

Criminal Investigations (Bodily Samples) Amendment Bill

Regulatory Impact Statement

Executive Summary

The Government's Post-Election Action Plan states that legislation will be introduced to "require DNA testing for every person arrested for an imprisonable offence". The policy is intended to recognise DNA as the 'modern day fingerprint' and assist Police to solve more crime by having more identified DNA profiles to match against the increasing number of DNA samples obtained from unsolved crime scenes.

DNA technology provides more possibilities to obtain suspect identification evidence from crime scenes than traditional fingerprinting. Progress in forensic investigation technology means mere traces left at crime scenes can produce DNA evidence. This increase in available trace evidence from crime scenes provides greater opportunities to use DNA profiles to identify the pool of potential suspects in relation to a crime.

It is proposed to amend the Criminal Investigations (Bodily Samples) Act 1995 (CI(BS) Act):

- to allow Police (without prior judicial approval) to collect DNA from a person when they 'intend to charge' them with an offence;
- for a wider range of offences than currently; and
- to allow the DNA profile to be matched against profiles from other unsolved crime scene samples prior to the person's conviction or acquittal for the original offence.

Adequacy statement

The Ministry of Justice has reviewed this Regulatory Impact Statement (RIS) according to the adequacy criteria and considers it to be adequate.

The Treasury states:

"Treasury's Regulatory Impact Analysis Team (RIAT) has not had sufficient time to assess whether or not the regulatory impact analysis (RIA) for this proposal is adequate. However, we have briefly reviewed the RIS and consider that this is inadequate on the following grounds:

- a lack of clarity around the nature of the problems with the current DNA testing regime along with evidence (anecdotal or empirical) to support these;
- limited analysis of the impacts of the options. The analysis of costs is partial, e.g. only aggregate first year costs are estimated and capital costs are excluded; and there is no assessment of risks, such as risks related to implementation and how these will be mitigated; and
- the RIS does not report on the outcome of consultation and how any issues raised have been addressed.

Therefore, the RIS does not contain the relevant information or level of analysis required for a proposal of this magnitude."

Status Quo and Problem

DNA profiling in New Zealand is governed by the Criminal Investigations (Bodily Samples) Act 1995 (the Act). The Act establishes two regimes:

- Suspect regime – Police can obtain an evidential DNA sample, with consent from a person suspected of an indictable offence, or via a court order if the Police have good cause to suspect that a person has committed a '*relevant offence*' (as defined in the Act). This regime is used to identify or eliminate a potential suspect for a specific crime.
- DNA profile databank regime – a DNA sample can be taken from volunteers or persons convicted of a relevant offence and placed on the DNA profile databank. DNA profiles obtained from crime scenes can then be compared against every profile on the databank. This matching is used to identify and eliminate potential suspects for a crime. The information cannot be used as evidence in a prosecution.

Currently, a person can only be compelled to provide a bodily sample if they are suspected, or convicted, of a relevant offence. The relevant offences are defined as:

- any offence that carries a maximum penalty of 7 years or more imprisonment and
- other lesser, offences (that either have some propensity link to more serious offending or are those for which offender DNA is often left at the crime scene) listed in the Schedule contained within the Act.

If the current scheme was expanded, this would:

- allow the possibility of more matches being made against unsolved crime scene samples prior to conviction (and, following further investigation, the possibility of getting more convictions for those crimes);
- allow the possibility of more matches to DNA samples taken from future crime scenes; and
- expedite criminal investigations in some cases (ie, provide previously unknown avenues of investigation).

In many cases, DNA technology now provides more possibilities to obtain evidence from crime scenes than traditional fingerprint searching. Forensic investigation technology has progressed to the point where a wide range of trace evidence left at crime scenes can produce DNA profiles of potential suspects. For example, a DNA sample can be obtained from only a nose smudge on a window. This increase in available trace evidence from crime scenes provides greater opportunities to use known DNA profiles to identify the pool of potential suspects in relation to a crime. At the same time, offenders more commonly take efforts to avoid leaving any fingerprint evidence at their crimes.

Objectives

The measures proposed will substantially increase the size of the DNA profile databank. This increased databank will aid criminal investigations by both linking offenders on the databank to previously unsolved crime scenes and potentially to future crime scenes. DNA's role in solving more crimes and prosecuting more offenders will in turn contribute to increasing public safety and public confidence in the justice system.

The proposed scheme will enable Police to match an individual's DNA profile against other unsolved crime scene samples after the person is charged, but prior to the person's conviction. This matching may link the individual with other crimes for which they are not a suspect, and for which they may also be prosecuted alongside the original offence (once

investigation of the other crime(s) is completed). In addition, the linking of the individual to other historic offending may legitimately affect the officer's (and Court's) perception of the individual's re-offending risk and the resulting risk to public safety in the context of decisions about whether bail is to be granted.

Alternative options

Ministry of Justice officials have developed two proposals to achieve the government's overall objective of fully implementing its Post-Election Action Plan statement by the next General Election.

The first proposal aims to achieve *full implementation* by July 2010; however, if the government considers that the cost implications of *full implementation* are unacceptable in the current economic environment, officials have also developed a *staged implementation* approach. Under this second approach, the pre-conviction DNA sampling power would initially be limited to the proposed expanded list of "relevant offences", with the ability to extend the power to "all imprisonable offences" by a subsequent Order in Council.

The table below summarises the two approaches (shaded boxes indicate common features):

Full Implementation (July 2010)	Staged Implementation: 1st Stage (July 2010) (Full Implementation Oct – Dec 2011)
<ul style="list-style-type: none"> • Ability to take DNA from person when Police 'intend to charge' with any <i>imprisonable</i> offence 	<ul style="list-style-type: none"> • Ability to take DNA from person when Police 'intend to charge' with a <i>relevant</i> offence (from the expanded list in Appendix 1)
<ul style="list-style-type: none"> • Destroy DNA sample upon extraction of DNA profile 	<ul style="list-style-type: none"> • Destroy DNA sample upon extraction of DNA profile
<ul style="list-style-type: none"> • Destroy DNA profile if person not charged within 2 months 	<ul style="list-style-type: none"> • Destroy DNA profile if person not charged within 2 months
<ul style="list-style-type: none"> • Can match DNA profile against other unsolved crime scene samples after the person is charged 	<ul style="list-style-type: none"> • Can match DNA profile against other unsolved crime scene samples after the person is charged
<ul style="list-style-type: none"> • Including young people (but not children), with additional protections/criteria <ul style="list-style-type: none"> - Take for any <i>imprisonable offence</i> AND <ul style="list-style-type: none"> ○ penalty for offence = imprisonment 7 yrs or more or ○ previous interactions with criminal justice system) - Retain <ul style="list-style-type: none"> ○ indefinitely if sentenced to imprisonment ○ 7 yrs or 4 yrs for lesser sentences if the youth has no further convictions/orders for <i>imprisonable</i> offence 	<ul style="list-style-type: none"> • Including young people (but not children), with additional protections/criteria <ul style="list-style-type: none"> - Take for any <i>relevant offence</i> AND <ul style="list-style-type: none"> ○ penalty for offence = imprisonment 7 yrs or more or ○ previous interactions with criminal justice system) - Retain <ul style="list-style-type: none"> ○ indefinitely if sentenced to imprisonment ○ 7 yrs or 4 yrs for lesser sentences if the youth has no further convictions/orders for <i>imprisonable</i> offence
<ul style="list-style-type: none"> • Destroy DNA profile if person acquitted of the offence or charges dropped 	<ul style="list-style-type: none"> • Destroy DNA profile if person acquitted of the offence or charges dropped
<ul style="list-style-type: none"> • Retain adult DNA profile in DNA databank if individual convicted for <i>imprisonable</i> offence 	<ul style="list-style-type: none"> • Retain adult DNA profile in DNA databank if individual convicted for <i>relevant</i> offence (from the expanded list in Appendix 1)

Full Implementation (July 2010)	Staged Implementation: 1 st Stage (July 2010) (Full Implementation Oct – Dec 2011)
<ul style="list-style-type: none"> Indefinite retention of adult DNA profile if <i>relevant offence</i> (from expanded list in Appendix 1) Adult mandatory retention period of 10 years if <u>not</u> a <i>relevant offence</i> and not convicted of any other <i>imprisonable</i> offence within 10 years after sentence completed 	<ul style="list-style-type: none"> Indefinite retention of adult DNA profile if <i>relevant offence</i> (from expanded list in Appendix 1)
<ul style="list-style-type: none"> Part 2 of CI(BS) Act (evidential sample and profile) = (1) Voluntary or (2) Compulsion Order for any <i>imprisonable</i> offence 	<ul style="list-style-type: none"> Part 2 of CI(BS) Act (evidential sample and profile) = (1) Voluntary for any <i>indictable</i> or (2) Compulsion Order for <i>relevant offence</i> (from expanded list in Appendix 1)
<ul style="list-style-type: none"> Transfer hearing of Part 2 compulsion orders from High Court to District Courts 	<ul style="list-style-type: none"> Compulsion order jurisdiction remains with High Court
<ul style="list-style-type: none"> Order in Council to bring into force in July 2010 	<ul style="list-style-type: none"> Order in Council to bring initial ability to take and retain expanded list of <i>relevant offences</i> into force (July 2010)
	<ul style="list-style-type: none"> Order in Council to bring into force ability to take and retain DNA for all <i>imprisonable offences</i> (<i>full implementation</i>) – when economic conditions allow (Oct – Dec 2011).
<ul style="list-style-type: none"> Review of Act by August 2011 	<ul style="list-style-type: none"> Review of Act by August 2011

Financial Implications

The proposed reforms will incur additional costs, based on a predicted increase in:

- collection of DNA samples;
- matches to crime samples;
- prosecutions, convictions; and
- prison bed numbers.

Constraints on the ability to fully identify all cost and other implications in the time available to implement the Government's 100 Day Actions, mean that at this stage only indicative costings can be provided for *full implementation* of the proposals.

It is only possible to provide the indicative costings for the first Order in Council in a *staged implementation* of the proposal, given the uncertainty of when exactly the second Order in Council providing the ability to take DNA for all *imprisonable offences* would be brought into effect. When the second Order in Council brings *full implementation* into force, there will be increased costs but these are unlikely to be of the magnitude of the first year of full implementation in effect from July 2010;

Departments have taken a prudential approach and based their estimates on an assumed negligible use of discretion. Appropriately drafted Police Operational Guidelines for the use of their proposed discretion could significantly reduce departments' estimated costs.

These estimated costings do not take into account the countervailing values that may be placed on the greater resolution of crime (eg, the current 8,265 unsolved crime scene DNA

samples include the following crimes: assault (8.1%), sexual assault (7.2%), aggravated robbery (5.6%), homicide (4.8%), arson (1.7%), drugs (1.2%));

These initial costings may be substantially revised, following development of the Police Operational Guidelines about how the agreed approach will be implemented. Officials will report back to Ministers with revised costings in April 2009.

Preferred option

The preferred option is *full implementation* (to allow DNA to be taken from anyone charged with any imprisonable offence), because it would enable Police to obtain more DNA profiles for a wider range of offences, providing more opportunities for matching with unsolved crime scene profiles, and therefore would have a greater impact on achieving the objective of solving more crime.

Implementation and Review

The proposals will be implemented by way of the Criminal Investigations (Bodily Samples) Bill, to be introduced in February 2009.

It is proposed that the Ministry of Justice undertake a review of the Criminal Investigations (Bodily Samples) Act 1995 to review the operational and cost effectiveness of the entire Act, any amendments made, any advances in technology, and the impact of the legislation on population groups including Māori. This review should be completed by August 2011.

Consultation

The Ministry of Justice has consulted on this paper with Crown Law Office, Department of Corrections, Department of Prime Minister and Cabinet, Institute of Environmental Science and Research, Ministry of Foreign Affairs and Trade, Ministry of Social Development, Ministry of Women's Affairs, New Zealand Police, the Privacy Commissioner, Te Puni Kōkiri and Treasury.