Report, above n 7, at 6.

[131] *R v SAB* 2003 SCC 60, [2003] 2 SCR 678 at [50].

proven guilty: the so-called "golden thread" of the criminal law extending back to *DPP v Woolmington*.[132] The principle is now also enshrined in s 25(c) of the NZBORA, and s 22 also affirms the liberty of the person and the right not to be subject to arbitrary detention (for the purpose of taking a bodily sample, for example).[133] The new DNA regime does not directly contradict the presumption of innocence (and, again, s 4 of the NZBORA means that the statutory power under the CIAA for police to detain suspects for the purpose of taking bodily samples will operate despite any rights inconsistency). DNA evidence must obviously still be presented before a judge and jury before a conviction can result. But it does raise concerns about the treatment of presumptively innocent suspects. Under the new regime, police will also be able to extract a DNA profile from a suspect's bodily sample and enter it onto the temporary DNA databank before the person is even convicted – essentially allowing the police to treat a suspect as a criminal offender before a court has had a chance to make that determination and thus placing them on a kind of "genetic probation".[134] "By placing an individual's profile on a central, national register of criminal information", the Privacy Commissioner has observed, "that individual is effectively deemed a criminal".[135] The power for police to take DNA from anyone they "intend to charge" places a considerable amount of subjective discretion in the hands of the police.[136] Where previously a judge or JP was required to assess the evidence to an objective standard before issuing an order for a DNA

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132 *DPP v Woolmington* [1935] AC 462 (HL) at 481 per Viscount Sankey LC.

133 The presumption of innocence is also now recognised internationally under art 111 of the Universal Declaration of Human Rights.

134 Human Genetics Commission, above n 7, at 98. The Nuffield Council on Bioethics has described the net effect of including a greater proportion of individuals on the databank as "shift[ing] the relationship between the individual and the state insofar as it treats all individuals as potential offenders rather than as citizens of good will and benign intent" – cited by the Human Genetics Commission at 48.

135 Privacy Commissioner, above n 6, at 4.

136 Editorial "Vague DNA Bill is a Law Unto Itself" *Manawatu Standard* (Palmerston North, 29 Oct 2009).

sample to be taken, the standard has now become a much more subjective one – "'intends' means just something that happens to be in the constable's mind".[137] The mere requirement of an intention to charge gives police legal cover to collect a DNA sample even if a charge never results, provided they can assert that there was "good cause to suspect the person of committing a relevant offence" and an intention at some point to "bring proceedings against the person in respect of that offence" – a vague and highly subjective standard.[138] The determination of a suspect's criminality (after all, matching a DNA sample against the CSD or crime-scene samples assumes there is criminality to be discovered) should not be devolved to the law enforcers themselves – as one member of the National Council of Women of New Zealand (NCWNZ) commented to Select Committee, "police must see themselves as under the law, not deciders without judicial guidance".[139]

3. Potential for Police Abuse – "Fishing Expeditions"

The conferral of such a powerful discretion on police is particularly concerning given reports of the outcome of similar practice overseas. Allegations have been made against police in the UK that they have stopped or arrested suspects on trumped-up charges purely to obtain their DNA for the database: as one retired UK police superintendent has publicly alleged, "it is now the norm to arrest offenders for everything if there is a power to do so ... so that the DNA of the offender can be obtained".[140] The risk of police going on speculative "fishing expeditions" is now also present here given that police need

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[137] (10 Feb 2009) 652 NZPD 1125 (Keith Locke).

[138] See Criminal Investigations (Bodily Samples) Act 1995, new s 24J.

[139] National Council of Women of New Zealand "Submission to Justice and Electoral Select Committee on the Criminal Investigations (Bodily Samples) Amendment Bill" at 2.

[140] The UK Association of Chief Police Officers (ACPO), however, has dismissed the claim as "plainly wrong" – "Police Arrests 'Made to Get DNA'" *BBC News* (24 Nov 2009) <http://newsvote.bbc.co.uk/mpapps/pagetools/print/news.bbc.co.uk/2/hi/uk_news/8375567.stm>; Human Genetics Commission, above n 13, at 21-22.

only "suspect" someone in order to obtain a DNA sample from them, and need only bring charges against someone in order to enter their DNA onto the temporary databank.[141] Police may also be tempted to use the threat of charging an individual to coerce him or her into giving over their DNA sample "voluntarily". The risk of bullying or coercion may be especially acute where vulnerable people – youth, minorities, the mentally impaired – are involved.[142] Individuals subject to DNA profiling – particularly those who haven't been charged with any offence – should know that that process has been subject to the proper and impartial scrutiny which judicial oversight provides, and should also have the right to challenge that process to an independent body. On the other hand, it should be noted that one crucial difference between the new CIAA arrestee regime in New Zealand and the current UK regime is that if a person is not convicted, their DNA profile will (at least in theory) be removed from the temporary databank and the sample destroyed, reducing the value to police of such "fishing expeditions" to obtain DNA profiles.[143]

4. A Need for Greater Oversight

The justification provided by the Act's supporters for allowing the police to take extra-judicial samples and enter them into the databank before a suspect is brought to court is that an individual may now be linked with other unsolved crimes prior to conviction, and they may thus be prosecuted for these unsolved crimes alongside the original triggering offence.[144] In addition, it is suggested, the linking of an individual to other historic crimes may influence the court's perception of the risk of his or her re-offending when it comes to making bail

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[141] On a practical level, the new regime may expose the police to numerous complaints by discharged suspects challenging that the police ever possessed an intention to charge them with an offence, as noted by the *Manawatu Standard*, above n 136.

[142] National Council of Women of New Zealand, above n 141, at 2.

[143] New Zealand Police Association, above n 32, at 11.

[144] Criminal Investigations (Bodily Samples) Amendment Bill (14-1) (explanatory note) at 15-16.

decisions.[145] These are legitimate potential benefits, but they hardly justify the risk of police abusing their power in the absence of any judicial oversight when taking a DNA sample. The Attorney-General observed in his NZBORA compliance report that the lack of independent oversight was contrary to comparable DNA regimes in New South Wales, Victoria, the Australian federal DNA scheme, the United States, Canada, Japan, Germany and the Netherlands.[146] Only in the United Kingdom, South Australia and Tasmania, he noted, were schemes comparable to the New Zealand regime operating without such safeguards.[147] No special circumstances could be discerned in New Zealand to justify bucking the international trend in this respect or to render such safeguards unnecessary: "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".[148]

A resolution to this serious concern would be easy to implement. Some parties, such as the Privacy Commissioner, have pushed for the establishment of an independent statutory oversight committee with additional audit powers.[149] Such an idea has merit, and accords with practice in many overseas jurisdictions – the US CODIS database, for instance, is subject to an external advisory committee including ethicists and a Supreme Court judge, while the UK system operates an advisory National DNA Database Ethics Group to provide

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145 Ibid at 16.

146 Attorney-General's Report, above n 7, at 2. Australia has such oversight of its National Criminal Investigation DNA Database (NCIDD), incidentally, even though there is no Commonwealth constitutional protection of the right against unreasonable search and seizure as in New Zealand.

147 Ibid at 2. The UK regime, moreover, with which our government is increasingly aligning itself, has been described as "effectively an 'outlier' in international terms", and is currently undergoing review following the ECtHR's highly critical ruling in 2008 – Privacy Commissioner, above n 6, at 6.

148 Ibid at 2, 6-7.

149 Privacy Commissioner, above n 105, at 5; see Summary Proceedings Act 1957, s 198 – the test for search warrants is "reasonable grounds for believing" that an offence has been committed or is intended to be committed.

independent ethical advice on the DNA databank to the government.[150] The simplest method, however, would be to require police again to obtain a warrant before they may exercise the power to compel a DNA sample, as they still currently do in almost every other case of search and seizure. Some have claimed requiring police to seek warrants from justices of the peace after-hours could create large practical headaches and incur significant costs, yet police seem to have coped previously with the requirement.[151] In fact, the Police Annual Report for 2008/09 states that of all DNA samples provided during the period, over 9,700 were obtained voluntarily with consent, and only 221 were obtained through suspect/juvenile compulsion orders – suggesting that the burden of seeking compulsion orders arises relatively infrequently in any case.[152] In total, 80,902 suspect profiles on the NDD were provided by consent, compared with only 16,596 obtained through suspect compulsion orders.[153] The relatively modest financial cost involved in seeking judicial approval, finally, is hardly a proportionate factor when weighed against the important protections which judicial oversight provides.

The strong need for judicial oversight is also further increased under the new CIAA regime because of the widened range of offences for which police can now potentially compel a DNA sample. Without some form of independent approval, the indiscriminate collection of samples by police may jeopardise the effective operation of the system. By expanding the range of relevant offences to *all* imprisonable offences, a very large number of crimes are brought within the scope of the Part 2 sampling regime, including many relatively low-level offences which carry a maximum sentence of imprisonment. Sentences importing a maximum sentence of 3 months' imprisonment include

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[150] Australian Law Reform Commission, above n 74, at 1088; Human Genetics Commission, above n 13, at 6-8.
[151] See, e.g., (27 Oct 2009) 658 NZPD 7486 (Nathan Guy).
[152] Police Annual Report, 2008/09, above n 124, at 76. Of course, this might also show that police obtaining DNA samples in the absence of both judicial oversight and consent will be relatively uncommon, but the point of principle is nonetheless important.
[153] Ibid at 77.

such relatively trivial offences as littering, shoplifting, disorderly behaviour, seeking donations by false pretence, possessing a knife in a public place, associating with convicted thieves, drink driving, and possession of cannabis (or even BZP).[154] The risk that all imprisonable offences would be caught under Part 2 was a particular concern of the Privacy Commissioner – "expansion of the databank to encompass potentially trivial lawbreaking is… not warranted".[155] The only tangible result might be, she suggested, "a loss of general public faith in the integrity of police practices if samples are taken for trivial (but imprisonable) offences".[156] Any number of ordinary New Zealanders present at a crime scene – many of whom "might just have been in the wrong place at the wrong time" – may be compelled to produce DNA samples if police are not subject to higher scrutiny.[157]

5. Undermining of the Act's Rationale

In Europe, as the ECtHR observed in *S and Marper*, Austria, Belgium, Finland, France, Germany, Hungary, Ireland, Italy, Luxembourg, the Netherlands, Norway, Poland, Spain and Sweden all restricted the collection of DNA samples "to some specific circumstances and/or to serious crimes".[158] In Austria, for instance, police may only collect DNA from suspects of "severe" crimes, and in Hungary for crimes of 5 years' imprisonment.[159] In New Zealand, however, it will ultimately be at the discretion of the police to decide whether a particular offence merits DNA collection. It is not realistic to expect that gross abuses of power by police will result, but granting such a wide discretion does risk police over-zealousness (not necessarily amongst *all* police, but

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[154] See Crimes Act 1961, s 219; Summary Offences Act 1981, ss 3, 6, 13A, 15, 27; Land Transport Act 1998, s 56; Misuse of Drugs Act 1975, s 7(2). In the UK, the list of "recordable offences" contains even more trivial offences, such as "failing to give advanced notice of a procession", "taxi touting", and "persistent begging" – Nuffield Council on Bioethics, above n 20, at xiv, 10.
[155] Privacy Commissioner, above n 6, at 3.
[156] Ibid.
[157] (27 Oct 2009) 658 NZPD 7498 (Metiria Turei).
[158] *S & Marper v United Kingdom*, above n 55, at [46].
[159] Nuffield Council on Bioethics, above n 20, at 52.

amongst some). If this occurs, the scheme will also have moved away from the original justification for its operation – which risks undermining the "specific and sufficient basis" for the regime to be justified under s 21 of the NZBORA. When it was first designed, the DNA regime was designed to operate on the basis of propensity – the idea, supported by criminological studies, is that people who were previously found guilty of a serious crime present a higher than average likelihood of being guilty of a current or future crime under investigation.[160] The category of relevant offences for which a DNA sample could be compelled were serious, violent offences such as rape, murder and serious assault for which there was a high risk of recidivism, but also lesser offences such as burglary – predicated on the assumption that such "precursor" offences indicated a high propensity for further and escalated offending.[161] Such a rationale does not hold up, however, when considering minor trivial offending, or in regard to mere suspects who have yet to be convicted of any offence at all.

Granting the police licence to take samples from suspects for all minor imprisonable offences without prior judicial authorisation thus not only goes against the principles of reasonable search and seizure, but risks jeopardising the operational efficiency of the database, its aim to identify precursor offenders, and public confidence in the justice system. For these reasons, both the Supreme Court of Canada and the ECtHR have emphasised the need for "clear, detailed rules" to provide "sufficient guarantees against the risk of abuse and arbitrariness".[162]

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[160] Institute of Environmental Science and Research, above n 24; see, e.g., Michael Townsley, Chloe Smith & Ken Pease "First Impressions Count: Serious Detections Arising from Criminal Justice Samples" *Genomics, Society and Policy* (Vol. 2, No. 1, 2006) at 28-40, whose research into "criminal careers" highlights the "significant link" between those providing a DNA sample and further offending – 80% of whom went on to commit offences different from the initial offence for which their DNA was taken (at 29-30).

[161] About 80%, in fact, of reported links between the NDD and the CSD have come from burglaries – Institute of Environmental Science and Research, above n 24.

[162] *S & Marper v United Kingdom*, above n 55, at [99].

The police, assisted by the Ministry of Justice, have also formulated Police Operational Guidelines to inform the police in exercising their discretion to take a DNA sample and to prevent the arbitrary application of their new power.[163] The Operational Guidelines envisage restricting DNA sampling to situations where it is likely the sample will reveal information about a serious crime.[164] The Attorney-General, however, rightly considered that such internally-developed guidelines would not provide "a sufficiently clear or reliable substitute for statutory safeguards".[165] The Privacy Commissioner too has been wary of placing operational controls in the hands of the police themselves, saying that "in my view it is *Parliament* that should decide where the line is to be drawn".[166]

Moreover, judicial oversight is important not only to guard against abuses of police procedure, but is also imperative for the police to ensure that the DNA evidence they adduce in court is sufficiently rigorous to be admitted.[167] This will only occur if the chain of custody – from crime-scene investigators to the ESR to the NDD operators – can be subject to a high degree of quality assurance to rule out the possibility of abuse or tampering.[168] The Police Association itself has recognised that "any dispute about lawful authority may jeopardise prosecutions, as well as creating litigation risks".[169] If police powers are abused or used arbitrarily in breach of s 21 of the NZBORA, then defendants can seek compensation under the NZBORA or seek to have the improperly obtained evidence excluded at trial under s 30 of

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163 (27 Oct 2009) 658 NZPD 7487 (Nathan Guy).
164 Cited by the Privacy Commissioner, above n 6, at 5.
165 Attorney-General's Report, above n 7, at 3.
166 Privacy Commissioner, above n 6, at 5 (original emphasis).
167 It should be noted, however, that s 71 of the Criminal Investigations (Bodily Samples) Act 1995 continues to provide that a DNA profile derived under Part 2 or the new Part 2B arrestee regime is not itself admissible in criminal proceedings, which means a fresh DNA sample must still be taken to adduce as evidence in court.
168 (14 Oct 2009) 658 NZPD 7067 (Moana Mackey).
169 New Zealand Police Association, above n 32, at 4.

the Evidence Act 2006.[170] For the justice system to operate effectively DNA evidence must be able to withstand such challenges.

6. The Risk of the Distortion of Justice

These issues are of particular importance given the powerful probative effect DNA evidence can have in jury trials. As the Hon Justice Kirby commented in a 2000 speech at the University of Technology, Sydney, "given the likely devastating power of DNA evidence, it becomes doubly important to ensure the integrity of collection of samples and their transmission, storage, testing, reportage and preservation for the scrutiny of independent experts and, ultimately if need be, by the courts".[171] DNA evidence can be strongly incriminating evidence, and the powerful "scientific aura" surrounding DNA testing can obscure the reality that DNA evidence is not foolproof.[172] Research on juries in New South Wales has found that jurors have "high expectations for the significance of DNA evidence" and indeed that "[t]his may be based more on popular culture rather than scientific understanding" – the so-called "CSI effect".[173] Another recent Australian study, in fact, found that juries were 23 times more likely to convict in homicide cases where DNA evidence was adduced.[174] The problem, as the HGC

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[170] See, e.g., *Simpson v Attorney-General (Baigent's Case)* [1994] 3 NZLR 667 (CA); *R v Shaheed* [2002] 2 NZLR 377 (CA).

[171] Hon Justice Michael Kirby "DNA Evidence: Proceed with Care" (speech given at Seminar on Science and Digital/Cyber Crime, University of Technology Sydney, 16 March 2000). Kirby J served as a member of the Ethics Committee of the Human Genome Organisation (HUGO) from 1995-2005.

[172] Human Genetics Commission, above n 7, at 28.

[173] Mark Findlay and Julia Grix "Challenging Forensic Evidence? Observations on the Use of DNA in Certain Criminal Trials" *Current Issues in Criminal Justice* (Vol. 14, 2003) at 269-82, 274; Michael Lynch, Simon A Cole, Ruth McNally & Kathleen Jordan, *Truth Machine: The Contentious History of DNA Fingerprinting* (University of Chicago Press, Chicago, 2008) at x.

[174] Michael Briody "The Effects of DNA Evidence on Homicide Cases in Court" *Australia and New Zealand Journal of Criminology* (Vol. 37, No.2, 2004) at 231-52, 242. Conversely, studies have also observed a reluctance among modern juries to convict in the absence of DNA evidence against the accused. DNA evidence, Lynch *et al* say, has effectively become "... reified as a

observes, is that "DNA evidence shifts the balance of likelihood that an individual is implicated if their DNA corresponds to DNA taken from a crime scene" – almost a *de facto* reversal of the presumption of innocence, as suspects are given the burden of providing an alternative explanation for how their DNA ended up at a crime scene.[175] Moreover, concern has been raised about the potential for jury's misunderstanding of probabilities and the so-called "prosecutor's fallacy" to distort the presumption of innocence.[176]

Thus because of the powerful probative effect of DNA evidence and the increasingly reliance upon it, the need for oversight to ensure that the evidence is robust and reliable, and the need for caution in extending the DNA regime so broadly, becomes all the more imperative. Errors can and do still occur during DNA testing – mix-ups between samples, contamination with other samples, misinterpretations drawn from partial or mixed DNA samples – which can result in the misattribution of identity or other error.[177] There also

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machinery of truth for determining guilt and innocence." – Lynch, Cole, McNally & Jordan, above n 173, at 346.

175 Human Genetics Commission, above n 13, at 28-29.

176 Australian Law Reform Commission, above n 74, at 1097. Studies on the "prosecutor's fallacy" have observed that juries tend to assume that statistical odds of "1 in a million" that the DNA match has not correctly identified the offender indicates a "1 in a million" chance that the accused is not guilty of the offence. Such a conclusion is clearly not logically defensible, but increased reliance on DNA evidence makes such distortions of juries' reasoning increasingly likely to occur – Nuffield Council on Bioethics, above n 20, at 70. See *R v Keir* [2002] NSWCCA 30 for an example where the prosecutor's fallacy was held to have led to a miscarriage at trial.

177 Nuffield Council on Bioethics, above n 20, at xiii, 22-23; Australian Law Reform Commission, above n 74, at 1092-3. A study conducted by the California Association of Crime Laboratory Directors (CACLD) found a 1 per cent error rate in DNA testing in the laboratories it reviewed – cited by the Committee on DNA Technology in Forensic Science, National Research Council (US) *DNA Technology in Forensic Science* (1992), <http://www.nap.edu/catalog.php?record_id=1866>. Indeed, even in New Zealand a DNA profile obtained from an assault victim in the South Island matched the profiles from two separate homicide scenes in the North Island, and although police were satisfied that the assault victim had not been present

exists the potential for abuse and manipulation by both corrupt police investigators and forensically sophisticated criminals.[178] It is not unknown even in New Zealand for police to plant circumstantial evidence at a crime scene or deliberately contaminate evidence in order to secure a conviction, and this has led to notorious miscarriages of justice such as in the Arthur Allen Thomas case.[179] Naturally the police have a vested interest in using the DNA database to solve crimes, and this confluence of interest and power creates the risk of both inadvertent error and deliberate tampering in the drive to ensure convictions. Criminals too are aware of the increasing significance of DNA sampling in criminal investigations, and the more technically literate criminals are likely to find ways to get around or subvert the DNA procedure and, as evidenced by the UK Pitchfork case, the potential exists for "expert criminals" to plant other people's DNA at a crime scene in order to frame someone else for an offence.[180]

7. DNA and Autonomy: Conclusion

Thus while fears over the new CIAA regime authorising police "assaults" by Q-Tip are largely unfounded, it is deeply regrettable that judicial oversight of DNA collection has been removed at the same time that the regime has been expanded. This lack of independent oversight gives rise to a number of risks associated with the use and misuse of police discretion, the reliability of DNA samples and the operational efficacy of the system.[181] Concerns surrounding the effect

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at either homicide scene and was not the offender, an independent inquiry could not account for the false positive results – cited by the Australian Law Reform Commission, above n 74, at 1094.

[178] Nuffield Council on Bioethics, above n 20, at 22.

[179] See Greg Newbold *Crime in New Zealand* (Dunmore Press, Palmerston North, 2000) at 241-243.

[180] Walker & Cram, above n 116; Human Genetics Commission, above n 13, at 94. This also constitutes an offence under s 77(2)(b) of the Act punishable by up to 3 years' imprisonment to "knowingly provide[] false information with the intent that it should be stored on a DNA profile databank").

[181] The Labour opposition sought to introduce an amendment to provide for judicial oversight during the Committee of the Whole House stage, but the

of the regime's expansion on the right against unreasonable search and seizure, the presumption of innocence and citizens' autonomy could be greatly allayed if the requirement for prior judicial approval were to be reintroduced, and statistics from past practice indicate that such a measure would not be prohibitively expensive in terms of time or cost incurred. Ultimately, as the Attorney-General noted, "intrusive search regimes require express, external and prior safeguards" in order to satisfy the courts, targeted suspects and the public that they are operating fairly and lawfully.[182] Anything less sets a dangerous precedent in respect of State incursions into personal autonomy and privacy, as expressly protected by s 21 of the NZBORA, with no reasonable justification.

E. Equality: Impact on Minorities and Young Offenders

The final human rights issue which arises in respect of the new CIAA regime concerns equality. Evidence from New Zealand and overseas research indicates that the impact of DNA collection will not fall proportionately on all groups in society. The Human Rights Commission, in an oral submission to the Justice and Electoral Select Committee, observed that the new DNA regime "increases the possibility of discrimination on the grounds of race and family status".[183] Proponents of the CIAA frequently cite the adage that no one who is innocent of a crime has any need for concern about the police holding their DNA profile – the "nothing to hide, nothing to fear" attitude– but what this ignores is the potential distress and stigma that being listed on the DNA database can engender.[184] Inclusion on

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amendment was defeated – see 2009 JHR 531 (Criminal Investigations (Bodily Samples) Amendment Bill).

[182] Attorney-General's Report, above n 7, at 7.

[183] "HRC and Privacy Concerned About Increased Police DNA Sampling" Guide2.co.nz: Politics (May 14 2009) <http://www.guide2.co.nz/politics/news/hrc-and-privacy-concerned-about-increased-police-dna-sampling/11/7855>.

[184] See, e.g., (10 Feb 2009) 652 NZPD 1128 (David Garrett) and 1131 (Richard Worth); (14 Oct 2009) 658 NZPD 7502 (Simon Bridges). The Nuffield Council also suggests that the "nothing to hide, nothing to fear" argument also

the databank marks one as a person of interest to the police – one of the first groups of people the police will turn to as likely suspects every time a crime is committed – and thus, as Dr Ruth McNally of the ESRC Centre describes, creates a distinct category of "pre-suspects" automatically placed under suspicion whenever an offence is committed.[185] Because in most cases a person's DNA will be held permanently on the NDD, that person is effectively branded for life – identified, as the HGC puts it, as in an official, "intentional" relationship with police.[186] An individual's ability to counter this social stigma may prove difficult – the suspicion that there is often "no smoke without fire" may be hard to overcome.[187] This stigmatisation effect may even prove counterproductive to the overall aims of the database by encouraging offending amongst those pre-judged and classified as offenders. The effect is exacerbated under the new regime by the wide range of offences for which individuals can now be placed on the database: drawing the line for DNA sampling at all imprisonable offences "effectively labels as criminals people charged with trivial lawbreaking".[188] The average New Zealander, would not consider himself a criminal because he dropped a piece of litter, but inclusion on the NDD for such an offence would effectively label him

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cannot be used *per se* to justify the regime because the starting point must still be the presumption of innocence – Nuffield Council on Bioethics, above n 20, at 34. Similarly, the Privacy Commissioner observes that "some might say that people with nothing to hide have nothing to fear – I would turn that round. If a person has done nothing serious wrong, then the Police don't need his or her DNA" – Privacy Commissioner, above n 6, at 7.

185 Cited by the Human Genetics Commission, above n 13, at 48.

186 Ibid at 48. The applicants in *S & Marper* complained of just such a stigmatisation effect – see *S & Marper v United Kingdom*, above n 55, at [21]-[22], [122]. In the Court of Appeal hearing, Waller LJ observed that "persons who have been acquitted and have their samples taken can justifiably say this stigmatises or discriminates against me – I am part of a pool of acquitted persons presumed to be innocent, but I am treated as though I was not" – see *R v Chief Constable of South Yorkshire Police/Secretary of State for the Home Department (ex parte S & Marper)* [2002] EWCA Civ 1275, [2002] 1 WLR 3223 at [66] per Waller LJ.

187 Human Genetics Commission, above n 13, at 48.

188 Privacy Commissioner, above n 6, at 4.

as one.[189]

1. Diminished Rights and Rehabilitation

In respect of convicted serious offenders this concern is perhaps less of an issue – a distinction is made with these offenders because of the severity of the offences they have committed. With serious offending, when one violates the laws of the State and a criminal conviction results, one abdicates one's unqualified entitlement to enjoy individual legal rights such as privacy – conviction is "accepted as justifying a greater level of interference" with privacy rights.[190] Thus the holding of a convicted serious offender's DNA profile on the NDD seems an analogous intrusion on these "social contract" grounds – individual rights are only protected so long as the individual complies with the agreed rules and responsibilities of society. Under the new regime, however, as noted above many people who have committed only minor offences nevertheless subject to a *maximum* sentence of imprisonment, as well as those who are merely suspected and never charged or convicted, may now be targeted for inclusion on the NDD, and thus subject to the social stigma and diminished privacy rights of having one's genetic information kept on file by the government. Moreover, even in respect of convicted serious offenders, the ongoing intrusion into their rights by retention of their DNA post-imprisonment represents a continuing social discrimination and interference with anonymity even after the offender is considered to have fulfilled his punishment.[191] The ability to be rehabilitated, as the Privacy Commissioner noted in her submission on the CIAA, "is a key component of the justice system and should not be lightly discarded".[192] The Criminal Records (Clean Slate) Act 2004 regime, represents a move in this direction by allowing a person's record of conviction to be removed for certain minor offences after a

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[189] Ibid at 7.
[190] Human Genetics Commission, above n 13, at 33; Nuffield Council on Bioethics, above n 20, at 44.
[191] Nuffield Council on Bioethics, above n 20, at 29.
[192] Privacy Commissioner, above n 6, at 6.

"rehabilitation period" of 7 years.[193] The stated aim of that legislation is to "limit the effect of an individual's convictions" to enable law-abiding citizens to live free from the adverse effects of historical criminal records. Yet the expansion of the DNA regime runs counter to this goal by permanently recording the details of convicted offenders.[194]

2. Effect on Māori Biases

The stigma effect is of particular concern because of its potential to impact disproportionately on certain ethnic and vulnerable minority groups and thus aggravate existing social tensions.[195] The Māori Party, for instance, has raised concerns that DNA sampling may unfairly target Māori. Although the DNA regime is in theory "colourblind", by giving the police discretion in choosing to compel DNA samples the DNA regime risks aggravating existing police biases or the "overscrutiny" of Māori by police.[196] Research into systematic biases in

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193 Criminal Records (Clean Slate) Act 2004, ss 7 & 14.

194 Ibid, s 3.

195 Human Genetics Commission, above n 13, at 51.

196 See (10 Feb 2009) 652 NZPD 1129 (Te Ururoa Flavell); (27 Oct 2009) 658 NZPD 7495 (Rahui Katene). The use of DNA profiling on Māori subjects calls for a particular sensitivity by police because many Māori see the taking of bodily samples as a "breach of their spiritual belief systems and therefore as a moral and cultural offence". Māori, as well as many Pacific Island groups, consider bodily samples – even hair and fingernails – to be tapu. Their sacredness arises from the Māori belief in the sanctity and respect for life, and that because every part of a person's body contains their life force – or wairua – it can even be used to cause harm to that person under the process of mākutu. This cultural sensitivity is also reflected in the aversion amongst Māori to the practice of familial and ethnic profiling. Whakapapa – ancestry and geneological connections – are considered to be particularly sacred taonga in Māori culture – see W Hemara *Tikanga Māori, Mātauranga Maori & Bioethics: A Literature Review* (report for the Toi te Taiao, NZ Bioethics Council, Aug 2006) at 31-32. As long ago as 1993, the Indigenous People's Council on

the criminal justice system has indicated that Māori are indisputably overrepresented in police arrests, charges and convictions: a 2007 study by the Department of Corrections, in fact, found that overrepresentation of Māori in the criminal justice system was, in part, one of the "unintended consequences of discretion", reflective of an "institutional racism" and "biases" among the police.[197] A 1993 New Zealand study indicated that Māori are three times more likely to come into contact with the police than non-Māori, and police statistics show Māori are more likely, for instance, to be arrested and convicted of cannabis offences – one of the new imprisonable offences for which police will soon be able to compel a DNA sample.[198] The more that Māori are targeted (unconsciously or otherwise) by the DNA regime, the greater the risk that Māori will be "labelled" and stigmatised as criminal offenders. Ultimately the assumption that Māori are more predisposed to being arrested for criminal offending may become a reality through police practice by reinforcing racial assumptions of their propensity to criminality.[199] If Māori see themselves branded as criminal offenders on the databank, and police treat them as pre-supposed suspects – risking premature "tunnel vision" in investigations – then increased rates of Māori criminal offending risk becoming a self-fulfilling prophecy.[200]

This fear is borne out by evidence from the UK, where there exists an undeniable overrepresentation of black men on the NDNAD – over 30% of all black males have profiles on the NDNAD, compared with

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Biocolonialism was established to oppose such bioprospecting or "biopiracy", such as research into the supposed Māori 'warrior gene' several years ago.

[197] Department of Corrections Policy, Strategy and Research Group *Overrepresentation of Māori in the Criminal Justice System: An Exploratory Report* (Sept 2007) at 7.

[198] DM Fergusson, LJ Horwood & MT Lynskey "Ethnicity and Bias in Police Contact Statistics" *Australian and New Zealand Journal of Criminology* (Vol. 26, No. 3, 1993) at 202-203; Ibid at 14.

[199] Nuffield Council on Bioethics, above n 20, at 20.

[200] Ibid at 81.

only 10% of white males and Asian males.[201] The risk, the UK Equalities and Human Rights Commission notes, is that such overrepresentation "is creating an impression that a single race group represents an 'alien wedge' of criminality" by stereotyping black men as criminal suspects.[202] This has the potential to result in a disproportionate number of arrests, charges and convictions for members of certain ethnic groups such as Māori, whereas others who commit similarly serious crimes may not be convicted. It may also serve to further alienate Māori from the criminal justice system by undermining their confidence in receiving fair and equal treatment. The Māori Party has expressed concerns that young Māori may fight back against police if confronted for the taking of a DNA sample. Māori Party MP Rahui Katene suggests that "they [young Māori] already distrust the police and [if] the police want to take a swab, they're not going to know what is going on at all".[203] A recent report by the UK Home Affairs Select Committee found that "it is hard to see how [such an] outcome can be justified on grounds of equity or public confidence in the criminal justice system".[204]

On the other hand, it should be borne in mind that DNA evidence also has the potential to exonerate Māori offenders as well as inculpate them. The US Innocence Project, for example, reported that 70 per cent of those exonerated by DNA testing in the US were members of minority groups.[205] DNA has the potential to impact positively or

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[201] Cited by the Human Genetics Commission, above n 13, at 53.

[202] Ibid at 54. In London, 55% of the total number of innocent people on the NDNAD (i.e. those suspected but never convicted) are black or Asian, even though they constitute only 29% of the London population – Nuffield Council on Bioethics, above n 20, at 56.

[203] Greer McDonald "DNA Bill Raises Maori Party Concerns' *Dominion Post* (Wellington, 29 Oct 2009) at 1. It should be borne in mind, however, that the vast majority of DNA samples were taken by consent rather than force – see Police Annual Report 2008/09, above n 124.

[204] Home Affairs Select Committee, UK House of Commons *Young Black People and the Criminal Justice System* (Second Report of Session 2006-2007, Vol. 1, June 2007) at 15.

[205] "Facts on Post-Conviction DNA Exonerations" The Innocence Project, <http://www.innocenceproject.org/Content/351.php>.

negatively on ethnic groups such as Māori; how the technology is used in practice will determine whether it serves to counteract or exacerbate existing systemic biases. The government's response has been to require police to include information in their annual report on the proportion of DNA samples taken from ethnic minority groups.[206]

3. Risk to Young Offenders: The Need to Maintain Protections

Finally, the DNA regime also raises concerns in respect of young offenders. New Zealand is a signatory to the UN Convention on the Rights of the Child, which recognises that children and young people are especially vulnerable and require special treatment by legal systems in a manner which "takes into account the child's age and the desirability of promoting the child's reintegration" (they also have an additional right to privacy under art 16 of that instrument).[207] In light of the above-mentioned concerns about stigmatisation and rehabilitation, young offenders ought to be subject to especial protections to protect their rights, yet the Police Association was eager to expand the regime to fully encompass youth offenders as well. The Police Association submitted to Select Committee that the limitations on the arrestee regime for youth offenders were too narrow "given known patterns of youth offending";[208] they wished to remove the "arbitrary limitation" which restricts DNA sampling to "serious" youth offenders. The Police Association even opposed the CIAA's "clean slate" provision for the removal of youth DNA profiles from the databank after 4-7 years on the grounds that "this arbitrary youth regime is unnecessary".[209] In fact, however, research by the ESCR Genomics Network has indicated that low-level offending behaviour is relatively common in young people but rarely carried on into adulthood, which means that "in most cases, indefinite or prolonged retention of DNA profiles obtained from young people is ... unlikely to

[206] See Criminal Investigations (Bodily Samples) Act 1995, s 76.
[207] See United Nations Convention on the Rights of the Child, arts 16, 40.
[208] New Zealand Police Association, above n 32, at 2.
[209] Ibid at 8.

have much forensic utility in future".[210]

Fortunately, however, the Justice and Electoral Select Committee made a number of amendments in relation to the process for taking a DNA sample from young persons, limiting the range of offences for which a sample can be taken to the more serious "relevant offences" rather than all imprisonable offences and providing for the same protections in respect of DNA sampling as young persons enjoy generally under New Zealand's existing care and protection legislation whilst in custody.[211] This seems entirely reasonable given the particular vulnerability of children and the need to promote their rehabilitation before their behaviour hardens into a repeat pattern of offending.[212] The Privacy Commissioner told Select Committee that the removal of minor offenders' information from the NDD after a suitable period of time would provide a "small but notable incentive towards law-abiding behaviour".[213] Children and youth offenders should not be treated in the same fashion as adults given the potential for the above human rights issues to affect them more severely, and thus any move to include them in the general adult DNA scheme should be resisted. That the period of retention be limited in relation to the age of the suspected person was also one of the recommendations of the ECtHR in *S and Marper*, , and already the UK has taken steps to remove the DNA of children under the age of 10 (estimated at around 70 profiles) from the NDNAD, although an estimated 39,000 profiles from children and young people remain.[214]

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[210] Cited by the Human Genetics Commission, above n 13, at 51.

[211] See Criminal Investigations (Bodily Samples) Act 1995, s 24K, and Children, Young Persons and Their Families Act 1989.

[212] See Children, Young Persons, and Their Families Act 1989, s 208 on the principles of youth justice, which provides that proceedings should not be instituted against a child or young person if there is an alternative means of dealing with the matter "unless the public interest requires otherwise".

[213] Privacy Commissioner, above n 6, at 4.

[214] UK Home Secretary "Protecting Rights, Protecting Society" (speech to the Intellect Trade Association, 16 Dec 2008); *S & Marper v United Kingdom*, above n 55, at [124] – "the court further considers that the retention of the unconvicted persons' data may be especially harmful in the case of minors

Conclusion

The new Criminal Investigations (Bodily Samples) Amendment Act regime has the potential to assist police in the fight against serious criminal offending. Breakthroughs in DNA technology, even since the original DNA legislation was passed in 1995, are astounding – but also give cause for considered reflection on the capacity for the technology to be misused or abused, or to erode some of New Zealand's long-established human rights protections. On the one hand, some of the alarmist fears raised by opponents of the CIAA – the risk of gross informational privacy violations, or the supposed authorisation of physical "assaults" by police – are exaggerated. On the other hand, we must ensure that adequate protections remain in place to oversee the lawful and proper application of the legislation, and to ensure that it operates in a way proportionate to the goals it seeks to achieve. Police are granted considerable discretion under the new regime to target suspects for DNA samples. As with any such discretionary power – particularly in the field of law and order– the greater the power granted the more potential for that power to be abused. Whether DNA profiling is used to the benefit or detriment of New Zealand society depends on ensuring that the police utilise this powerful new tool in an appropriate and proportionate manner. Any increase in police powers should be accompanied by a corresponding increase in oversight of that system to ensure that the potential for abuse and harmful consequences is minimised.

Of the three key human rights issues considered above, the impact on informational privacy rights is the least concerning, even though it is the issue that springs most readily to mind in the public discourse. The system as it is designed to operate contains little potential risk for the disclosure or misuse of private genetic information. DNA profiles extracted from bodily samples are highly technical and contain negligible information of an intimate or personal nature. Effectively a

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such as the first applicant, given their special situation and the importance of their development and integration in society".

DNA profile operates in the same manner as a fingerprint profile, using a small number of unique markers in a given sample to distinguish an individual from the population as a whole, while discarding the broader range of private information that a genetic sample can potentially reveal. Only if the sample itself is retained is the risk to informational privacy increased, and the legislative regime is designed to ensure that sample destruction takes place soon after the DNA profile is extracted – largely addressing the concerns of the ECtHR in *S and Marper* in respect of the unwarranted retention of DNA samples. The only real concern is that, by placing the responsibility for ensuring sample destruction fully in the hands of the police themselves, the government is effectively asking us to trust the police that this will actually occur. It is to be hoped, however, that the range of existing protections under the Privacy Act and the Criminal Investigations (Bodily Samples) Act 1995 itself will help reassure the public that avenues of redress are available should the police fail to discharge their statutory obligation. Strengthening the ability of the Privacy Commissioner to oversee and audit this process, as she suggested in her Select Committee submission, should be considered as a means of further strengthening those contingency protections.

In respect of the issue of equality, particular care must be taken to ensure that the impact of the legislation does not fall disproportionately on Māori and young people, given the particular vulnerability of these groups in society. It is reassuring therefore to see that youth offenders will continue to be subject to a separate regime in recognition of the need to protect vulnerable youth and promote their rehabilitation. The potential for the DNA regime to exacerbate existing systemic biases against Māori – resulting in their being subjected to increased suspicion or persecution by police – is a real risk, but ultimately the issue of institutional racism runs much more deeply than DNA profiling. DNA technology can work for or against Māori interests, exonerating as well as implicating Māori as criminal offenders, and which way it goes in practice depends entirely on whether the police are willing to address any underlying systemic disparities in their treatment of Māori offenders. In this respect, the

requirement of ethnic statistics in DNA profiling in the police annual report is heartening recognition that an issue does exist here which needs to be monitored.

1. The Outstanding Issue: The Continued Need for Judicial Oversight

It is the broad human rights issue of autonomy and due process that gives the greatest cause for reservation. In light of the considerable expansion of police powers that the CIAA represents, it is all the more important for independent judicial oversight of the process to be maintained. As the HGC puts it, our responsibility is to provide the "practical conditions for its ethical acceptability and responsible development in the future".[215] New Zealand risks running against the international trend and our own Bill of Rights Act legislation in discarding the role of the judiciary in the DNA collection process, and overseas examples like the UK provide a salutary example of the consequences under international law if a country is seen to overstep the "margin of appreciation" in its international human rights obligations. The present lack of independent judicial oversight in our system may not be looked kindly upon by the UN Human Rights Council.

The simple addition of a requirement for police to seek prior judicial authorisation before compelling a DNA sample in the absence of consent would go a long way to addressing these concerns. A system of judicial oversight has operated in respect of the DNA regime in the past, and continues to operate in respect of police seeking search and seizure warrants generally, with little indication that the system is overburdened or intolerably inefficient. Judicial oversight is not only an important rights issue, but also ensures that the DNA collection process is sufficiently robust and reliable to allow the databank system to function efficiently and to withstand evidential challenges at trial. An independent oversight committee of the DNA profiling regime, as

[215] Human Genetics Commission, above n 13, at 104.

operates in many jurisdictions overseas, is a further measure that should be given serious consideration.

Without those protections, however, it remains to be seen what consequences occur in practice, and how the police choose to use the powerful new tool which has been given to them. Informational privacy concerns may have been somewhat overstated, and equality issues have at least been recognised as an issue worthy of further investigation, but the question of autonomy and oversight remains the outstanding issue: the CIAA as it stands at present may come to haunt the police and the government with unanticipated challenges at a domestic and even international level. It is to be hoped that this issue is recognised and addressed before such an eventuality comes to pass.