Submission on the Law Commission Review of the law governing the use of DNA in criminal investigations in New Zealand

Donna Cormack, on behalf of Te Mana Raraunga (Māori Data Sovereignty Network), April 2019

The Law Commission is reviewing the law governing the use of DNA in criminal investigations, including the Criminal Investigations (Bodily Samples) Act 1995 (CIBS Act).

Introduction

1. Te Mana Raraunga, the Māori Data Sovereignty Network[1], brings together over 100 Māori researchers, practitioners and entrepreneurs from a range of sectors. Te Mana Raraunga advocates for the realisation of Māori rights and interests in data, for data to be used in safe and ethical ways to enhance the wellbeing of Māori people, language and culture, and for Māori governance over Māori data.[2] Māori data "refers to digital or digitisable information or knowledge that is about or from Māori people, our language, culture, resources or environments". [2]

2. Te Mana Raraunga has articulated principles of Māori Data Sovereignty that guide approaches to the collection, management, and use of data.[2] Specifically, these principles are: Rangatiratanga (Authority); Whakapapa (Relationships); Whanaungatanga (Obligations); Kotahitanga (Collective benefit); Manaakitanga (Reciprocity); and, Kaitiakitanga (Guardianship).

3. We welcome the opportunity to contribute to the Law Commission Review of the law governing the use of DNA in criminal investigations in New Zealand, which has a primary focus on the Criminal Investigations (Bodily Samples) Act 1995 (CIBS Act) (The Law Commission 2018). There is a critical need for embedded Māori governance and oversight of Māori data across all government systems, including in respect of genetic materials that may be used as part of criminal investigations.

4. The CIBS Act 1995 is the key legislative framework guiding the use of DNA in criminal investigations. As such, Te Mana Raraunga have a significant interest in ensuring that the current Review of the CIBS Act supports Māori data rights and interests, strengthens rights related to Te Tiriti o Waitangi and the United Nations Declaration on the Rights of Indigenous Peoples, and promotes Māori data governance and the realisation of Māori aspirations.

Context

[1] www.temanararaunga.maori.nz

[2] *Principles of Māori Data Sovereignty,* available on www.temanararaunga.maori.nz

5. It is important to recognise the historic and colonial context of current policies and practices within the criminal justice system in Aotearoa NZ, particularly in relation to Māori. There is a strong research base that documents institutional racism within the criminal justice system and the negative, disproportionate impacts on Māori (e.g. Brittan & Tuffin 2017; Jackson 1998; Workman 2016). This includes the over-policing of Māori, differential sentencing, and the over-incarceration of Māori (Brittan & Tuffin 2017; Fergusson, Horwood & Lynskey 1993; Fergusson, Horwood & Swain-Campbell 2003). Research has also documented racism among police officers (e.g. Maxwell & Smith 1998).

6. 50% of the current male prison population is estimated to be Māori, and 63% of the female prison population is Māori. The United Nations, in a number of its reports on Aotearoa NZ's performance in relation to international conventions, has commented unfavourably on discrimination against Māori within the criminal justice system (e.g. UN 2016; 2017).

7. Consideration of any policies and legislation in relation to criminal investigations in Aotearoa NZ has to, therefore, carefully consider the documented institutional and interpersonal racism in the criminal justice system.

8. In terms of the particular context of the CIBS Act, in the original ACT, DNA could only be taken in relation to conviction for particular offences or where it was given voluntarily. There is some evidence that Police were proactive in pursuing voluntary acquisition of DNA historically. For example, a Ministry of Justice report on the Rotorua district notes that notes that "Rotorua police had several initiatives around the collection of volunteer DNA samples. In 2002 they set targets for each quarter and actively sought voluntary DNA samples from known offenders and those in custody" (Segessenmann & Jones 2005: 13). It is unclear how widespread this practice was.

9. The amendments to the Act in 2003 and 2009 extended the provisions under which DNA could be taken. Under the 2009 amendment, samples could now be taken by the police for a wider range of offences and on arrest (where there was intent to charge with an imprisonable offence), a Temporary Databank was introduced, and police were given the discretion to take samples without needing prior judicial approval (The Law Commission 2018).

10. The police are required to report on number of bodily samples taken and stored for criminal investigations in their annual reports. The latest annual report available online (NZ Police 2018), shows that in 2017/2018, bodily samples were taken from Māori on 5,699 occasions by the police under the CIBS Act, and DNA profiles derived from bodily samples taken from Māori on 4,881 occasions. This compares with 5,766 and 5,236 for European

respectively.[3] While the numbers reported having bodily samples taken for Māori and European are similar in 2018, this only represents around 0.2% of the European population but around 1% of the Māori population. Māori are thus around **five** times more likely to have a bodily sample taken under the Act each year.

11. The Police and/or ESR do not routinely report on the ethnicity of people whose DNA profiles are stored on databanks (either the DNA Profile Databank (DPD) or the Temporary Databank), so it is difficult to estimate the proportion of Māori who have DNA profiles on either the temporary databank or the other datasets. However, it is likely that it is disproportionately higher based on higher likelihood of having samples taken in the first place. ESR report that the DPD databank has around 189,000 samples and approximately 40,000 DNA profiles from case samples (ESR 2019).[4]

12. The current review also occurs within a context of increasing state surveillance. While state surveillance, in its various forms, has been a constant for Indigenous peoples in colonial contexts, there have been significant increases in state powers since the early 2000s, with the passing of the 2002 *Terrorism Suppression Act*, and the *Search and Surveillance Act 2012.*

13. There have been significant changes in the data environment in Aotearoa NZ since the original Act, including increased linkage of datasets with each other and data-sharing between agencies, and greater offshore storage of data. This context also needs to be taken into account in any legislative review relating to data, including data derived from biological samples.

14. In parallel to increasing datafication, Māori and other Indigenous peoples have been articulating concerns relating to data justice, privacy, and informed consent, and reasserting data sovereignty and other data rights under tikanga, the United Nations Declaration on the Rights of Indigenous Peoples, and other international and nation-based treaties and conventions (e.g. Kukutai & Taylor 2016; UN 2007).

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[3] Ethnicity data from the NZ Police should be interpreted with some caution in light of known issues with the quality of police data (Cormack 2010).

[4] The databanks storing forensic bodily samples are administered by ESR and include the *DNA Profile Databank* (which stores DNA profiles for persons who have a relevant conviction), the *Temporary Databank* (which stores DNA obtained voluntarily or under compulsion, and transferred to the DPD on conviction) and the *Crime Sample Database* (which stores DNA samples from crime scences) (The Law Commission 2018).

15. Indigenous peoples have raised specific concerns around genetic samples and data for many years (e.g. Mead 1996; Tallbear 2001). These include unethical research practices documented both internationally and in Aotearoa NZ (e.g. Harry 2009; Hook 2009).

16. Our submission is organised into two main sections. Section 1 discusses key points in relation to the Review and CIBS Act, organised around Te Mana Raraunga's Principles of Māori Data Sovereignty. In Section 2, we provide comment on selected specific questions asked by the Law Commission in the review document, paying particular attention to those questions of most direct relevance to Te Mana Raraunga.

Principles of Māori Data Sovereignty and the use of DNA/bodily samples in criminal investigations

Section One

Rangatiratanga | Authority

Control. Māori have an inherent right to exercise control over Māori data and Māori data ecosystems. This right includes, but is not limited to, the creation, collection, access, analysis, interpretation, management, security, dissemination, use and reuse of Māori data.
Jurisdiction. Decisions about the physical and virtual storage of Māori data shall enhance control for current and future generations. Whenever possible, Māori data shall be stored in Aotearoa New Zealand.
Self-determination. Māori have the right to data that is relevant and empowers sustainable self-determination and effective self-governance.

17. Any legislation that deals with bodily samples/DNA from Māori and data derived from these must explicitly recognise Māori rights and interests, including Māori rights to govern all samples collected and all data generated or derived.

18. Crown obligations in relation to Te Tiriti o Waitangi are not currently acknowledged in the CIBS Act. Any legislation in this space should make explicit references to the Crown's obligations to Māori under Te Tiriti o Waitangi.

19. In addition, government obligations under other international conventions and declarations should be recognised. The United Nations Declaration on the Rights of Indigenous Peoples references rights in relation to Indigenous peoples' human and genetic resources in Article 31 (UN 2007).

20. There should be oversight of the collection, storage, and use of bodily samples and derived data in criminal investigations that is independent of both the Police and ESR (the organisation currently responsible for testing and management of forensic databanks in Aotearoa NZ). This oversight needs to involve Māori representation at the highest level. This lack of oversight is inconsistent with other comparable jurisdictions internationally, and with principles of Rangatiratanga.

Whakapapa | Relationships

Context. All data has a whakapapa (genealogy). Accurate metadata should, at minimum, provide information about the provenance of the data, the purpose(s) for its collection, the context of its collection, and the parties involved.
Data disaggregation. The ability to disaggregate Māori data increases its relevance for Māori communities and iwi. Māori data shall be collected and coded using categories that prioritise Māori needs and aspirations.
Future use. Current decision-making over data can have long-term consequences, good and bad, for future generations of Māori. A key goal of Māori data governance should be to protect against future harm.

21. In relation to the data sovereignty principle of Whakapapa, legislation and policies governing the use of bodily samples in criminal investigations need to include strong provisions requiring agencies to provide detailed documentation of the processes and context of data collection and use. This includes transparency over what demographic details are collected and stored in the forensic databases.

22. The police and ESR (or whichever agency is involved in forensic analysis and reporting) should be required to report statistics for Māori for every indicator that is monitored. Currently, in police annual reporting, some of the data are not reported by ethnicity and it is therefore not possible to monitor impacts for Māori.

23. Any new or revised legislation needs to be clear about what is acceptable future use, and to consider the potential future harms, for Māori specifically, particularly in light of new technologies in forensic DNA phenotyping and the current over-representation of Māori in the databanks.

Whanaungatanga | Obligations

Balancing rights. Individuals' rights (including privacy rights), risks and benefits in relation to data need to be balanced with those of the groups of which they are a part. In some contexts, collective Māori rights will prevail over those of individuals.
Accountabilities. Individuals and organisations responsible for the creation, collection, analysis, management, access, security or dissemination of Māori data are accountable to the communities, groups and individuals from whom the data derive.

24. Legislation needs to recognise both individual and collective rights in relation to data and make sure that individual and collective rights are balanced. Collective rights are of particular relevance in the context of bodily samples from which information can be derived or inferred about family members.

25. Collective rights are provided for under UNDRIP, and should be incorporated into any new or revised legislation.

26. Familial searching raises particular issues in relation to the balance of individual and collective rights. Given both the disproportionate taking of biological samples from Māori and subsequent disproportionate inclusion of Māori on the current forensic databanks, and the relatively smaller size of the Māori population, familial searching will have differential impacts on Māori communities and individuals. This differential impact could be considered a form of differential effect discrimination, by which a policy has differentially racially-discriminatory impacts on a community (National Research Council 2004).

27. The Review should consider how accountabilities to the communities, individuals and groups from whom Māori data derive are incorporated into legislation and into the functioning of the relevant agencies. This should include regular reporting back to Māori on how these obligations are being met by government agencies, including how Māori samples and data are collected, managed, analysed, reported stored and disposed of (either through return or destruction).

Kotahitanga | Collective benefits

Benefit. Data ecosystems shall be designed and function in ways that enable Māori to derive individual and collective benefit.
Build capacity. Māori Data Sovereignty requires the development of a Māori workforce to enable the creation, collection, management, security, governance and application of data.
Connect. Connections between Māori and other Indigenous peoples shall be supported to enable the sharing of strategies, resources and ideas in relation to data, and the attainment of common goals.

28. The Review and any resulting legislation should consider if and how the use of DNA in criminal investigations provides real meaningful benefits for Māori, both at individual and collective levels. There is currently little information available about how bodily samples and derived data contribute to investigative outcomes to assess levels of benefit for Māori communities.

Manaakitanga | Reciprocity

Respect. The collection, use and interpretation of data shall uphold the dignity of Māori communities, groups and individuals. Data analysis that stigmatises or blames Māori can result in collective and individual harm and should be actively avoided.
Consent. Free, prior and informed consent (FPIC) shall underpin the collection and use of all data from or about Māori. Less defined types of consent shall be balanced by stronger governance arrangements.

29. Free, prior and informed consent (FPIC) should be the underpinning principle and preferred approach to the collection and use of Māori data. Where such consent is not present, there need to be strong governance and ethical provisions in place, including oversight that is independent of the agencies involved (Police and ESR).

30. There appears to be instances in which current police practices are circumventing opportunities for suspects to provide consent (see 8.39 and 8.40 of the Review, Law Commission 2018: 147-148). FPIC should be a fundamental principle to the collection of bodily samples and/or use of derived data from Māori. If there is no opportunity for consent, there should be external judicial oversight.

31. Strong Māori governance should be embedded as part of independent oversight of the system to support collection and use of data in ways that uphold the dignity of Māori and minimise use of data in ways that are stigmatising and harmful to Māori collectives and/or

individuals. This is of particular relevance in terms of forensic DNA phenotyping, where statements or assumptions may be made about ethnic communities, as has been the case by researchers associated with ESR previously (see Hook 2009).

32. Any revised or new legislation should be cognisant of the documented context of racialised policing in Aotearora New Zealand and consider how this can be addressed in the design of any new policies and systems.

Kaitiakitanga | Guardianship

Guardianship. Māori data shall be stored and transferred in such a way that it enables and reinforces the capacity of Māori to exercise kaitiakitanga over Māori data. **Ethics**. Tikanga, kawa (protocols) and mātauranga (knowledge) shall underpin the protection, access and use of Māori data. **Restrictions.** Māori shall decide which Māori data shall be controlled (tapu) or open (noa) access.

33. Any new legislation should ensure Māori governance of Māori data, including in stewardship arrangements for the collection, transfer and storage of data.

34. Māori should have control over deciding the protocols and policies around Māori data. This includes control over deciding appropriate tikanga and kawa around bodily samples and derived data.

Comments on specific questions in the Review Discussion Document

Section Two

This section provides responses to specific questions asked by Law Commission in its review document, focusing on questions of particular relevance or interest for Te Mana Raraunga.

Chapter 2: Framework for analysis

Question 1: *One of our goals is to ensure that legislation regulating the use of DNA in criminal investigations is fit for purpose. It must have a clear purpose that has been robustly tested, be certain and flexible for the future and be appropriately comprehensive and effective for that purpose within the context of the wider criminal justice system. What do you think about the way we have framed this goal?*
Question 2: *One of our goals is to ensure that the use of DNA in criminal investigations is regulated in a way that is constitutionally sound. This requires ensuring that the regime is consistent with the principles of the Treaty of Waitangi and NZBORA and that any intrusions upon tikanga and privacy are minimised. What do you think about the way we have framed this goal?*
Question 3: *One of our goals is to ensure that legislation governing the use of DNA in criminal investigations is accessible. It should be conceived of and expressed simply. What do you think about the way we have framed this goal?*

35. We agree that legislation governing bodily samples and derived data in criminal investigations should be clear, unambiguous and accessible in the way that it is written.

36. Recognition of Te Tiriti o Waitangi in legislation aligns with Te Mana Raraunga's principles of Rangatiratanga in relation to data. We suggest that specific clauses articulating government obligations in relation to Te Tiriti o Waitangi be incorporated into new legislation.

37. We recommend that the incorporation of Te Tiriti o Waitangi into new legislation should include reference to the provisions (i.e. the articles of Te Tiriti) rather than only to the principles.

38. Te Tiriti o Waitangi should also guide relationships with Māori (as individuals, collectives and Iwi). That is, Māori should be understood as Treaty partners in the formulation of any new policies and legislation in this space. This partnership should be reflected in structural, decision-making and governance arrangements, including independent oversight.

39. We would suggest that the framework for analysis and goals proposed by the Law Commission review should include reference to the United Nations Declaration on the Rights of Indigenous Peoples, as well as to UN documents in regard of Indigenous data rights and principles.

Chapter 4: Time for a new Act

Question 4: *Do you think that the CIBS Act should be repealed and replaced with a new Act? Why or why not?*

40. We agree, in principle, that the CIBS Act should be repealed and replaced with a new Act. The current Act is limited in terms of any independent oversight, and does not provide certainty or clarity in a number of areas. However, we would not support a new Act that extended state powers. A new Act needs to strengthen Māori governance, align with obligations under Te Tiriti o Waitangi and relevant international conventions, provide for independent oversight and provide clarity and certainty around what is acceptable practice.

41. A new Act needs to be considered within the context of documented institutional racism in the criminal justice system that over-polices and over-incarcerates Māori (e.g. Jackson 1998; Workman 2016). A new Act should actively address this context in its formulation and operationalisation, or it will likely reinforce already existing racial bias in the system.

Chapter 6: Forensic DNA phenotyping

Question 5: *What concerns do you have, if any, about the use of forensic DNA phenotyping in criminal investigations?*

Question 6: *How do you think forensic DNA phenotyping should be regulated in New Zealand?*

42. Forensic DNA phenotyping is of particular relevance for Māori, given that it can be used, as the Review document notes, to "… predict some of the likely physical characteristics of the person who left the sample – such as a person's hair colour, eye colour or ethnicity" (The

Law Commission 2018: 96). It appears, from the discussion document, that ethnicity is inferred from markers of genetic ancestry by ESR.

43. We are concerned that there is no independent oversight of the use of forensic DNA phenotyping in criminal investigations, as highlighted in the Law Commission Review. 'Ethnic inference' has been used in investigations in New Zealand in some cases (The Law Commission 2018), and its use is likely to increase in the future.

44. Ethnic inferencing relies on comparison with the New Zealand Y-STR population databank, which categorises population groups as "Caucasian", "Asian", "Western Polynesian", "Eastern Polynesian" and "Other" (The Law Commission 2018). We are concerned about the inconsistent application of terminology and concepts in this space, specifically the use of ethnicity, alongside what appear to be 'racial' categorisations, when the testing presumably relates to concepts of genetic ancestry/geographic origins.

45. The Law Commission document notes that ethnicity is collected voluntarily by Police alongside the sample (whether the sample itself is collected voluntarily or by compulsion). There are known issues with the quality of ethnicity data from the Police historically, including inconsistent and inappropriate approaches to ethnicity data collection (Cormack 2010).

46. Ethnicity is not a measure of ancestry or geographic origins, and should not be conflated as such. This risks stigmatising population groups, and is contrary to the Māori data sovereignty principle of Manaakitanga. The ESR 'Voluntary Ethnicity Form' includes the question "What is your ancestral origin (tribal group/language group/island)"? The example on the form includes reference to "full blood". This approach is highly problematic and unscientific (Yudell et al 2016), and suggests ESR are confusing a number of different concepts in their approach. References on the form to "full blood" and "biological parents" allude to racialised, biological conceptualisations of ethnicity.

47. The relationship between the Y-STR population databank maintained by the ESR and the other databanks is unclear. The Review document notes that prior to 2010 most of the samples will have been obtained by consent, while most are now obtained by compulsion. There need to be clear policies governing the transfer of samples to the Y-STR population databank and/or their use.

48. It appears as if the Y-STR population databank may have been used in research/published. For example an article published in 2010 in *Forensic Science International Genetics,* with author affiliation to ESR NZ, notes that the analysis is on "Blood or buccal samples on FTA card from over 44,000 individuals who had self-declared their ethnicity as being of Caucasian, Eastern Polynesian (predominantly New Zealand Maori and Cook Island Maori), Western Polynesian (Samoan, Tongan and Niuen) or Asian (predominantly Chinese, Vietnamese and Korean) descent" and was funded in part by the NZ Police Forensic Operational Fund (Bright et al 2010).

49. It is not clear if research has been undertaken using samples collected either voluntarily or compulsory for the purposes of criminal investigations. Any new legislation needs to be clear on the restrictions on the use of biological samples and any derived data outside of the purposes for which they were collected, particularly where that collection was coercive. Given that ESR is involved in both forensic testing and research, any legislation needs to be clear about the distinction and boundaries between these activities.

50. Forensic DNA phenotyping will disproportionately impact Māori in two ways: through the greater relative likelihood of Māori being in the databanks due to over-policing and over-sampling of the population; and, the smaller population size of Māori relative to NZ European making 'ethnic inferencing' relatively more useful and practical as an investigative tool in populations of smaller size (as noted in the Law Commission document, p.104). This provides even more support for the critical need for strong Māori governance and independent oversight.

51. We support the Law Commission's statements that "… wide public consultation is necessary to determine the appropriate use of forensic DNA phenotyping in New Zealand. This would need to include a central for Māori in a way that recognises the principles of rangatiratanga, partnership and equity under the Treaty of Waitangi. Those principles would also require Māori to have an active role in development of policies governing use and oversight if forensic DNA phenotyping were ultimately permitted" (2018: 109).

Chapter 7: Forensic comparisons

Question 7: *What concerns do you have, if any, about the introduction of new DNA analysis techniques into casework in New Zealand?*
Question 8: *What factors do you think should be considered before a new DNA analysis technique is introduced into casework? Who do you think should make that decision?*
Question 9: *Do you think that the role of Police "forensic services provider" should be recognised in statute? If so, how do you think that role should be structured?*
Question 10: *What concerns do you have, if any, about the increased use of highly sensitive DNA analysis techniques (that enable trace DNA to be analysed) in criminal investigations?*
Question 11: *What limits, if any, do you think there should be on the type and/or amount of information that may be included in a DNA profile that is generated from a crime scene sample and a reference sample for direct forensic comparison purposes?*

52. Any new DNA analysis techniques should only be introduced into casework in New Zealand after a review that is **independent** of the agencies involved (currently Police and ESR), and should be endorsed by a governance group. This level of independence is important particularly in managing conflicts of interest (real or perceived) for pursuing new techniques that may be of competitive or financial advantage to the agency doing the testing. This independent review needs to take into account privacy, ethical and Māori data sovereignty considerations alongside other considerations, as well as opportunity for public consultation and submission.

53. We support, as a general principle, that the minimum data needed for direct forensic comparison purposes between a crime scene sample and a reference sample should be generated and stored. In particular, generation of data on coding regions of the genome should be avoided.

Chapter 8: Reference samples – direct collection

Question 12: *What methods for obtaining a suspect or elimination sample directly from a person should be available in new legislation (that is, venous, fingerprick, buccal (mouth) swab, tape and/or fingerprint) and why?*

Question 13: *Do you think that, if a person refuses to comply with a suspect or juvenile compulsion order a police officer should be able to use reasonable force to obtain the sample? If so, what legislative safeguards do you think should be in place? If not, what should happen if the person refuses to comply with the order?*

Question 14: *What concerns, if any, do you have about police officers obtaining suspect samples from adults, young persons (aged 14 to 16) and prosecutable children (aged 10 to 13) by consent? How do you think those concerns could be best addressed in new legislation?*

Question 15: *Do you think that a statutory framework should be put in place governing the collection of elimination samples (that is, samples from victims, third parties and investigators)? If so, what do you think the key features would be?*

Question 16: *How do you think mass screenings should be regulated in New Zealand?*

54. We have some concern that elimination sampling is not covered by any statutory framework, but rather relies on Police processes specified in the Police Manual. In particular, we are concerned that there is not clarity about how and for how long elimination samples and any derived data can be retained and used (see The Law Commission 2018: 145).

55. Any new legislation needs to include requirements for the Police to provide clear, transparent and complete information about what will be involved in analysis, how derived data may be used (e.g. familial searching), how data will be stored and for how long, and how consent can be withdrawn.

56. There should be a statutory framework regulating mass screenings, that should involve independent oversight. Any statutory framework must be written in such a way to prevent the potential for 'racial'/ethnic profiling to be enacted as 'mass screening'.

Chapter 9: Reference samples – indirect collection

Question 17: *Instead of obtaining a reference sample directly from a suspect, do you think that a police officer should be able to seize a personal item belonging to the suspect or something that they have touched in order to compare it to a crime scene sample? If so, in what circumstances do you think this would be appropriate?*

Question 18: *Instead of obtaining a reference sample directly from a suspect, do you think that a police officer should be able to obtain access to the suspect's newborn blood spot card in order to compare it to a crime scene sample? If so, in what circumstances do you think it would be appropriate?*

Question 19: *Instead of obtaining a reference sample directly from a suspect, do you think that a police officer should be able to obtain a reference sample from one of the suspect's close relatives in order to compare it to a crime scene sample? If so, in what circumstances do you think this would be appropriate?*
Question 20: *Do you have any concerns about Police using information that is publicly available on genealogical websites as an investigative tool to help identify potential suspects in criminal investigations?*

57. In line with data sovereignty principles, Free, Prior and Informed Consent (FPIC) should be the underlying principle for obtaining any reference samples, directly or indirectly. Any indirect collection should be governed by independent oversight, e.g. judicial oversight, and should be as a last resort. Indirect collection should not be considered for reasons of convenience.

58. Any new legislation should make explicit reference to the fundamental guiding principle of Free, Prior and Informed Consent, and provide clear statutory guidelines around the limited circumstances under which indirect collection without consent could occur, including a requirement for oversight independent of the police.

59. There is a collective interest in DNA and derived data for Indigenous peoples that needs to be taken into account in terms of indirect collection of reference samples.

60. We do **not support** the general provision for the police to obtain access to a suspect's newborn blood spot card in order to compare it to a crime scene sample, albeit in limited circumstances. Consent to participate in health screening should not include the potential for collected samples to be used in the future in criminal investigations. In addition, newborn blood spot cards rely on next-of-kin consent (for provision of the original blood spot collection) and there is therefore no opportunity for an individual to consent (or not) to this collection, requiring an even stricter regime around future access and use.

61. We do **not support** the collection of reference samples from close genetic relatives to identify a suspect. As the Review document notes, this will have a differential impact on Māori for a number of reasons, including over-representation in databanks, documented differential application of discretionary police powers by ethnicity, and impacts on collective rights. Any consent process in relation to samples from relatives would need to have strict, comprehensive processes for collective consent due to the significant collective impacts outside of either the suspect or the donor.

62. Given the current institutional racism in the criminal justice sector, sampling of genetic relatives should be prohibited, as it would likely increase the current racially discriminatory outcomes for Māori.

63. We would **not support** the use of Māori genealogical information, whether obtained from publicly available websites or other sources, in criminal investigations. These are Māori data, and their use should be governed and controlled by Māori.

Chapter 10: Crime sample databank

Question 21: *Do you think that the Crime Sample Databank (CSD) should be expressly referred to in legislation? If so, what level of detail do you think would be appropriate?*

Question 22: *Do you have any particular concerns about victim and third-party profiles being uploaded to the CSD? If so, how do you think those concerns would best be addressed?*

Question 23: *Do you have any concerns about low-quality scene profiles being uploaded onto the CSD? If so, how do you think those concerns would best be addressed?*

Question 24: *What type of offending do you think we should aim to resolve using the CSD? Put another way, do you think that DNA profiles associated with any level of offending should be able to be uploaded onto the CSD, or should there be a seriousness threshold? If so, what level of seriousness do you think would be appropriate?*

Question 25: *Do you think that additional steps should be taken to measure how effective New Zealand's DNA profile databanks are in helping to resolve criminal investigations? If so, what do you think those steps would be?*

64. The current ambiguity around the different databanks and their relationships to each other needs to be addressed in any new legislation.

65. The Crime Sample Databank (CSD) should have an explicit statutory framework governing its management and usage and its relationships with other databanks used in criminal investigations. This framework should align with Māori data sovereignty principles.

66. The CSD currently holds around 40,000 crime scene profiles (that are single contributors). The risks of retaining profiles indefinitely on the CSD needs to be considered in any new legislation, particularly in relation to populations that are over-surveilled. This practice may reinforce racially discriminatory outcomes in the criminal justice system.

67. Crime scene profiles should not be uploaded to the CSD where there is no case-specific need to do so.

68. Profiles for individuals who are later identified as victims or eliminated as suspects should be removed from the CSD, unless explicit consent is given by those individuals for their data to be retained, with clear information provided to them about the potential risks of their profiles being retained indefinitely. Samples provided for elimination purposes should not be able to be later used in an unrelated investigation.

Chapter 11: Known person databank - collection

Question 26: *Generally speaking, the threshold for obtaining DNA profiles for the known person databank is that the triggering offence must be imprisonable. What offence threshold do you think is appropriate, and how do you think it should be framed? For example, should the threshold be framed as a list of triggering offences, should it be based on the maximum penalty for the triggering offence, should it be based on whether the person serves a prison sentence or should it be framed a different way?*

Question 27: *Do you think that it is appropriate to obtain biological samples from convicted offenders for the purpose of the known person databank? If so, how do you think these samples should be collected?*

For instance, should they continue to be obtained by databank compulsion notice, and if so, what time limit should apply? Alternatively, do you think it would be appropriate to obtain a databank sample at the time a person is arrested and then effectively quarantine it until the relevant court proceedings have concluded?

Question 28: *Do you think that it is appropriate to obtain biological samples from suspects for the purpose of the known person databank? If so, how do you think these samples should be collected? For instance, if a person provides a suspect sample in relation to an investigation, should the resulting DNA profile also be uploaded onto the known person databank (prior to any court proceedings concluding)? Alternatively, should the court be empowered to order that a charged person must provide a databank sample (which can then be compared to the Crime Sample Databank) before the court proceedings against them have concluded? If so, what factors should the court take into account?*

Question 29: *Do you think that it is appropriate to obtain biological samples from people for the purpose of the known person databank if they are not convicted offenders or suspects? If so, who should these samples be collected from and how should they be collected? For instance, do you think there should be a universal databank, and if so, how would that work in practice? Do you think police officers should be able to obtain databank samples by consent, and if so, who should they ask?*

69. The current provision allowing for a police officer to require a sample on arrest for an offence for which a sentence of imprisonment could be possible is too low, and requires individuals to provide information for an offence for which they have not yet, or may never, be charged. This is in contrast to the rights of an individual to control what verbal information they provide in an investigation outside of a relatively prescribed set of information (e.g. name, address, date of birth).

70. We are concerned that the use of discretion by Police in obtaining samples, given known issues with differential application of discretion by the Police, even though the Police Manual states that "the person's race, ethnic or national origins' cannot be the sole influence for making a decision about requiring a sample to be obtained (The Law Commission 2018: .222).

71. Issues with the way in which both the police and ESR represent ethnicity as a construct, including the conflation of ethnicity with other concepts, has been mentioned previously in relation to concerns about forensic DNA phenotyping. The discussion of police and ESR processes in relation to the 'ESR Voluntary Ethnicity Form' in Chapter 11 raises similar concerns.

72. The question asked by Police on behalf of ESR – "What is your ancestral origin (tribal group/language group/island)?" is not a measure of ethnicity, despite the title of the questionnaire (*Voluntary DNA Ethnicity Questionnaire*). In addition, the question or response categories appear not to be appropriate for measuring the other constructs that are part of the question (namely, ancestry, geographic origins, tribal group or language group), and instead list groups that could be understood to be ethnicities, nationalities or dis-credited 'racial' constructs (i.e. Caucasian).

73. The prompts for people to identify their "…own ethnicity, the ethnicity of their parents and the ethnicity of their grandparents" (The Law Commission 2018: 224) suggests ESR are attempting to measure ancestry, but using the language of ethnicity. This approach is highly problematic and unscientific.

74. According to the Review document, 3.9% of the NZ population has a profile on the DPD or Temporary databank as of 2018. The Police are required to report on the ethnicity of those sampled. This is purportedly self-identified but the categories reported do not appear to align with the official statistical standard for ethnicity (i.e. Asian, European, Indian, Latin American, Māori, Middle Easter, Native African, Pacific Islander, Other, Unknown) (The Law Commission 2018: 232). The data shows about 39-41% of samples are from Māori.

75. Police should be required to routinely report on the ethnicity of those profiles on the databank, and ethnicity data should be collected and coded in line with the whole-of-government statistical standard for ethnicity (Stats NZ 2005).

76. Data from the Review show that around 42% of the profiles added to the DPD between 2012 and 2018 were reported as Māori ethnicity. If this percentage was applied to the total 186,019 profiles on the DPD in 2018, about 78,128 profiles on the DPD are Māori.[5] Using the 2013 Estimated Resident Population as denominators, this represents about 11.3% of the total Māori population having a profile on the DPD currently. In contrast, only 2.4% - 2.7% of people in the broad European ethnic grouping would have a profile on the DPD (depending on whether Other/Unknown is also included in the numerator). This supports our concern in the context section of this document, that Māori are **five times** more likely both to be sampled and to be included subsequently in the DPD.

77. Alarmingly, 67% of profiles added to the DPD between 2012 and 2018 for young persons and children were from Māori (The Law Commission 2018: 234). The impacts of the indefinite retention of these samples on young people is likely to be both significant and differentially discriminatory.

78. Given the proportion of matches each year (less than 2%), the risks of the DPD for Māori versus its potential benefits in criminal investigations need to be seriously considered.

Chapter 12: Known person databank - use

Question 30: *What limits do you think should be placed around New Zealand Police comparing an overseas crime scene profile to the known person databank on behalf of a foreign law enforcement agency?*

Question 31: *Should the DNA profiles on the known person databank ever be made available for research in an "anonymised" form? Is so, in what circumstances and how do you think that the request/approval process should be managed?*

[5] Using the Estimated Resident Population at June 2013 for Total European and other (3,213,300) and Māori (692,300) as the denominator (as estimates of the European population are not available more recently).

79. We do not support the disclosure of information on the CSD, DPD or temporary databank even in anonymised form for research or other purposes. The samples, even where consent is obtained, are collected in coercive environments and should only be used for the specific purposes of criminal investigation for which they were collected.

80. ESR scientists have previously been involved in research using Māori samples that has made inappropriate, stigmatising claims about Māori populations (e.g. Hook 2009). There should be a clear separation between ESR's forensic and research functions.

81. Aggregate, de-identified data should be reported as part of auditing and monitoring procedures to assess the impact of Police and ESR policies and practices on Māori. However, this should only occur within the context of Māori governance, with Māori involved in the analysis and interpretation of data.

Chapter 13: Familial searching

Question 32: *What concerns do you have, if any, about the use of familial searching in criminal investigations?*

Question 33: *How do you think familial searching should be regulated in New Zealand?*

82. As noted above, familial searching has particular implications in relation to Māori data sovereignty. This includes collective rights and processes for gaining collective consent, which is of high relevance in familial searching. Current practices in respect of familial searching undermine principles of collective rights and FPIC under the UNDRIP.

83. Familial searching should not be able to occur without independent judicial oversight, and should only be considered in cases of high seriousness and as a last resort. We are concerned that the disproportionate inclusion of Māori on the current databanks, alongside the smaller overall population size, means that familial searching will have a differentially racially discriminatory impact on Māori.

Chapter 14: Retention of samples and profiles

Question 34: *Do you think that a person should be able to choose to have their biological sample returned to them (as opposed to it being destroyed)?*

Question 35: *What procedures do you think should surround the destruction of biological samples? Should people have a choice as to how it is done? Should people be notified when it has occurred?*

Question 36: *Would an oversight body audit compliance with the rules around retention and destruction of biological samples and tikanga, ensure secure storage of samples and consider compliance consistency with tikanga?*

Question 37: *Should suspect and elimination samples that are obtained from known persons in relation to specific cases be retained after a DNA profile is generated? If so, why, and for how long?*

Question 38: *Should crime scene samples be retained after the associated criminal investigation is closed? If so, do you think they should be retained in all cases or only in cases over a certain threshold of seriousness? How long should they be retained?*

Question 39: *How should a convicted person's request for reanalysis of a crime scene sample be managed? Should the procedure be set out in legislation?*

Question 40: *Do you have any concerns around DNA profiles being retained on the known person databank indefinitely?*
Question 41: *Do you think the DNA profile retention periods that currently apply to the known person databank should be simplified?*
Question 42: *Do you think that the DNA profile retention periods that apply to the known person databank should be changed to place a greater emphasis on rehabilitation?*
Question 43: *Do you think that steps should be taken to ensure that a person's DNA profile is not retained for a lengthy period of time on the known person databank following their death? If so, what measures do you think should be put in place?*
Question 44: *Should crime scene profiles be retained on the Crime Sample Databank indefinitely? If not, what legislation and/or policies do you think would ensure that the profiles are removed at an appropriate time?*
Question 45: *Should an independent oversight body oversee the retention, security and destruction (as appropriate) of DNA profiles (whether held on case files, indices or databanks)?*

84. A person should be able to have input into whether or not they would like a bodily sample returned to them. The person from who the sample was obtained should also be notified when the sample is destroyed, if it is not returned to them, and should be given clear information about the processes for destroying samples at the time the sample is obtained. These processes should consider appropriate tikanga.

85. As part of accountability mechanisms, there should be auditing to ensure that samples are not retained longer than is required and then samples are in fact destroyed (or returned) as soon as practicable when this is applicable.

86. A person should be notified when their DNA profile has been destroyed/removed from the databank, as part of accountability and transparency mechanisms.

87. In any new legislation, there should be wide consultation with Māori around how long samples and any derived data should be retained, and under what circumstances. Any new arrangements should be subject to Māori governance and independent oversight.

Chapter 15: Oversight
Question 46: *Do you think there needs to be increased independent oversight of the use of DNA in criminal investigations?*
Question 47: *If so, what oversight functions and powers do you see as being the most important?*
Question 48: *What form of oversight body do you think might be appropriate?*

88. We believe that there needs to be increased independent oversight of the use of DNA in criminal investigations. These arrangements for oversight need to include Māori governance and oversight, and need to be fully independent of both Police and ESR (or whichever agency is undertaking forensic testing and analysis).

89. As part of oversight provisions, new legislation should consider obligations and accountabilities where harm results from the (mis)use of bodily samples or derived data, in line with Māori data sovereignty principles of Whanaungatanga, Kotahitanga and Manaakitanga. New legislation should include mechanisms for monitoring and recording data harm, including mandatory reporting of data breaches.

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