

Familial Searches and the New Zealand DNA Profile Databank:

The Thin Edge of the Genetic Wedge?

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A dissertation submitted in partial fulfillment of the degree of Bachelor of Laws (Honours) at the  
University of Otago- Te Whare Wānanga o Otāgo

October 2013

## Acknowledgements

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To my supervisor, Colin Gavaghan, for your positive comments, patience and guidance throughout the year.

To Judge Arthur Tompkins for sparking my interest in this area and for your helpful observations. Also to Kevin Dawkins, and both John Manning and John Walker of the New Zealand Police, for so kindly answering my many questions.

To my flatmates (past and present). You girls have been the best support network I could have asked for during my time at university.

To the tutors, this year has been made all the better by having a group of truly amazing people to share the ride with.

To my parents, I cannot adequately express how grateful I am to you both for your love, support and encouragement. To Mum, for being my sounding board and for your interest in every aspect of my education, and to Dad, for your ongoing willingness to help me, at any time of the day or night, in whatever way you can.

Finally, to all the other people who have so kindly given me their time when I have needed it.

Thank you all so much.

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## Abbreviations

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CBI	Colorado Bureau of Investigation
DNAPD	DNA Profile Databank
ECHR	European Convention of Human Rights
ECtHR	European Court of Human Rights
ESR	The Institute of Environmental Science and Research
FSC	Familial Search Committee
STR	Short Tandem Repeat
TD	Temporary Databank

## Introduction

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The introduction of DNA<sup>1</sup> technology, and specifically DNA profiling, to forensic science has been responsible for a significant change in the dynamics of criminal justice systems throughout the world. Since the initial success, in the mid-1980s, the change has been so drastic and the implementation so massive that it is now very difficult to imagine crime investigation without DNA analysis.<sup>2</sup> In New Zealand, the Criminal Investigations (Bodily Samples) Act 1995 (“CI (BS) Act”) authorises the creation of a DNA databank, which stores profiles from certain convicted offenders. The trend has been to expand the pool of offenders on the DNA databank and the situations where samples can be obtained, as seen in two statutory amendments.<sup>3</sup> Familial searching follows this trend by further extending the search capabilities of the DNA databank.

Familial searching is where a DNA profile taken from a crime scene is compared to profiles on the DNA databank, not to find an exact match, but to look for near matches to profiles on the databank. The technique allows people who have not been convicted of a relevant crime to be brought into investigations by way of the DNA databank; thus marking a radical shift in how DNA is used in the criminal justice system. Familial searches are used as an investigative tool to create new leads, not as evidence in a trial. Although this technique appears to be a promising ‘crime fighting’ tool, it pushes us to consider the appropriate limits of the uses of DNA databanks.

In New Zealand, much attention has been paid to DNA in the medical context. However, there is a lack of literature on its use in criminal investigations, both generally (in regards to databanks) and specifically, in relation to familial searches.<sup>4</sup> This dissertation will question

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<sup>1</sup> Deoxyribonucleic acid (DNA).

<sup>2</sup> See Candice Roman-Santos “Concerns Associated with Expanding DNA Databases” (2010) 2 Hastings Sci & Tech LJ 267 at 267-268, 279. The investigations of Sir Alec Jeffreys into the Enderby murder case in 1986 saw the first use of DNA profiling in criminology; also see generally SA Harbison, JF Hamilton and SJ Walsh “The New Zealand DNA Databank: Its Development and Significance as a Crime Solving Tool” (2001) 41 Sci Justice 33, at 33-34.

<sup>3</sup> Criminal Investigations (Bodily Samples) Amendment Act 2003; Criminal Investigations (Bodily Samples) Amendment Act 2009.

<sup>4</sup> Compare to, for example Mark Heneghan and others *Findings from the Law Foundation Sponsored Human Genome Research Project* (Brookers Ltd, Dunedin, 2009).

whether unrestricted use of familial searching in criminal investigations is concerning, the appropriateness of the current regulations in light of any such concerns, and changes that could be implemented to better accommodate this technique. The object is both to enrich debate and assist in informing future policy and legislative development.<sup>5</sup>

A discussion of the merits of familial searching requires an understanding of the search technique itself, as well as the operation of DNA databanks generally. Accordingly, in the first chapter, attention is placed on the New Zealand position regarding the development and operation of the National DNA Profile Databank (“DNAPD”) and inclusion of familial searches. This will include an analysis of the requirements imposed by New Zealand’s regulatory regime.

Familial searching raises serious policy questions and ethical issues that law enforcement and society did not consider when DNA profiling was first implemented. Due to this, Chapters II and III will draw attention to the major concerns arising from the use of familial searches and to the weight that each concern should be given. Chapter IV will then canvass the use of familial searches in overseas jurisdictions. The benefits and shortcomings of various approaches will be examined and compared with New Zealand.

With this in mind, the final chapter will consider whether New Zealand has adopted the regulatory structure best suited to our social and political climate. The current political climate in New Zealand is one in which the government regularly seems to favour security and public safety over individual freedoms.<sup>6</sup> This is likely to mean it will be difficult to gain support for any argument in favour of restricting the use of a ‘crime fighting’ technology.

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<sup>5</sup> See, for example Ministry of Justice *Statement of Intent 2012-2015* (E.64 SOI (Ministry of Justice, 2012); see also Email from Aphra Green, Criminal Law Policy Manager, Ministry of Justice, in response to questions regarding the review of the Criminal Investigations (Bodily Samples) Act 1995 (9 October 2013). For instance assistance may be given to the proposed review of the CI (BS) Act. It was originally intended that this review take place from 2012-2015. The Ministry of Justice has stated that while the previous government supported the review, as of 2013 resource constraints have meant that this has been temporarily put on hold.

<sup>6</sup> See, for example Search and Surveillance Act 2012; Government Communications Security Bureau Amendment Act 2013; First Reading Public Safety (Public Protection Orders) Bill (17 September 2013) 693 NZPD 13441 in which Alfred Ngaro (National Party MP) stated, “ordinary everyday New Zealanders want to know and ensure that their safety is actually paramount in this Parliament.” This provides an example of the Government’s current position.

However, the intention here is to find, and then strike, an appropriate balance between these conflicting values. A system of regulation enabling technological innovation while displaying concern for legitimate moral, ethical and legal views is the ideal in this area.

## Chapter I

### DNA Databanks, DNA profiling and the Current Perspective on Familial Searches in New Zealand

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Following a brief introduction to DNA databanks and familial searching generally, this chapter will outline the developments of the New Zealand DNA databank, the inclusion of familial searches within the relevant statutory framework and the operation of this search technique.

#### ***A DNA Profiling***

DNA profiling has revolutionised forensic science and become a dominant identification tool in law enforcement. Short Tandem Repeat (“STR”) analysis is the standard approach used to create DNA profiles.<sup>7</sup> These are created from locations within the human genome that do not code for protein, known as ‘junk-DNA’. This means that profiles do not reveal any information about an individual’s health status or physical traits.<sup>8</sup> The number of STR repeats at any one site on the DNA varies between individuals, even within a family.<sup>9</sup> Each different number of repeats at a site is called an allele, and each individual can have two alleles, one from each parent.<sup>10</sup> An STR allele is small enough that DNA fragments differing by a four base repeat can be readily distinguished.<sup>11</sup> In New Zealand 15 STR loci, in addition to a sex test, are used to create DNA profiles.<sup>12</sup>

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<sup>7</sup> John Butler *Forensic DNA Typing: Biology, Technology and Genetics of STR Markers* (2<sup>nd</sup> ed, Elsevier Academic Press, Burlington, 2005) at 29.

<sup>8</sup> K Lerner and Brenda Lerner “DNA Profiling” in K Lerner and Brenda Lerner (eds) *World of Forensic Science* (Vol 1, Thomson Gale, Detroit, 2005) 227 at 228.

<sup>9</sup> Butler, above n 7, at 26. This is with the exception of identical twins.

<sup>10</sup> Donald Voet, Judith Voet and Charlotte Pratt *Fundamentals of Biochemistry: Life at the Molecular Level* (4<sup>th</sup> ed, John Wiley & Sons, New York, 2012) at 66.

<sup>11</sup> At 66.

<sup>12</sup> Institute of Environmental Science and Research Website (2013) <[www.esr.cri.nz](http://www.esr.cri.nz)>.

Assertions of the special character of DNA are often the basis for arguments concerning the necessity to regulate carefully the production, use, and dissemination of genetic data in a range of contexts (of which forensic applications are only one example).<sup>13</sup> Some argue forensic DNA analysis is simply an advanced form of traditional forensic analysis, thus coining the term ‘DNA fingerprint.’<sup>14</sup> However, although the STRs used in forensic sampling are not of major functional significance, the simple ability of DNA evidence to predict kinship means that it is sufficiently different from traditional forensic evidence, and must be treated as such.<sup>15</sup> The term ‘junk-DNA’ may be considered misleading with regard to a DNA profile, as even non-coding regions of DNA transmit more information than a standard fingerprint. Studies have shown that such regions are not devoid of biological function. Though they may not ever be found to have highly sensitive direct coding functions they may very well be found to correlate with things we care about and deem private.<sup>16</sup>

This view was supported in *S and Marper v The United Kingdom*. In this case two applicants contended that the retention of DNA profiles and DNA samples breached the individuals’ rights to privacy under the European Convention on Human Rights (“ECHR”), as neither had been convicted of an offence.<sup>17</sup> The European Court of Human Rights (“ECtHR”) unanimously held that the blanket and indiscriminate nature of the powers of retention, for persons suspected but not convicted of offences, failed to strike a fair balance between the competing public and private interests.<sup>18</sup> The ECtHR observed that DNA profiles contain substantial amounts of unique personal data.<sup>19</sup> Although DNA profiles carry limited information, this information is still significant as it allows authorities to go beyond matching

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<sup>13</sup> For example see Heneghan and others, above n 4.

<sup>14</sup> See Barry Steinhardt “Privacy and Forensic DNA Data Banks” in David Lazer (ed) *DNA and the Criminal Justice System: The Technology of Justice* (MIT Press, Cambridge Massachusetts, 2004) 173 at 173.

<sup>15</sup> Roman-Santos, above n 2, at 292. For example a British team has discovered that the standard DNA profile contains a subtle signature, which can be linked to a person’s susceptibility to Type I diabetes. Alec Jeffreys was a member of the research team that made this discovery, and he predicted, “further troubling links between DNA fingerprints and disease will emerge as scientists probe the completed draft of the human genome.”

<sup>16</sup> Sheldon Krinsky and Tania Simoncelli *Genetic Justice: DNA Data Banks, Criminal Investigations, and Civil Liberties* (Columbia University Press, New York, 2011) at 236.

<sup>17</sup> *S and Marper v The United Kingdom* (2008) 48 EHRR 50 (Grand Chamber, ECHR) at [13]; see also European Convention on Human Rights (4 November 1950, entered into force 3 September 1953). The European Convention on Human Rights is an international treaty to protect human rights and fundamental freedoms in Europe. All Council of Europe member states are party to the Convention and new members are expected to ratify the convention at the earliest opportunity. The Convention establishes the European Court of Human Rights. Any person that feels his or her rights have been violated under the Convention by a state party can take a case to the ECHR. Judgments finding violations are binding on the states concerned, who are obliged to act in response.

<sup>18</sup> At [19] and [25].

<sup>19</sup> At [74]-[76].

two samples, as profiles can be used to identify genetic relationships between individuals and to draw inferences as to ethnic origins.<sup>20</sup>

Therefore, the continued use of the term ‘genetic fingerprint’ encourages DNA profiles to be seen as equivalent to traditional fingerprinting, which is not an accurate description of the information that can be gained.<sup>21</sup>

### ***B Familial DNA Searches***

Familial searching is the practice of creating new investigative leads in cases where crime scene DNA evidence strongly resembles an existing DNA profile in the DNA databank but is not an exact match. It is based on the assumption that people who share a large majority of genetic markers are likely to be closely related.<sup>22</sup> The technique can be used to generate a list of offenders already in the databank most likely to be a close relative of the forensic profile obtained.<sup>23</sup>

To be identified as a possible familial match, most but not all of the loci must match between the two DNA profiles.<sup>24</sup> Although familial search matches are likely to identify family members they are also likely to yield false positives; thus identifying individuals unrelated to

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<sup>20</sup> At [75]. In this respect the Court saw no need to depart from the decision in *Van der Velden v The Netherlands* (29514/05) Section III, ECHR 7 December 2006, in which it was accepted that the potential future use of cellular material was sufficiently intrusive to interfere with the right to privacy.

<sup>21</sup> Compare, for example to The Office of the Privacy Commissioner “Criminal Investigations (Bodily Samples) Amendment Bill: Supplementary Submission by the Privacy Commissioner to the Justice and Electoral Committee” (2009) at 7. The New Zealand Privacy Commissioner has stated “a DNA sample is not like a fingerprint- a fingerprint is nothing but identity, while DNA can reveal the most intimate details of a persons makeup”; see also Steinhardt, above n 14, at 173.

<sup>22</sup> Richard Hindmarsh and Barbara Prainsack *Genetic Suspects: Global governance of Forensic DNA Profiling and Databasing* (Cambridge University Press, Cambridge, 2010) at 256.

<sup>23</sup> Krimsky and Simoncelli, above n 16, at 65.

<sup>24</sup> At 66.

the offender.<sup>25</sup> Such a search is a purely investigative tool and so is distinct from other DNA evidence, as it will seldom feature in an actual trial.<sup>26</sup>

In 2002, the United Kingdom (“UK”) undertook the first familial search of a DNA databank.<sup>27</sup> New Zealand adopted this technique, with the first search in 2004.<sup>28</sup> In New Zealand, there have been a total of 36 cases involving familial searches and a total of 62 searches in those 36 cases (some cases have involved multiple searches).<sup>29</sup> Two people have been convicted as a result of such a search.<sup>30</sup> Of the 36 cases, 20 were historical.<sup>31</sup> Each search has involved crimes of a serious nature, such as sexual assault, murder and arson.<sup>32</sup> Such statistics suggest this technique is currently only being utilised in New Zealand in exceptional circumstances. The success rate in New Zealand to date is low compared to the UK (even taking account of the UK’s larger population) where, as at 2012, 44 offenders had been arrested following approximately 200 familial searches.<sup>33</sup>

Current technology can alter and expand the uses for forensic genetic information and it is possible that, as genetic technologies continue developing, the information may be used in ways that we cannot currently predict.<sup>34</sup>

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<sup>25</sup> Erin Murphy “Relative Doubt: Familial Searches of DNA Databases” (2009) 109 Mich L Rev 291 at 317-320; see also Henry Greely and others “Family Ties: The Use of DNA Offender Databases to Catch Offenders’ Kin” (2006) 34 JL Med & Ethics 248 at 252. On average, the chance that an unrelated person’s genotype will match the genotype from crime scene DNA at 13 or more of the 26 alleles, is around three per cent. However, the chance that two unrelated people match at 13 or more sites, with every marker having at least one match (as will occur for parent-child pairs), is about one in two thousand). These odds vary by ethnicity.

<sup>26</sup> Email from Judge Arthur Tompkins, District Court Judge and honorary member of Interpol’s DNA Monitoring Expert Group, in response to questions regarding the use of familial searches in New Zealand (1 October 2013).

<sup>27</sup> Greely and others, above n 25, at 248-249.

<sup>28</sup> Emails from Detective Inspector John Manning, Police- ESR Liaison Adviser, in response to statistical queries, (4 July to 15 July 2013). The first search was conducted in 2004, and was followed by a gap until 2007. As of 2007 familial searches have been conducted yearly. 2004- 1 search; 2007- 7 searches; 2008- 4 searches; 2009- 3 searches; 2010- 11 searches (coincided with the National Historical Sexual Assault Project); 2012- 4 searches; 2013- 3 searches to date.

<sup>29</sup> Emails from Detective Inspector John Manning, above n 28.

<sup>30</sup> *Police v Reekers* HC Auckland CRI-2008-404-0221, 8 October 2008 (search conducted in 2008); *R v Jarden* [2009] NZCA 367 (search conducted in 2007).

<sup>31</sup> Emails from Detective Inspector John Manning, above n 28. This means they have remained unsolved (often without a DNA profile to match to) and they have been re-examined taking advantage of the familial DNA search technique.

<sup>32</sup> Email from Detective Inspector John Manning, above n 28. The statistics are as follows: 26 cases of sexual assault, 5 cases of homicide, 2 cases of unidentified remains, 1 case of missing person, 1 case of arson, 1 case of aggravated robbery.

<sup>33</sup> Email from Detective Inspector John Manning, above n 28.

<sup>34</sup> Krimsky and Simoncelli, above n 16, at 236.

### ***C The New Zealand DNA Databank in Context***

New Zealand began operating a DNA databank in 1996.<sup>35</sup> Both the system of databank governance and the scope of allowable uses of DNA for operational purposes are currently governed in New Zealand by the CI (BS) Act, which the Police are ultimately responsible for.<sup>36</sup> This Act provides for the taking of bodily samples for use in criminal investigations and also establishes the DNAPD, which holds DNA profiles derived from analysis of bodily samples. Once a DNA profile has been taken, the original bodily sample is destroyed and only the profile is retained.<sup>37</sup> There are two databases on the DNAPD:<sup>38</sup>

1. The National DNA database, containing the DNA profiles of persons convicted of relevant offences.
2. The Crime Sample Database, containing unidentified DNA profiles from unsolved crime scenes.

A stand alone Temporary Databank (“TD”) also exists; holding DNA from bodily samples taken from a person the Police have arrested or intend to charge.<sup>39</sup> If such a person is subsequently convicted, their DNA profile will be transferred from the TD for permanent storage on the DNAPD.<sup>40</sup>

Since its introduction the Act has undergone significant amendment. Under the original Act, DNA could only be collected from volunteers and those convicted of certain criminal offences.<sup>41</sup> Minor amendments were made in 2003, authorising the taking of buccal swabs

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<sup>35</sup> ESR, above n 12. New Zealand was the second country in the world to establish a DNA databank, closely following the United Kingdom; see also Tim McBride “State Surveillance- The Slippery Slope?” (1997) 4 PLPR 41 at 41-42. The issue of DNA testing was first raised in New Zealand in 1978 when the New Zealand Criminal Law Reform Committee published a report on Bodily Examination and Samples as a means of identification. At that time, the recommendation of testing criminal suspects was met with heavy resistance.

<sup>36</sup> ESR, above n 12.

<sup>37</sup> Criminal Investigations (Bodily Samples) Act 1995, s 60 and s 60A.

<sup>38</sup> ESR, above n 12.

<sup>39</sup> CI (BS) Act, Part 2B.

<sup>40</sup> CI (BS) Act, s 24S.

<sup>41</sup> ESR, above n 12.

and extending the range of serious offences for which DNA samples could be taken and stored.<sup>42</sup>

In 2009 the Government's Post-Election Action Plan stated that legislation would be introduced requiring DNA testing for every person arrested for an imprisonable offence.<sup>43</sup> The policy sought to assist the 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.<sup>44</sup> The 2009 Amendment Act made two important changes to the DNA regime. First, it established the TD, giving the Police discretion to take DNA samples in prescribed circumstances without prior judicial review.<sup>45</sup> Secondly, the amendment lowered the threshold for obtaining bodily samples to any imprisonable offence, significantly widening the range of offences triggering police authority to take a DNA sample.<sup>46</sup> These changes represent fundamental departures from the original Act.

To reduce the impact of the discretion given to the Police, guidelines have been developed (by the Police) with the intention to prevent the discretion to take bodily samples from being exercised arbitrarily.<sup>47</sup> These Operational Guidelines somewhat reduce the impact of the amendments by further restricting the circumstances in which bodily samples should be taken. The guidelines include requirements that police officers only take samples from persons who have committed crimes in which DNA evidence would be relevant, and include a list of circumstances where a person's DNA is more likely to link to DNA profiles from unsolved crime scenes.<sup>48</sup>

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<sup>42</sup> Criminal Investigations (Bodily Samples) Amendment Act 2003; see also Simon Power "Parliament Passes DNA Law" (press release, 28 October, 2009) <beehive.govt.nz>. The original Act only allowed DNA derived from blood samples to be taken. Since then developments in scientific methods of analysis meant that buccal samples became a reliable, and less intrusive, means of providing a DNA sample. This resulted in the 2003 amendments, which allowed for collection of a bodily sample with consent, judicial approval, or by compulsion after a conviction for a serious offence (generally offences punishable by seven years or more imprisonment).

<sup>43</sup> Ministry of Justice *Regulatory Impact Statement: Criminal Investigations (Bodily Samples) Amendment Bill May 2009* (2008) at 1.

<sup>44</sup> At 1.

<sup>45</sup> CI (BS) Act, s 24J and s24K.

<sup>46</sup> CI (BS) Act, s24J and 24K.

<sup>47</sup> New Zealand Police "Intention to Charge (Part 2B)- Operational Guidelines" (sent as email attachment by Inspector John Walker on 1 October 2013); see further The Office of the Privacy Commissioner "Supplementary Submission to the Justice and Electoral Committee," above n 21. The Attorney General "Report of the Attorney General under the New Zealand Bill of Rights Act 1990 on the Criminal Investigations (Bodily Samples) Amendment Bill" (2009). During discussions regarding the 2009 Amendments, both the Ministry of Justice and Privacy Commissioner expressed concerns with the lack of oversight and free reign given to the Police by the Act. Such concerns were somewhat mitigated by the Operational Guidelines.

<sup>48</sup> New Zealand Police, "Operational Guidelines," above n 47.

## ***D Incorporation of Familial Searches into the Current Framework***

As mentioned, the New Zealand Police conducted the first familial search in 2004.<sup>49</sup> But it was not until *Police v Reekers* that the legitimacy of this search technique was called into question.<sup>50</sup> In February 2008, a familial search of the DNAPD was carried out, producing a ranked list of 49 individuals whose DNA was on the databank. This led the Police to Joseph Reekers, the brother of one of those individuals.<sup>51</sup> A sample of his DNA was later positively matched to the crime scene sample.<sup>52</sup> In order to obtain an evidential DNA profile for use at Reekers' trial, the Police applied for a suspect compulsion order.<sup>53</sup> Reekers opposed the application, arguing that under the Act the Police were not permitted to undertake familial DNA comparisons.<sup>54</sup>

At trial, counsel for Reekers argued that the definition of 'DNA Profile' in the CI (BS) Act restricted the use of a profile to determining whether or not two samples were from the same person:<sup>55</sup>

DNA profile, in relation to any person, means information derived from an analysis of a sample of genetic material obtained from that person, being information-

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<sup>49</sup> Emails from Detective Inspector John Manning, above n 28; see also Email from Inspector John Walker, Manager: National Forensic Services, in response to statistical queries (8 July 2013). Familial searching was first adopted in New Zealand following correspondence with the Forensic Science Service in the UK (now disestablished).

<sup>50</sup> *Reekers*, above n 30. This case involved the rape and murder of Marie Jamieson in early 2001. At the scene, semen was found on her clothing, which yielded a DNA profile originating from an unknown male described as "Male A." Police DNA screening failed to identify "Male A" and, after almost 7 years, the case had gone cold.

<sup>51</sup> At [3]; see also Tony Wall "My Brother, the Killer" *Sunday Star Times* (online ed, New Zealand, 3 January 2010). Joseph Reekers sister had voluntarily given a blood sample in 2002. Following the familial search the Police investigated other relatives, including her son. In an interview the sister of Reekers commented that she was upset her son was "dragged into it."

<sup>52</sup> *Reekers*, above n 30, at [3]. A sample of Reekers DNA was obtained when he was convicted of theft from a supermarket in early 2008. As a result of that conviction, Reekers was required to give a bodily sample pursuant to a databank compulsion notice. When a DNA profile was derived from this sample it exactly matched the crime scene DNA profile.

<sup>53</sup> CI (BS) Act, s 13. A compulsion order is a court order legally requiring a person to provide a DNA sample. The Police frequently apply for a suspect compulsion order after getting a 'hit' or match between DNA evidence obtained from a crime scene sample and the suspect's DNA profile already held on the DNAPD.

<sup>54</sup> *Reekers*, above n 30, at [14]. The application was also opposed on two further grounds. First, that his rights under s 21 and s 23 New Zealand Bill of Rights Act 1990 were breached when he was required to give a bodily sample pursuant to the databank compulsion notice. Second, that the criteria in s 16 (1)(a)-(c) of the Act were not established.

<sup>55</sup> CI (BS) Act, s 2. Emphasis added; see also *Reekers*, above n 30, at [17]-[18].

- (a) that is clearly identifiable as relating to that person; and
- (b) that is able to be compared with information obtained from an analysis (using the same technique) of another sample of genetic material for the purpose of determining, with reasonable certainty, whether or not the other sample is *from that person*.

Woodhouse J, in rejecting this argument, stated that the wording of ‘able to be’ meant that the definition was not restricted to that purpose.<sup>56</sup> He stated that the restricting definition was instead found in s 27 CI (BS) Act. Under s 27 (1) (a), the Police may have access to, and may disclose, any information stored on the DNAPD ‘for the purpose of forensic comparison.’ Woodhouse J concluded that the disclosure of the DNA profile to the Police, by the Institute of Environmental Science and Research (“ESR”),<sup>57</sup> and the use of it by the Police, were for the purpose of forensic comparison:<sup>58</sup>

The relevant “purpose” is that contained in the definition of forensic comparison- “the purpose of confirming or disproving the involvement of *any* person in the commission of an offence”. That is exactly why the Police undertook the familial search.

Therefore the use of familial searches is accommodated under the current Act, despite no explicit reference being made regarding this search technique.<sup>59</sup>

In the absence of a legislative framework explicitly setting appropriate limits on the use of this search technique, the Police and ESR have developed procedures for operational activities involving the DNAPD. Both agencies have agreed on a protocol relating to familial searches (“the Protocol;” see Appendix B).<sup>60</sup> This provides the basis upon which approval to conduct a familial search is granted or denied, thus outlining the permissible limits on this technology. It

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<sup>56</sup> *Reekers*, above n 30, at [18].

<sup>57</sup> ESR, above n 12. ESR is a Crown Research Institute and the sole provider of forensic services to the New Zealand Police.

<sup>58</sup> *Reekers*, above n 30, at [19]. Emphasis added.

<sup>59</sup> At [19]-[22]. Woodhouse J went on to state that even if that conclusion were wrong and the Police were not authorised to use the relative’s DNA profile, s 13(4) CI (BS) Act provided that, in considering an application for a suspect compulsion order, the Court may take into account any material considered to be relevant “whether or not it would be admissible in a court of law”. So an argument on the inadmissibility of the evidence obtained from the use of the relative’s DNA profile, based on s 30 Evidence Act 2006, could not assist *Reekers*.

<sup>60</sup> New Zealand Police “Protocols- Familial Testing” (Police Protocol sent as email attachment by Detective Inspector John Manning on 4 July 2013, 25 September 2012); see also Email from Inspector John Walker, above n 49. The Protocol is dated 23 September 2012. The Police have stated that this Protocol has remained unchanged since this search technique was first used in New Zealand.

also restricts familial searches exclusively to the DNAPD (thus excluding the TD from being searched). The Protocol expressly recognises that this type of search has important ethical implications and should only be considered on a case-by-case basis. The Protocol also recognises that familial searches will generate a list of potential close relatives to the offender and will contain sensitive personal information. Access to such search results will be restricted to Police and ESR staff involved in the investigation.<sup>61</sup>

In order for a case to qualify for a familial search, certain criteria must be met, as laid out in the Protocol. Such a search may only be undertaken when considered “necessary and proportionate in a particular case” and only in regards to a serious offence where no DNA link resulting from a specific crime profile exists.<sup>62</sup> Before such a search is allowed an authorisation process must be undertaken requiring completion of the proforma ‘NZ Police Request for a Familial Search of the NZ DNA Profile Databank (see Appendix C).’<sup>63</sup> This request form states that authorisation must be obtained from the Crime Manager in the relevant District, and proof of such authorisation must be provided alongside the search request. The application also states that additional costs apply to such searches and these costs must also be approved.<sup>64</sup> The form is submitted to the National Forensic Services Adviser who is ultimately responsible for authorising a familial search.<sup>65</sup> Although not specifically stated in the separate request form, the Protocol comments that as part of the authorisation process consideration must be had to the seriousness of the offence and whether a familial search is appropriate in the particular investigation.

This Protocol acts as an ‘administrative speed bump’ by providing a threshold one needs to clear before conducting a familial search of a database in a particular case.<sup>66</sup> However, when one considers the specific language of the Protocol, on the face of it this threshold does not appear high. The Protocol itself is sparse, requiring simply that the technique be used only for

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<sup>61</sup> New Zealand Police, “Protocols- Familial Testing,” above n 60.

<sup>62</sup> New Zealand Police, “Protocols- Familial Testing,” above n 60.

<sup>63</sup> New Zealand Police, “NZ Police request for a familial search” (sent as email attachment by Detective Inspector John Manning on 4 July 2013).

<sup>64</sup> New Zealand Police “NZ Police request for a familial search,” above n 63; see also Emails from Detective Inspector John Manning, above n 28. A familial search involves a charge per hour for searches and preparation of the report at a cost of \$200 per hour. Searches and reporting charges average about 1.5 hours or \$300.

<sup>65</sup> The current National Forensic Services Manager is Inspector John Walker.

<sup>66</sup> David Lazer and Viktor Mayer-Schonberger “Statutory Frameworks for Regulating Information Flows: Drawing Lessons for the DNA Data Banks from other Government Data Systems” (2006) 34 *JL Med & Ethics* 366 at 372-373.

a “serious offence” and only when the technique is considered “necessary and proportionate.”<sup>67</sup> Both of these phrases are highly ambiguous and subject to the personal view of the officer who ultimately authorises the search. The only safeguards are internal police ‘checkpoints’ (the need for approval from two police authorities) with no external body overseeing the correct use of such processes. Consideration will be given, in Chapter V, to how the Protocol could be more appropriately drafted.

### ***E Concerns with the Reekers Decision***

The argument that prevailed before Woodhouse J in the *Reekers* decision suggests that one should not read down a provision of a statute, when a practice (here familial searching) is readily accommodated within the existing wording or scope of that wording. Kevin Glubb, the Crown Prosecutor in *Reekers*, stated that the decision suggests we should not be too prescriptive in legislative terms as forensic advances continue apace, and as long as new techniques are developed and used within the spirit and intent of the existing legislation, that should be sufficient.<sup>68</sup>

However, I argue that familial searches have been accidentally included in the Act or alternatively that the Act is silent on this issue of familial searches.

Although forensic advances should be readily utilised, this should be limited to advances that improve the current techniques (such as improved methods to create or analyse a DNA profile), not a technique that fundamentally changes the reach of the DNA databank, thus being outside the intent of the Act.<sup>69</sup>

The Act simply states that it applies to the investigation of offences.<sup>70</sup> Nevertheless there are indications in the legislative history that Parliament did not intend for the databank to be used to find individuals other than those already included on it. For example, during

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<sup>67</sup> New Zealand Police, “Protocols- Familial Testing,” above n 60.

<sup>68</sup> Email from Kevin Glubb, Partner at Meredith Connell, in response to questions regarding the Prosecution’s arguments in *Police v Reekers* (22 July 2013).

<sup>69</sup> Criminal Investigations (Bodily Samples) Amendment Bill, as reported from the Law and Order Committee, No 221-2 (23 June 2003) at 24. For example the 2003 Amendment Act was drafted so to allow other forms of bodily samples to be added to the definition section without the need to undertake a wholesale redraft of the Act. This was in response to the progress in the nature of bodily material from which DNA samples can be obtained.

<sup>70</sup> CI (BS) Act, s 4.

Parliamentary debates on the 2009 Amendment Act, Chester Burrows (National Party) stated:<sup>71</sup>

[T]he legislation will identify offenders very, very early in the piece, based on their earlier offending. The offences contained in the schedule are a number of precursor offences...we know that those people who go on to commit tragic offences...start off their offending at a very low level...so having their DNA on record very early in the piece would identify them as soon as they left traceable bodily evidence at the scene of a crime or on a victim.

There does not appear to be evidence, throughout the Parliamentary debates on this Amendment, that Parliament had cast its mind to such an indirect association.<sup>72</sup> Instead the focus was on the ability of an expanded databank to match DNA profiles, thus catching reoffenders.

A further example is found in the Regulatory Impact Statement for the 2009 Amendments: ‘an increased databank will aid criminal investigations by both linking offenders on the databank to previously unsolved crime scenes and potentially to future crime scenes.’<sup>73</sup> Again, this stresses that the focus during discussions of these amendments was on the ability to catch re-offenders, via the databank.

Even the Police Operational Guidelines implicitly suggest that familial searches were not considered when the legislation was enacted.<sup>74</sup> The Operational Guidelines state that DNA samples should only be administered when police have reasonable grounds to suspect that the person has committed another offence in respect of which DNA evidence would be relevant, and provides characteristics that are more likely to link the person’s DNA to the DNA profiles of unsolved crimes.<sup>75</sup> This suggests that the original intent of the Act was to compare the DNA of one person to the DNA of a crime scene to see if an exact match could be found, not to create a new lead to third parties.

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<sup>71</sup> Third Reading of the Criminal Investigations (Bodily Samples) Amendment Bill (15 October 2009) 658 NZPD 7469.

<sup>72</sup> See, for example Third Reading of the Criminal Investigations (Bodily Samples) Amendment Bill, above n 71.

<sup>73</sup> Ministry of Justice, *Regulatory Impact Statement*, above n 43.

<sup>74</sup> New Zealand Police, “Operational Guidelines,” above n 47.

<sup>75</sup> New Zealand Police, “Operational Guidelines,” above n 47.

Familial searches do not appear to be within the intent of the legislation as initially drafted. It seems reasonably clear that the broad interpretation of “any person” in the definition of “forensic comparison” arose from a drafting accident, or fortuitous coincidence, rather than a calculated and intentional decision of the legislature.<sup>76</sup> The original purpose of the databank was for matching DNA profiles of suspects with crime scene samples. Extending the application of the databank to family members, is not what was originally envisioned by the legislature that authorised its creation.

### ***F Concluding Remarks***

Familial searches are considered a permissible legislative choice in New Zealand. However, not all that is permitted is desirable. As I have argued, the inclusion of familial searches was not foreseen when the legislation was enacted. Consequently no reference has been made within the Act limiting the extent to which this technique can, and should, be utilised. Although the application of the technique is currently restricted by police procedure, there is nothing external to prevent the police loosening such restrictions as they see fit, or as the need arises. With this current environment in mind, the next chapters will consider whether legitimate concerns exist regarding extensive use of familial searches and whether, in light of this, the current restrictions in New Zealand are appropriate and sufficient.

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<sup>76</sup> See Email from Judge Arthur Tompkins, above n 26.

## Chapter II

### **Ethical and Policy Considerations Surrounding the Use of Familial Searches**

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This chapter analyses ethical and policy issues surrounding the use of familial searches in criminal investigations, concluding that unrestricted use may have serious implications. While acknowledging that familial searches are a useful ‘crime-fighting’ tool, the need to place specific constraints on such use will be demonstrated.

#### ***A Opposing Viewpoints***

While proponents of familial searches recognise the need for restrictions on the use of the technology, they believe that the communitarian benefits stemming from the use of this practice ‘tip the scales’ in their favour.<sup>77</sup> In contrast, opponents of the use of familial searches maintain that such arguments should not undermine safeguards that have been placed on the criminal process, to reduce human rights and privacy concerns.<sup>78</sup>

The consequentialist logic of those favouring this technique is attractive, as it seems difficult to argue against a novel investigative method that has effectively apprehended perpetrators of atrocious crimes.<sup>79</sup> In *R (LS and Marper) v Chief Constable of South Yorkshire Police* Lord Steyn stressed the importance of using technology during criminal investigations, stating:<sup>80</sup>

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<sup>77</sup> Kimberley Wah “A New Investigative Lead: Familial Searching as an Effective Crime Fighting Tool” (2008) 29 Whittier L Rev 909 at 918. The term ‘communitarian’ emphasises the connection between the individual and the community.

<sup>78</sup> See Sonia Suter “All in the Family: Privacy and DNA Familial Searching” (2010) 23 Harv J L & Tech 309 at 376.

<sup>79</sup> Julia Driver *Consequentialism* (Taylor and Francis, London, 2011) at 5. Consequentialism holds that the consequences of one’s conduct are the ultimate basis for any judgment about the rightness of that conduct.

<sup>80</sup> *R (LS and Marper) v Chief Constable of South Yorkshire Police* (2004) UKHL 39, per Lord Steyn at [1].

[I]t is of paramount importance that the law enforcement agencies should take full advantage of the available techniques of modern technology and forensic science...as a matter of policy it is high priority that police forces should expand the use of such evidence where possible and practicable.

However, this logic can be criticised as being located upon a 'slippery slope'. If followed to its logical conclusion, it allows for unlimited expansion in the uses of DNA, so long as such use is beneficial from a crime solving perspective. For example, although the installation of cameras in private locations would likely help solve more crimes, allowing such an extreme loss of privacy would be highly controversial. Therefore, determining whether or not a particular law enforcement technique should be allowed, and if so under what conditions, in my view requires going beyond the inquiry 'will it help solve crime?'<sup>81</sup>

Further, although the approach of proponents is problematic, it can produce tangible results. As noted by Suter:<sup>82</sup>

The social value of identifying murderers and rapists is palpable and visceral- it keeps them off the street, it provides peace and resolution to the victims and their families and it vindicates public justice. These benefits are...measureable in economic terms.

In contrast, the potential impact of familial searching on privacy and human rights is more abstract. As further noted by Suter, 'it is difficult to quantify or demonstrate empirically the costs of privacy violations or the benefits of protecting privacy.'<sup>83</sup> Thus when juxtaposed against a murder or other violent crime, amorphous values (such as individual rights) often become steamrollered by public desire to solve the crime. Both sides of the debate tend to neglect (or undervalue) strong arguments voiced by the opposing side.<sup>84</sup>

These viewpoints cannot be reconciled, as one set of values will ultimately outweigh the other in any debate. The question becomes, to what extent are we willing to promote one set of

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<sup>81</sup> See Erin Murphy "Familial DNA Searches: The Opposing Viewpoint" (2012) 27 Crim Just 19 at 19.

<sup>82</sup> Sonia Suter, "All in the Family," above n 78, at 375.

<sup>83</sup> At 375.

<sup>84</sup> See generally Sonia Suter "Book Review: Genetic testing and the use of information" (2000) 41 Jurimetrics 261 at 271-272.

values at the expense of the other? The following discussion will weigh up the various ethical issues involved in answering this question.

### ***B 'Function Creep'***

'Function creep' refers to changes in, and especially additions to, the use of a technology. Williams and Johnson use 'function creep' to describe, "how a government's programme of technological intervention into social life is gradually, incrementally, but deliberately, increased over time."<sup>85</sup> It is when personal data, collected and used for one purpose and to fulfil one function, has migrated to other purposes and functions that extend beyond what was originally understood and considered ethically and legally acceptable.<sup>86</sup> While the use of DNA in forensics was initially considered quite controversial, there has been a trend of loosening legal restrictions regarding forensic DNA databanks- 'function creep' has taken place.<sup>87</sup> DNA databanks were created for the isolated purpose of retaining data on convicted felons. Departure from this original purpose has been 'triangular' in form, as a once narrow intent has steadily broadened outward from the pinpoint goal of tracking violent, previously convicted offenders.<sup>88</sup>

Familial searching is clearly an example of 'function creep' as it effectively expands a databank, designed to identify known offenders, to include other people who happen to be relatives of convicted offenders. The search technique increases the reach of existing search functions in DNA databanks and consequently broadens the scope of individuals who can be affected by police investigations.<sup>89</sup>

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<sup>85</sup> Robin Williams and Paul Johnson *Genetic Policing: The use of DNA in Criminal Investigations* (2008) (Willan Publishing, Devon, 2008) at 82.

<sup>86</sup> Johanne Dahl and Ann Saetnan "It All Happened So Slowly: On Controlling Function Creep in Forensic DNA Databases" (2009) 37 *IJLCJ* 83 at 84.

<sup>87</sup> For example both the Criminal Investigations (Bodily Samples) Amendment Act 2003 and the Criminal Investigations (Bodily Samples) Amendment Act 2009 have extended the scope of the original Act.

<sup>88</sup> Daniel Grimm "Demographics of Genetic Surveillance: Familial DNA Testing and the Hispanic Community" (2007) 107 *Colum L Rev* 1165 at 1174.

<sup>89</sup> Sophie Rushton *Familial Searching and Predictive DNA Testing for Forensic Purposes* (Australian New Zealand Policing Advisory Agency, Victoria, 2010) at 13.

### ***C Privacy in Databank Searches and Subsequent Investigations***

Privacy concerns are considered a major hurdle to implementing this search technique. A primary basis for objection to such searches is that they represent an increasing intrusion into the right to informational privacy. Familial searching shifts the focus of genetic surveillance from the individual to the family.<sup>90</sup> Because familial searching aims to develop a suspect pool when conventional investigation has not created leads, by design it opens the investigation to potentially innocent individuals based on kinship.

Familial searches pose privacy concerns for two different groups: the person whose profile has been identified on the databank (the ‘genetic informant’) and relatives the Police investigate, and from whom the Police may try to obtain samples.<sup>91</sup> It is important to remember that a ‘genetic informant’ may turn out to be unrelated to the offender. In such cases individuals may be brought into an investigation solely on the basis of an incorrect genetic link.<sup>92</sup>

#### *1 The ‘genetic informant’*

Arguably, such searches make the person whose profile is on the database a ‘genetic informant’ on their family members.<sup>93</sup> It also makes that person part of an investigation, in which, had a familial search not been undertaken, they would never have been involved.

Since the inception of DNA databanks, it has generally been conceded that the privacy rights of offenders do not receive the same degree of protection as other citizens.<sup>94</sup> Although society appears to have accepted that offenders placed on a databank can be subject to ‘genetic surveillance,’ familial searching raises further, novel concerns.<sup>95</sup> For example, the revelation, during an investigation, that a family member’s DNA profile is on the DNA databank may

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<sup>90</sup> Laura Thomas “Nothing to Hide, Something to Fear? The use of partial DNA matching in criminal investigation”(2006) 17 *JLIS* 76 at 82.

<sup>91</sup> Suter, “All in the Family,” above n 78, at 375.

<sup>92</sup> See Greely and others, above n 25, at 251-257.

<sup>93</sup> Thomas, above n 90, at 91.

<sup>94</sup> See Murphy, above n 25, at 317.

<sup>95</sup> Thomas, above n 90, at 90-92.

also reveal that they have been convicted of a criminal offence, if this fact is disclosed.<sup>96</sup> This impinges on that person's privacy right to keep that information secret from their family.<sup>97</sup> Further, while DNA profiles contain non-coding STRs it remains uncertain whether science will eventually uncover further uses for this genetic material. As bio-informatics technologies continue advancing, non-coding STRs may be used to reveal information ranging from health status to racial identity.<sup>98</sup> The potential for future information discovery creates a privacy interest that may be as compelling as the need to protect code-producing DNA, and at the least means a cautious approach should be taken regarding such information.<sup>99</sup>

## 2 *Relatives and family relationships*

Familial searching also raises specific privacy issues in the context of family relationships. By their nature, familial searches are discriminatory in a way that other searches are not because they distinguish between persons related to convicted offenders on the DNA databank and persons who do not have close relations on the databank. Arguably the fundamental objection to this search technique is that such searches impact on those with 'bad' relatives while ignoring those with 'good' relatives.<sup>100</sup> Any relative of a convicted offender who is identified through a familial search will be a relative who is not already in the databank.<sup>101</sup> The people who fall under suspicion from familial searching are particular kinds of people—those who would not otherwise be in the databank, but have a 'presence' there because of inferences that can be drawn from their relationship to an offender's DNA profile. Therefore, this process allows police to indirectly do what could otherwise not be done. Why should the non-database eligible relatives of convicted offenders be accessible in this manner, while everyone else retains the right to keep their DNA profile private?<sup>102</sup>

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<sup>96</sup> At 90-92; see, for example Tony Wall, "My Brother, the Killer;" above n 51. In *Reekers*, the sister of Reekers stated that she had never told her family about the conviction leading to her being required to give a DNA sample.

<sup>97</sup> Thomas, above n 90 at 91.

<sup>98</sup> RE Gaensslen "Should Biological Evidence or DNA be Retained by Forensic Science Laboratories After Profiling? No, Except under narrow legislatively- stipulated conditions." (2006) 34 *JL Med & Ethics* 375 at 376.

<sup>99</sup> See, for example *United States v Kriesel*, 508 F 3d 941 (9<sup>th</sup> Cir. 2007) at 947-948. The Court was "mindful of the caution that DNA often reveals more than identity and that, with advances in technology, junk DNA may reveal far more extensive genetic information;" see also Roman-Santos, above n 2, at 292.

<sup>100</sup> Jennifer Mnookin "Devil in the DNA Database" *Los Angeles Times* (online ed, Lost Angeles, 5 April 2007).

<sup>101</sup> If they had been in the databank they would have been identified in the original databank search.

<sup>102</sup> Murphy, "Familial DNA Searches: The Opposing Viewpoint," above n 81, at 23.

Such concerns were recognised as early as 1995, with the United States of America (“USA”) National Academy of Sciences stating:<sup>103</sup>

The ability of DNA to recognise relatedness poses a novel privacy issue for DNA databanks... DNA databanks have the ability to point not just to individuals but to entire families-including relatives who have committed no crime. Clearly, this poses serious issues of privacy and fairness... It is inappropriate for reasons of privacy, to search databanks of DNA from convicted criminals in such a fashion. Such uses should be prevented both by limitations on the software for search and by statutory guarantees of privacy.

On the other hand, advocates have noted that these concerns are not necessarily greater or more threatening than those raised by other forms of police surveillance. The New York District Attorney has expressed infuriation at the State’s failure to use this technique, stating, “if I’ve got something of scientific value that I can’t share because of imaginary privacy concerns, it’s crazy. That’s how we solve crimes.”<sup>104</sup> Advocates argue that familial searching has a minimal affect on an individual’s sense of privacy and liberty. This is because individuals investigated following familial searches remain unaware they are under police scrutiny until law enforcement officials identify further causes for interrogation.<sup>105</sup>

However, this in itself is a weak argument as privacy should not be measured by whether the person becomes aware or not, but by whether their privacy is *in fact* intruded upon.<sup>106</sup> The right to privacy is an important check on the state’s power to intrude into the private lives of citizens.<sup>107</sup> The Nuffield Council on Bioethics observed that even if no specific harm results from a breach of privacy, “the unauthorised use of such sensitive personal information might

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<sup>103</sup> National Research Council *DNA Technology in Forensic Science* (National Academy Press, Washington DC, 1994) at 86-87.

<sup>104</sup> Quoted in Ellen Nakashima “From DNA of Family, a Tool to Make Arrests” *The Washington Post* (online ed, Washington, April 21 2008) A1.

<sup>105</sup> Joyce Kim, Danny Mammo, Marni Sigel and Sara Katsanis “Policy Implications for Familial Searching” (2011) 2 *Investigative Genetics* 1 at 4.

<sup>106</sup> For example in the recent decision of *C v Holland* [2012] NZHC 2155 the New Zealand High Court ruled that the filming of a woman while naked in the bathroom at her residence was a breach of her privacy (thus extending the tort of privacy). Would it have been any less of a breach of her privacy if she did not know she had been filmed?

<sup>107</sup> Viktor Mayer-Schoenberger “Strands of Privacy: DNA Databases, Informational Privacy, and the OECD Guidelines” in David Lazer (ed) *DNA and the Criminal Justice System: The Technology of Justice* (MIT Press, Cambridge Massachusetts, 2004) 225 at 227.

be seen as undermining the inherent dignity of human beings.”<sup>108</sup> This view is linked to the concept of ‘genetic exceptionalism,’ which is defined by O’Neil as “the view that genetic data are intrinsically unlike other personal data...because they provide information not only about an individual...but also about related individuals.”<sup>109</sup>

A further issue concerns whether, following a familial search, the Police are likely to ‘knock on lots of wrong doors’ in order to find the offender.<sup>110</sup> Although it is arguable that almost all investigative techniques involve this, the extent of this intrusion in regards to this technology will depend on how familial searches are conducted. Currently in New Zealand, the Police analyse the list resulting from a familial search and reduce it to a smaller number according to various criteria, which do not involve contact with relatives.<sup>111</sup> It is only when a person of interest is identified that contact is made with anyone and in most cases this will be confined to the person of interest.<sup>112</sup> Therefore, as long as this is actually occurring in practice, this concern is mitigated.<sup>113</sup>

A final issue raised in this regard, but easily resolved, is that in subsequent investigations the Police may reveal a genetic relationship previously unknown to the individuals. Familial searches have the potential to be highly intrusive as the revelation of previously unknown biological relationships could have “profound and destabilising consequences for the individual involved.”<sup>114</sup> However, although this is a possibility, the privacy risk is minimal provided the Police exercise appropriate discretion in making their inquiries. The public fear of revealing such unknown family connections perhaps has more to do with the sensitivity of the issue rather than the true extent of the risk.<sup>115</sup> The Colorado protocol specifically addresses such concerns (as discussed in Chapter IV).<sup>116</sup>

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<sup>108</sup> Nuffield Council on Bioethics *The Forensic Use of Bioinformation: Ethical Issues* (Nuffield Council on Bioethics, London, 2007) at 9. The Nuffield Council on Bioethics is an independent body that examines and reports on ethical issues in biology and medicine.

<sup>109</sup> Onora O’Neil *Autonomy and Trust in Bioethics* (Cambridge University Press, Cambridge, 2002) at 101.

<sup>110</sup> David Lazer “Searching the Family Tree for Suspects: Ethical and Implementation Issues in the Familial Searching of DNA Databases” (Policy Brief, Harvard University, Taubman Center, March 2008) at 6.

<sup>111</sup> Email from Inspector John Walker, above n 49.

<sup>112</sup> Email from Inspector John Walker, above n 49; Emails from Detective Inspector John Manning, above n 28.

<sup>113</sup> The need for external oversight to ensure this is the case is the subject of Chapter V.

<sup>114</sup> 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* (Human Genetics Commission, United Kingdom, 2009) at 46.

<sup>115</sup> Nuffield Council on Bioethics, *The Forensic Use of Bioinformation*, above n 108.

<sup>116</sup> Colorado Bureau of Investigation “DNA Familial Search Policy” (Policy Statement, 22 October 2009).

### ***D The ‘No Reason to Fear if You’re Innocent’ Argument***

The argument that people who are innocent have nothing to fear from their close relatives being on a DNA databank directly opposes any argument favouring privacy. On the face of it, such an argument appears attractive and so has been used to justify expansions regarding criminal justice. For example, during Parliamentary debates on the 2009 Amendments to the CI(BS) Act, the Associate Minister of Justice, Hon Dr Richard Worth, stated, “the reality, of course, is if someone has done nothing wrong, he or she has nothing to fear.”<sup>117</sup> The same justification could be and has been applied to support familial searches.<sup>118</sup> It seems increasing pressure has been placed on our established notions of privacy, as more and more personal information is sought in the name of public safety.

This argument ignores any intrinsic value that might be placed on liberty, privacy and autonomy, and focuses solely on the more concrete forms of harm that might come to individuals. The argument is misleading because, if innocent, simply being the subject of a criminal investigation by the police can cause harm, distress and stigma.<sup>119</sup> For example, if a person is one of a number investigated in connection with a rape they may well be harmed by the taint of suspicion, both personally and socially, even if they are never arrested or charged. This may also have significant reputational effects. As Kaye observed, “I don’t think anybody’s going to be falsely convicted...it’s the time, hassle and indignity of being interviewed by police. How much is that worth? How much does that cost a person? I don’t know, but it’s not zero.”<sup>120</sup>

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<sup>117</sup> First Reading of the Criminal Investigations (Bodily Samples) Amendment Bill (10 February 2009) 652 NZPD 1125; see also Audrey Young and Kate Shuttleworth “Spy Bill: ‘This isn’t playtime’- Key” *The New Zealand Herald* (online ed, New Zealand, 25 January 2013), which provides a further example. Prime Minister John Key comments on the proposed GCSB Act, stating “if people aren’t doing something wrong, then its very unlikely they would be falling within the remit of the GCSB’s activities;” see also Anne Salmond “Govt must heed Kiwis’ unwillingness to live in spy state” *The New Zealand Herald* (online ed, New Zealand, 6 August 2013). Anne Salmond mentioned that in Nazi Germany, critics were told “If you have nothing to hide, you have nothing to fear’, and likened that to arguments by the GCSB bill’s supporters.

<sup>118</sup> See, for example Human Genetics Commission, above n 114 at 48; see also Nuffield Council on Bioethics *The Forensic Use of Bioinformation*, above n 108, at 33-34.

<sup>119</sup> Nuffield Council on Bioethics *The Forensic Use of Bioinformation*, above n 108, at 59.

<sup>120</sup> David Kaye “The Genealogy Detectives: A Constitutional Analysis of Familial Searching (2013) 50 Am Crim L Rev 110 at 156.

These problems could be ameliorated if police always showed the utmost sensitivity towards those investigated, but as long as there is no guarantee that this will always be the case, harm may eventuate.

Furthermore this argument cannot, alone, be sufficient justification for extending police powers. One's starting point should be the presumption of liberty, which is necessarily accompanied by the importance of keeping governmental and police power appropriately controlled and within the rule of law. Given this starting point, the government should always be required to show strong reason, backed by objective evidence, that there is adequate justification for interfering with the lives and rights of its citizens.

It should not be assumed that a desire for privacy means someone has 'something to hide.' Sometimes people just want to be 'let alone.' People who wish to protect their privacy should not be required to justify their desire to do so.<sup>121</sup> Therefore the argument that innocent people have nothing to fear from the DNA databank, is in itself insufficient to justify unfettered use of familial searches.

### ***E Concluding Remarks***

The above ethical and policy analysis supports the view that, although familial searching is likely to be a very advantageous investigative technique, such use should be restricted to exceptional cases. Due to the many intangible, but no less important, concerns raised unfettered use of this technique to solve crimes would be inappropriate. I conclude that the scales should only be tipped in favour of this search technique, at the expense of privacy and human rights concerns, in restricted and well-defined circumstances. To use this technique widely would dramatically alter the purpose of DNA databanks. Consequently, only a restricted approach should be taken.

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<sup>121</sup> Tim McBride "Our emerging surveillance society- is privacy a goner?" <<http://www.timmbridelaw.co.nz>>.

## Chapter III

### Factors that Should Influence the New Zealand Approach

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The analysis in Chapter II will provide background to the discussion, in this chapter, of factors which should influence defining the appropriate limits on the use of familial searches in New Zealand.

#### *A The Current Context*

In order to assess what regulation would best suit New Zealand's context, it is appropriate to consider the climate in which the expansion of the search capabilities of the DNAPD has occurred. Contemporary security policies are characterised by a dramatic focus on technologies like biometrics. Criminal justice policy in New Zealand has regularly seen increases in the powers afforded to the state to investigate crime, such as increased powers of search and seizure, gathering evidence (including taking bodily samples) and state surveillance.<sup>122</sup> While such powers impact heavily on individual human rights (such as privacy, liberty and bodily integrity) and due process values, the right of the state to investigate crime is seen as a legitimate and necessary facet of society. Current discourse appears to suggest that criminal justice policy has been shifting from systems traditionally focused on due process ideals to systems predicated on crime control.

However, it has also been acknowledged that privacy is an interest worthy of protection and in modern times there has been a determination to extend the legal protection given.<sup>123</sup> This development is due, in part, to the fact that modern society has become increasingly

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<sup>122</sup> For example see Criminal Investigations (Bodily Samples) Amendment Act 2009; Search and Surveillance Act; Government Communications Security Bureau Amendment Act.

<sup>123</sup> John Burrows "Invasion of Privacy" in Stephen Todd and others (eds) *The Law of Torts in New Zealand* (6<sup>th</sup> ed, Thomson Reuters, Wellington, 2013) 935 at 942.

conscious of the value of having a sphere in which individuals can keep to themselves. One aspect of this is due to the increasing sophistication of modern technology.<sup>124</sup> Our jurisprudence is also becoming more rights based. This movement is international and is particularly evidenced in New Zealand by the New Zealand Bill of Rights Act 1990. Although the Act does not specifically codify a right of privacy, it has sensitised us to the essential dignity of the individual.<sup>125</sup>

Despite the shift toward a system predicated on crime control, the need for oversight and other safeguards to balance any expansions in police power is therefore still applicable. Although it has been suggested that familial searching does not represent an expansion in police power, I argue this is not the case. Although New Zealanders would likely support the use of familial searching, restriction on such use, increased oversight and accountability should be linked to any expansion.

### ***B The Expansion of the DNAPD's Search Capabilities***

The potential benefits of creating a nationwide, all citizens included, databank has been discussed widely.<sup>126</sup> Although this is unlikely to be feasible currently, due to budget and resource constraints, it may become possible in the near future. However, regardless of such administrative concerns, it is likely the public backlash would be too great to allow such an intrusion on the private lives of individuals.<sup>127</sup> The central problem appears to be that such a databank would treat all citizens as crime suspects, therefore radically altering the relationship between the citizen and government.

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<sup>124</sup> At 942.

<sup>125</sup> At 942-943.

<sup>126</sup> See generally John Cronan "The Next Frontier of Law Enforcement: A Proposal for Complete DNA Databanks" (2000-2001) 28 AMJ Crim L 119; Lena Carlucci, "DNA Collection at Birth: A Uniform System of Identification" (2012-2012) 26 JCR & Econ Dev 303.

<sup>127</sup> See, for example The Office of the Privacy Commissioner "Submission by the Privacy Commissioner to the Justice and Electoral Committee on the Criminal Investigation (Bodily Samples) Amendment Bill 2009" (2008) at 4. The Privacy Commissioner stated, 'it is imperative that a databank of DNA information about criminals should not become, by a process of 'function creep,' a databank of the general population. Such a process, were it to occur, would run a serious risk of eroding public trust and confidence in the Police, the Government and the justice system.

*Marper* represents the first substantial restriction of a DNA expansion programme by a legal entity.<sup>128</sup> The retention of the DNA of particular groups of non-offenders was held to constitute an interference with the right to respect for private life and could not be regarded as necessary in a democratic society.<sup>129</sup> While subjecting those convicted of a crime to DNA databank inclusion has been widely accepted, subjecting those who have never been convicted of a crime to surveillance subverts our notion of a free and autonomous society and is characteristic of an authoritarian regime.<sup>130</sup>

Although familial searching is a 'less extreme' example, the same fundamental concerns exist. The introduction of familial searching has expanded the reach of the databank, as the focus of the databank has shifted from the known and convicted individual to the previously unknown group. Therefore, instead of merely identifying suspects, groups of suspects are actively created.<sup>131</sup>

Rothstein and Talbott have cautioned that, whenever the State adopts a new technological instrument, we need to keep an eye on the larger regulatory environment:<sup>132</sup>

Assume that a hypothetical country routinely required all of its residents to submit the following items to the police: a DNA sample, a yearly photograph, handwriting exemplar, voiceprint, fingerprints, hair samples...and other details of their personal life. Obviously, ready access to the information by police would help solve crimes. Nevertheless such comprehensive information submission to law enforcement would be widely viewed as hallmarks of a repressive, totalitarian state.

The concerns about the creation of a nationwide databank, although more far reaching, are fundamentally similar to those raised by familial searching. Both would bring those who have never been in contact with the justice system into it, effecting a fundamental departure from the original use of DNA databanks. This highlights the changing scope of DNA databanks

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<sup>128</sup> *Marper*, above n 17.

<sup>129</sup> At [125].

<sup>130</sup> Tania Simoncelli "Dangerous excursions: the case against expanding forensic DNA databases to innocent persons" (2006) 34 *JL Med & Ethics* 390 at 391.

<sup>131</sup> See Krimsky and Simoncelli, above n 16, at 65-68.

<sup>132</sup> Mark Rothstein and Meghan Talbott "The Expanding Use of DNA in Law Enforcement: What Role for Privacy?" (2006) 34 *JL Med & Ethics* 153 at 160-161.

and the need for public discussion about appropriate limits. Although this concern may be insufficient to justify complete prohibition on familial searching, it is sufficient to support the reduced role of such searches in criminal investigation.

### ***C Police Discretion***

In particular circumstances police officers have discretion to acquire samples upon arrest. Such discretion is concerning generally, but may be more so when familial searches are ‘thrown into the mix’.<sup>133</sup> There may be strong incentive for police officers to obtain as many samples as possible in order to increase the chance of familial search successes. Therefore the Police may choose to take samples from a wider range of arrestees in order to increase the number of profiles retained on the DNAPD.

Although the current Protocol does not permit familial searches of the TD, by taking samples from an increased range of arrestees, the Police will ultimately be adding more samples to the permanent database. The Operational Guidelines (see Appendix A) will hopefully mitigate these fears, as they attempt to restrict the circumstances when samples can be taken.<sup>134</sup> However, a recent inquiry in the UK, in which it was found that British Police were arresting people to obtain a DNA sample, suggests that such concerns are justified.<sup>135</sup>

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<sup>133</sup> Interview with Judge Arthur Tompkins, District Court Judge and honorary member of Interpol’s DNA Monitoring Expert Group (the author, by telephone, 13 August 2013).

<sup>134</sup> New Zealand Police, “Operational Guidelines,” above n 47.

<sup>135</sup> Human Genetics Commission, above n 114, at 21-22. The Human Genetics Commission quoted an unidentified retired senior police officer as saying ‘it is now the norm to arrest offenders for everything’ in order to obtain a DNA sample; see also Alan Travis “Police routinely arresting to get DNA, inquiry told” *The Guardian* (online ed, United Kingdom, 24 November 2009); see also “Police making arrests ‘just to gather DNA samples’” *BBC News* (online ed, United Kingdom, 24 November 2009).

## ***D Impact on Minorities***

Internationally, there is a trend towards disproportionate representation of minority populations on DNA databanks.<sup>136</sup> Therefore, although familial searching affects the privacy rights of all those connected to a search, an even greater concern may be that these privacy threats will not be distributed equally throughout the population. Instead minorities are likely to endure far greater and disproportionate amounts of genetic surveillance than the Caucasian majority, if familial searches were practised routinely.

The 2009 CI (BS) Act amendments empower the Police, with discretion, to take DNA samples from any person they intend to charge with an imprisonable offence.<sup>137</sup> Research into systematic biases in the criminal justice system indicates that Maori, and other ethnic groups including Pacific Islanders, are indisputably overrepresented in police arrests, charges and convictions. Consequently, minorities are also disproportionately represented in the DNA databank.<sup>138</sup> A 2007 study by the Department of Corrections found that overrepresentation of Maori 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.<sup>139</sup>

Familial searches may exacerbate these concerns, as the reach of surveillance will likely extend across a larger proportion of minority populations. If the databank is already racially skewed then further developing familial leads will aggravate the problem.

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<sup>136</sup> See, for example Grimm, above n 88, at 1176. African Americans compose at least 40 per cent of the CODIS Offender Index (part of the US DNA databank), such that familial testing will render about 17 per cent of African American citizens findable through the system, as compared to only about 4 per cent of the Caucasian population; see also Human Genetics Commission, above n 114, at 53. Evidence from the UK is that over 30 per cent of black males have profiles on the National DNA Database, compared to only ten per cent of white males; see also Australian Bureau of Statistics “2011 Census Counts- Aboriginal and Torres Strait Islander Peoples” (21 June 2012) <<http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/2075.0main+features32011>>. In Australia a similar trend is shown, with Aborigines and Torres Strait Islanders comprising 26 per cent of the prison population, despite only making up 2.5 per cent of the Australian population.

<sup>137</sup> CI (BS) Act, s 5.

<sup>138</sup> Peter Marshall, Commissioner of Police *New Zealand Police 2011/12 Annual Report* (2012) at 93- 96. Between 2011 and 2012 5,562 European DNA profiles were derived compared to 5,155 Maori DNA profiles and 1575 Pacific Islander DNA profiles.

<sup>139</sup> Policy, Strategy and Research Group, Department of Corrections *Overrepresentation of Maori in the Criminal Justice System: An Exploratory Report* (Department of Corrections, September 2007) at 7.

Further, because the accuracy of familial searches depends on the number and types of samples that already exist in the databank, the accuracy will vary with ethnicity. In one study it was found that the rate of false positives of African Americans was much higher than other ethnic groups.<sup>140</sup> If minority groups are found to suffer disproportionately from false positive matches it follows that they will suffer disproportionately from intrusions of privacy and police interrogations.

Allowing the Police to control which profiles of individuals should be retained on the databank is dangerous because it enables the Police to target and retain biological information about particular sections of society. This argument is given credibility by the disparity within the DNAPD. Further, concerns raised by familial searches generally may be heightened when applied to a minority group which already perceives itself as being routinely harassed by the Police. The cumulative effect of including a wider range of DNA profiles in the databank and familial analysis therefore has the potential of magnifying ethnic imbalances.

### ***E Technological Concerns***

Concerns exist regarding evidence of the success of this search technique. When the 2009 Amendments passed, opponents argued that there was insufficient evidence that expanding the database would catch more criminals.<sup>141</sup> It is therefore arguable that if familial searching had been exposed to public scrutiny, similar concerns would be raised. In Canada familial searching has yet to be adopted into legislation, because it is believed that the effectiveness of this technique is still in doubt and the success rate and application not well understood, even by law enforcement.<sup>142</sup> As this technique has not been publicly scrutinised, such concerns have not been addressed in New Zealand.

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<sup>140</sup> Rori Rohlf's and others "The Influence of Relatives on the Efficiency and Error Rate of Familial Searching" (2013) 8 PLoS ONE, e70495.

<sup>141</sup> See, for example First Reading of the Criminal Investigations (Bodily Samples) Amendment Bill, above n 116.

<sup>142</sup> Chantal Bernier, Assistant Privacy Commissioner of Canada "Challenges to Privacy: what should keep you up at night" (speech delivered at the Access & Privacy Workshop, St. John's, Newfoundland and Labrador, May 16 2011).

The Nuffield Council on Bioethics stated, in 2007 that before widely deploying familial searching there needed to be detailed and independent research on its operational usefulness and on the practical consequences for those affected by it.<sup>143</sup> Since then, debate has continued regarding the scientific value of this technique, although efforts to quantify the impact of familial searches have been minimal. Studies undertaken have been somewhat conflicting, both in terms of the usefulness of familial search results and the techniques used to interpret them.

Early studies have suggested that, although an investigator may have to pursue several false leads before getting the right one, there is a relatively high chance of a match being made to a close relative.<sup>144</sup> However, as the databank size increases, so too does the chance of producing a false match.<sup>145</sup>

A recent study has raised new concerns about the method's accuracy and efficacy.<sup>146</sup> The study raised a previously unrecognised risk, finding that familial searches often suggest two people are close relatives when they are in fact distant relatives.<sup>147</sup> The significance of this in New Zealand relates back to the current Protocol, which places emphasis on the ability of familial searches to result in lists of potential 'close relatives'.<sup>148</sup> The Protocol does not acknowledge, or perhaps those who drafted it did not consider, the potential for very distant relatives to be implicated, perhaps so distant that their relationship with the offender will not be helpful to investigators.<sup>149</sup>

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<sup>143</sup> Nuffield Council on Bioethics *The Forensic Use of Bioinformation*, above n 108, at 80.

<sup>144</sup> See, for example Frederick Bieber, Charles Brenner and David Lazer "Finding Criminals Through DNA of Their Relatives (2006) 312 Science 1315. This study used a simulated database of 50 000 profiles in order to determine the probability of a relative being the closest database match to the crime scene sample. Parent-child kinships were identified 62% of the time as the best match, meaning an unrelated individual would be identified as the best match 38% of the time. Supporting material for this research demonstrated that the chance of a relative yielding the best match diminishes as the size of the database increases; see also Cassandra Gershaw and others "Forensic Utilisation of Familial Searches in DNA Databases" (2011) 5 Forensic Sci Int Genet 16.

<sup>145</sup> Gersaw and others, above n 144, at 17.

<sup>146</sup> Rohlf and others, above n 140.

<sup>147</sup> Steven Myers and others "Searching for First-Degree Familial Relationships in California's Offender DNA Database: Validation of a likelihood ratio-based approach" (2011) 5 Forensic Sci Int Genet 493; See also Bieber, Brenner and Lazer, above n 144; JM Curran and JS Buckleton "Effectiveness of Familial Searches" (2008) 48 Science & Justice 164. If a more distant relative is in the database that person may have up to a 42% chance of being identified as a first-degree relative of the person who left the crime scene sample.

<sup>148</sup> New Zealand Police "Protocols- Familial Testing," above n 60.

<sup>149</sup> New Zealand Police "Protocols- Familial Testing," above n 60; see also Rohlf and others, above n 140.

Evidence suggesting that the source is a more distant relative, alongside evidence suggesting there is a high probability that the lead is a good one, may alter police investigative techniques.<sup>150</sup> Although the Police will always have to undertake further investigation to locate actual sources, it is the scope and impact of follow up investigations that may be troubling given these results. For example, although information may be easily acquired regarding close relatives, sources are much less likely to contain information about secondary relatives. This means that composing a list of potential suspects could require more aggressive investigation, which may lead to greater intrusion.

Therefore, these findings may exacerbate the numerous concerns already discussed. The greater the number of persons involved, and the less likely that one of them is in fact the perpetrator, the more such investigations may begin to feel like a ‘fishing expedition’ rather than a reasonable search. If it is accepted that the use of this technique causes some infringements of rights then there needs to be a good reason to proceed with its use. Without disputing the clear benefits from a criminal justice perspective, insofar as research casts doubt on the usefulness of the technique the case for widespread use will be affected.

It is highly relevant that the potential of this technique has been subject to conflicting reports, as such studies emphasise the lack of scientific certainty regarding familial searches.<sup>151</sup> This may support the Canadian Privacy Commissioner’s view that not enough is known about this technique currently to warrant its use.<sup>152</sup> It is appropriate to have some certainty of the technique’s scientific value before its widespread implementation, instead of retrospectively proving its value. This further supports an argument for the restricted use of the technique.

## ***F Funds***

Familial analysis is unlikely to result in many matches because it can be highly demanding on police resources. The Ministry of Justice has stated that one reason the regulation of familial

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<sup>150</sup> Rohlfis and others, above n 140.

<sup>151</sup> For example see Curran and Buckleton, above n 147; see also Jeffrey Rosen “Genetic Surveillance for All” (17 March 2009).

<[www.slate.com/articles/news\\_and\\_politics/jurisprudence/2009/03/genetic\\_surveillance\\_for\\_all.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2009/03/genetic_surveillance_for_all.html)>.

<sup>152</sup> Chantal Bernier, “Challenges to Privacy: What Should Keep You Up at Night,” above n 142.

searches is adequate (for the time being) is that there is a significant cost involved in its use, limiting it to the most serious cases.<sup>153</sup> The National Forensic Services Manager, Inspector John Walker, has expressed a similar view, commenting, “[p]rivacy and cost issues have restricted its use”.<sup>154</sup> However, although this may restrict the use of the technique now and into the near future, there is a historic tendency for technologies to become cheaper over time and for increased subsequent use of such technologies, once this has occurred.<sup>155</sup> It seems shortsighted to rely on such a limitation instead of addressing the issue before it becomes of increased concern.

### **G Written Notice Requirements**

Under the CI (BS) Act, a person will be given a specific written notice prior to consenting to giving a bodily sample,<sup>156</sup> being required to give a bodily sample,<sup>157</sup> and being compelled to give a bodily sample.<sup>158</sup> Such notices are intended to provide important information to the person. When requesting a bodily sample a police officer must also inform the person that the purpose is to “obtain information that will be stored on a DNA profile databank and that may be used by the police in the investigation of criminal offences”.<sup>159</sup>

It is arguable that a broad interpretation of this would include familial searches (as such searches still utilise the investigative capabilities of the databank). However, s 30(2) CI (BS) Act states that the person must be informed of this purpose in a manner and in language that the person is likely to understand. It is arguable this will not be the case under the current

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<sup>153</sup> Interview with Scott Ryland, Senior Policy Adviser, Criminal Law Team, Criminal Justice Group, Ministry of Justice, (the author, Ministry of Justice, Wellington, 5 July 2013. No research has been conducted regarding familial searches by the Ministry of Justice; see also Interview with Sebastian Morgan-Lynch, Senior Policy Adviser (Health), Office of the Privacy Commissioner (the author, Office of the Privacy Commissioner, Wellington, 4 July 2013). No research specifically on familial searches has been undertaken by the Privacy Commission.

<sup>154</sup> “Cigarette linked man to two rapes” *The Press New Zealand* (online ed, New Zealand, 15 December 2008).

<sup>155</sup> See, for example Institute of Environmental Science and Research “NEC New Zealand and Institute of Environmental Science and Research Complete Collaborative Evaluation of Portable DNA Analyser” (press release, June 7 2013) <[www.nec.com/en/press/201306/global\\_20130607\\_01.html](http://www.nec.com/en/press/201306/global_20130607_01.html)>; see also Helen Wallace “The UK National DNA Database: Balancing Crime Detection, Human Rights and Privacy” (2006) 7 *EMBO Reports* at s26. The UK National DNA Databank was initially limited by funding considerations to include only violent and sexual offences and domestic burglary. Between 1996 and 2003, legislation continually expanded the powers of the Police to take and retain DNA samples.

<sup>156</sup> CI (BS) Act, s 31.

<sup>157</sup> CI (BS) Act, s 24M and s 24N.

<sup>158</sup> CI (BS) Act, s 24.

<sup>159</sup> CI (BS) Act, s 30(2)(b)(i).

wording. For example, the sister of Joseph Reekers stated that she had never considered the possibility her DNA could implicate her brother when she gave a voluntary sample.<sup>160</sup> Informational privacy principle 3 of the Privacy Act 1993 also supports this view, stating that an individual must be informed of matters listed, including being informed of the purpose for the personal information being collected.<sup>161</sup> Therefore police officers should emphasise that samples can be used not only to implicate the person themselves but also others, as this would better meet the requirements under both Acts.

## ***H Concluding Remarks***

The necessity for placing restrictions on the use of this technique should be balanced against the potential impact on New Zealand of allowing more widespread use. As discussed in this chapter, the current climate would not support widespread use of this technique, particularly given uncertainty regarding the technology. A significant concern regards the impact on minority groups, given inherent biases in the system and the granting of Police discretion under the Act. When viewed alongside the ‘slippery slope’ and ‘function creep’ arguments advanced in Chapter II, it becomes clear that the current system, in which the setting of restrictions is left in the hands of the Police, may not be sufficient to satisfy such concerns in the absence of external oversight. In light of this, the following chapters seek to determine what the most appropriate form of regulation would be.

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<sup>160</sup> Tony Wall, “My Brother, the Killer,” above n 51.

<sup>161</sup> Privacy Act 1993, s 6 Principle 3 (1)(a). A DNA profile constitutes ‘personal information’ under the Privacy Act 1993 as it is ‘information about an identifiable individual;’ See also *Police v Ombudsman* [1988] 1 NZLR 482 where the Court of Appeal considered personal information to include information ‘which informs, instructs, tells or makes aware.’

## Chapter IV

### International Responses

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This chapter will analyse the different approaches taken by several jurisdictions in response to the possible utilisation of familial search techniques. The UK occupies one end of the spectrum, while Canada maintains some of the most restrictive laws in this area.<sup>162</sup> Such variation reflects the contentious and complex nature of the issues surrounding this technique and the differing circumstances existing between countries. In response to this analysis, proposals will be made in Chapter V, as to how New Zealand should best accommodate familial searches.

It is important to appreciate that legislation governing databanks differs across jurisdictions. Although the value of DNA in criminal investigations is not disputed, policies relating to the parameters of these databanks and duration of DNA storage are in a state of flux.<sup>163</sup> A variety of diverging DNA retention regimes have emerged, with the majority of states differing in relation to whom (offender, suspect or volunteer) and what (a profile or the original sample) may be subject to retention.<sup>164</sup> For example, concerns that individuals will be subject to 'lifelong genetic surveillance,' although prevalent in the literature, are not applicable in a New Zealand context due to the limited retention periods under the Act.<sup>165</sup> Despite these differences there has been a general trend to amend legislation to widen the scope of whom profiles might be obtained from.<sup>166</sup> Familial searching is just one component of a much larger debate regarding the utilisation and operation of databanks generally.

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<sup>162</sup> Note that the use of the UK databank has been significantly curtailed as a result of the *Marper* decision. This has resulted in the enactment of the Protection of Freedoms Act 2012. However, *Marper* did not discuss familial searches extensively, nor provide a view on the use of this technique, instead restricting its analysis to the specific facts at hand.

<sup>163</sup> Liz Campbell "Non-conviction' DNA Databases and Criminal Justice: A Comparative Analysis" (2011) JCC Law 55 at 59.

<sup>164</sup> At 59-60.

<sup>165</sup> CI (BS) Act, s 26A. The period of retention in New Zealand is generally 10 years after the date of conviction, provided the offender does not reoffend.

<sup>166</sup> Bob Bramley, "DNA Databases in the United Kingdom and Elsewhere" in Jim Fraser and Robin Williams (eds), *Handbook of Forensic Science* (William Publishing, USA, 2009) 323 at 323.

In New Zealand, ESR is solely responsible for the DNAPD.<sup>167</sup> In many other jurisdictions this is more complex, with multiple providers having access to state databanks and delivering forensic services to law enforcement. This is made more problematic by coordination difficulties surrounding DNA databanks in federal systems. These differences suggest that the ability to control and adequately monitor DNA databanks is likely to be more effective in a New Zealand context than in some other jurisdictions.

### **A Canada**

Canada has traditionally taken a very cautious approach to the use of DNA technology.<sup>168</sup> The wording of the Canadian DNA Identification Act 1998 expressly prohibits familial searching. Provisions of the Act require that an offender's identity only be revealed to law enforcement if there is an *exact* match found between a profile on the databank and the crime scene sample.<sup>169</sup> The Act would need to be amended for familial searches to be used. Due to the difference in drafting, the somewhat restrictive Canadian legislation has allowed for conversations to occur which appear to have slipped under the radar in a New Zealand context.<sup>170</sup>

Because familial searching is a live issue in Canada, large-scale consultation in a public forum has been encouraged, where rights of citizens and the State can be discussed in depth. One significant concern is that the adoption of familial searches will radically expand the use of DNA in investigations.<sup>171</sup> The National DNA Data Bank Advisory Committee<sup>172</sup> is of the

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<sup>167</sup> ESR, above n 12.

<sup>168</sup> Campbell, above n 163, at 61-62; also see generally Julianne Parfett "Canada's DNA databank: Public Safety and Private Costs (2002-2003) 29 Man LJ 33.

<sup>169</sup> DNA Identification Act SC 1998 c 37, s 6. This section specifies that the databank can only communicate a profile and related information if the profile in the databank exactly matches the profile of the sample sent in by the Police, or if the persons DNA profile cannot be excluded as a possible match because there is a technical limit on the completeness of the profile sent in by law enforcement officials.

<sup>170</sup> See, for example Joan Fraser and John Wallace *Public Protection, Privacy and the Search for Balance: A Statutory Review of the DNA Identification Act* (Standing Senate Committee on Legal and Constitutional Affairs, Canada, 2010) at 61-64.

<sup>171</sup> See generally Rushton, above n 89, at 22; see also Chantal Bernier, Assistant Privacy Commissioner of Canada and Carman Baggaley, Strategic Advisor "Appearance Before the Senate Standing Committee on Legal and Constitutional Affairs on the Study of the Provisions and Operation of the DNA Identification Act" (statement to Parliament, Ottawa, Ontario, April 22 2009).

general opinion that familial searching may be beneficial to the Canadian justice system if implemented in a controlled process, with full recognition of the privacy rights of Canadian citizens.<sup>173</sup> To achieve this, the Department of Justice should research how to appropriately craft a provision that would balance the need to protect society, the need to protect privacy and the need to preserve the presumption of innocence. The Committee has emphasised the need for a public forum, where both privacy rights of citizens and the right of the State to utilise this technology can be discussed in depth.<sup>174</sup> It has recommended such searching only be allowed if a series of restrictions are imposed on the ability to conduct such a search. The Canadian Criminal Code establishes and defines a list of ‘primary designated offences,’ which require automatic DNA collection upon conviction.<sup>175</sup> The Committee has suggested possible restrictions should include allowing familial searches only in unsolved cases, which fall within this category, and are of a violent nature. The Committee has also suggested that any use of the technique should require provincial Attorney General authorisation or be subject to warrant procedures.<sup>176</sup>

The Office of the Privacy Commissioner suggested that even restricted use might be problematic, remarking that if familial analysis is allowed for certain serious offences it might one day open the floodgates to such analysis for all designated offences.<sup>177</sup> It has indicated that it will not support familial DNA searching in criminal investigations without more evidence that such searches actually catch criminals; “the effectiveness of familial searches is

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<sup>172</sup> “Privacy and Security” Royal Canadian Mounted Police <[www.rcmp.gc.ca](http://www.rcmp.gc.ca)>. The National DNA Data Bank Advisory Committee is an independent body established to advise the Royal Canadian Mounted Police Commissioner on matters related to the establishment and operation of the data bank.

<sup>173</sup> National DNA Data Bank Advisory Committee *National DNA Data Bank Advisory Committee Annual Report 2008-2009* (National DNA Data Bank Advisory Committee, Canada, 2009) at 18; see also “Privacy and Security” Royal Canadian Mounted Police; above n 172. The DNA Data Bank Advisory Committee is an independent body established to advise the Royal Canadian Mounted Police Commissioner on matters related to the establishment and operation of the data bank.

<sup>174</sup> National DNA Data Bank Advisory Committee *Annual Report 2008-2009*, above n 173, at 20; See also Fraser and Wallace, above n 170, at 61-64. A majority of witnesses who appeared before the Committee expressed serious concerns about the potential negative consequences to the justice system that could arise from this type of searching. Concern was also raised that such searches could infringe upon the privacy of innocent citizens or affect the presumption of innocence.

<sup>175</sup> Criminal Code RSC 1985 c C-46, s 487.04 and s 487.051 See generally Forensic Science and Identification Services *National DNA Data Bank of Canada Annual Report 2011-2012* (Royal Canadian Mounted Police, Ottawa, 2012). Here it is suggested that the technique be limited to the ‘16 most grave offences,’ which include murder, kidnap and aggravated sexual assault. Unlike primary designated offences, for all other offences collection of a DNA sample may occur only with a Court warrant and in relation to a suspected indictable offence, if the best interests of the administration of justice necessitate a comparison between that persons DNA and material found at the crime scene; see also Campbell, above n 163, at 61.

<sup>176</sup> National DNA Data Bank Advisory Committee, *Annual Report 2008-2009*, above n 173, at 19.

<sup>177</sup> Fraser and Wallace, above n 170, at 33.

in doubt, its success rate and application is not well understood, even among law enforcement agencies and, therefore, we would not support it.”<sup>178</sup> The Assistant Privacy Commissioner has expressed concern about the moral implications of familial searches, stating: “Are we comfortable with the deliberate targeting of presumed innocent people, whose DNA has never been subject to inclusion in the DNA databank? A process that includes a judicial decision at the end of trial that leads to a conviction.”<sup>179</sup>

A final hurdle in the Canadian context is that an extension of the use of the DNA databank to analyse family relationships would also bring into question the Supreme Court’s conclusion in *R v Rodgers* that the DNA databank is intended to be an identification tool only- to identify criminals who “have lost any reasonable expectation that their identity will remain secret from law enforcement authorities.”<sup>180</sup>

## ***B Australia***

The six States and two Territories of Australia have independent DNA databanks, which support criminal investigations and the individual criminal justice systems.<sup>181</sup> At a Commonwealth level, the state and territory DNA databanks support the National Criminal DNA Database.<sup>182</sup> None of the current Australian DNA database legislation expressly permits, nor prohibits, familial searching.<sup>183</sup> A recent review of the Federal Crimes Act 1914, the Ford Review, concluded that while the legislature had clearly not examined the issue, there was nothing in the Act that would prevent familial searching.<sup>184</sup> As a result, as has occurred in New Zealand, it appears that a broad interpretation of the current Act would permit this search technique.

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<sup>178</sup> Chantal Bernier, “Challenges to Privacy: What Should Keep You Up at Night,” above n 142.

<sup>179</sup> Chantal Bernier, Assistant Privacy Commissioner of Canada “Privacy and DNA Databanks: Harnessing the Power of DNA Analysis in a Democratic Society” (speech delivered at the Toronto Police Centre of Forensic Sciences, Toronto, March 10 2010).

<sup>180</sup> *R v Rodgers* [2006] 1 S.C.R. 554 at [5] and [42]. This is the leading case decided by the Supreme Court of Canada on the constitutionality of the collection of blood samples from prisoners. The Court upheld a Criminal Code provision allowing for retroactive DNA samples of prisoners without notice.

<sup>181</sup> Australian Law Reform Commission *Essentially Yours* (ALRC 96, 2012) at 1071-1072.

<sup>182</sup> At 1071-1072.

<sup>183</sup> See, for example Australian Crimes Act 1914.

<sup>184</sup> Peter Ford and others *DNA Forensic Procedures: Further Independent Review of Part 1D of the Crimes Act 1914* (Australia, 2010 (The Ford Review)) at 29. The Australian Parliament has not considered the issue, leaving its legal status uncertain. This is despite the Ford Committees’ recommendation in 2010 that familial matching should “only be adopted after an appropriate exposure to public examination and assessment.”

The Ford Review also stated that, “‘familial matching’ has been regarded by the CrimTrac<sup>185</sup> Board as warranting the development of a technical and policy framework before being undertaken.”<sup>186</sup> The review recommended that legislation should not be framed to prohibit familial searching, or other developments in DNA technology, but that significant new techniques should not be employed until they have been subjected to an appropriate amount of exposure to public examination and assessment.<sup>187</sup> As a result, utilisation of familial searches at this time could represent a ‘function creep’ in the use of the DNA databanks beyond the original use of direct matching of suspects and crime scenes.

### ***C The USA***

The position in the USA is less clear and much more nuanced than elsewhere. The DNA Identification Act of 1994 is silent on the issue of familial searching, simply stating that the database will be used “for law enforcement purposes.”<sup>188</sup> The Federal Bureau of Investigation (“FBI”) has hesitated in allowing the use of the National DNA Index System<sup>189</sup> for familial searches at the national level without explicit legislative approval.<sup>190</sup> A Bill was introduced in 2011, which would have allowed familial searching at a federal level. However, this was ultimately unsuccessful.<sup>191</sup>

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<sup>185</sup> CrimTrac operates the National Criminal Investigation DNA Database system in Australia.

<sup>186</sup> Ford and others, above n 184, at 29; see also Paris Cowan “CrimTrac to Widen its DNA Matching Net” *It News* (online ed, Australia. 18 September 2013). CrimTrac has recently begun looking at sourcing technologies that would allow it to expand the Australian databanks search capabilities to include familial searching.

<sup>187</sup> Ford and others, above n 184, at 21, 113-116. The Ford Review considered suggestions for a prohibition on familial matching but recommended only that any legislation not be framed in terms of prohibiting the adoption of developments in DNA technology. Instead it suggested that any significant new techniques should not be employed until they have been subjected to public scrutiny. Significant development in DNA technology or application of it, such as familial matching, should only be adopted after an appropriate exposure to public examination and assessment.

<sup>188</sup> DNA Identification Act of 1994, 42 U.S.C. §14132.

<sup>189</sup> The Federal Bureau of Investigation “Familial Searching” <<http://www.fbi.gov/about-us/lab/biometric-analysis/codis/familial-searching>>. The NDIS is a system of DNA profile records compiled by criminal justice agencies (including federal, state and local law enforcement agencies). The Combined DNA Index System (“CODIS”) is the automated DNA information processing and telecommunication system that supports NDIS. Sometimes the term CODIS is used interchangeably with NDIS.

<sup>190</sup> See also Nakashima, above n 104. Thomas Callaghan, then-head of the FBI CODIS, stated that the FBI would be more comfortable with congressional authorisation to conduct familial searches.

<sup>191</sup> US House. 112<sup>th</sup> Congress, 2<sup>nd</sup> Session. *HR 3361, Utilizing Technology to Solve Cold Cases Act of 2011*, Washington, Government Printing Office, 2012.

The FBI has created an interim policy, allowing states to choose whether to share information regarding both familial and partial matches.<sup>192</sup> A partial match is defined as “the spontaneous product of a regular database search,” thus distinguishing it from a familial search, which is “an intentional or deliberate search.”<sup>193</sup> Both are conducted to identify close biological relatives of the crime scene sample.<sup>194</sup>

The rules governing familial search methods in the USA consist of a patchwork of state law, state and local regulation and even internal laboratory policies, meaning it is impossible to formulate a precise legal picture.<sup>195</sup> Maryland has passed legislation explicitly banning the use of familial searches, while other states include written protocols excluding this technique.<sup>196</sup>

California and Colorado have protocols authorising familial searching and thus provide useful comparisons to the New Zealand position (the subject of Chapter V).<sup>197</sup> Due to the complex picture in the USA only these two states will be scrutinised.

### *1 California*

In 2008, California was the first USA state to release an official policy on familial searching.<sup>198</sup> The name of a possible relative match may be released to the investigating law enforcement agency in two scenarios. First, if a partial match is obtained during an initial search of the databank. Secondly, in prescribed circumstances a special request for a modified search can be made by a law enforcement agency (analogous to a New Zealand familial

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<sup>192</sup> The Federal Bureau of Investigation “Familial Searching,” above n 189.

<sup>193</sup> Thus in the USA a partial match can be reported following an original search of the database in some circumstances. This is distinguished from the New Zealand position.

<sup>194</sup> The Federal Bureau of Investigation “Familial Searching,” above n 189.

<sup>195</sup> Council for Responsible Genetics “State Rules on Partial/Familial Searching” <<http://www.councilforresponsiblegenetics.org/dnadata/usa/usa2.html>>. Only four states expressly permit familial searches: California, Colorado, Texas and Virginia. Pennsylvania, Minnesota and Tennessee are considering legislation. Both Maryland and Washington, D.C, have laws expressly forbidding it. At least another seven states prohibit familial searches, but allow reporting of inadvertent partial matches.

<sup>196</sup> MD Code, Public Safety, §2-506; see also Council for Responsible Genetics “State Rules on Partial/Familial Searching,” above n 184. As a matter of either written or unwritten policy, roughly eight states expressly forbid both partial matching and familial searching (Alaska, Nevada, Utah, New Mexico, Michigan, Vermont, Massachusetts and Georgia).

<sup>197</sup> California Department of Justice, Division of Law Enforcement, Information bulletin no. 2008-BFS-01, DNA partial match (crime scene DNA profile to offender) Policy (2008).

<sup>198</sup> California Department of Justice, above n 197.

search).<sup>199</sup> Thus the Californian position differs from that of New Zealand as information can be released even when a familial search has not been deliberately sought.

The conditions for disclosure in both scenarios require that the case has remained unsolved and that all investigative leads have been exhausted.<sup>200</sup> A Californian Department of Justice Committee, named the Familial Search Committee (“FSC”), must discuss the case with the local law enforcement agency, laboratory, and Prosecutor and decide whether to release the offender’s name. It is the FSC, not the Police, which initiates a background investigation on the candidate to determine whether that candidate can be eliminated, by historical facts and relationships or circumstances, as being a potential relative of the true offender.<sup>201</sup> If this Committee cannot reach a consensus then the Attorney General is given responsibility for a decision.<sup>202</sup>

Specific to the second scenario, when making a special request, a law enforcement agency must first send a written request to the Chief of the Bureau of Forensic Services describing the case, attesting that all other investigative leads have been exhausted and committing the investigative agency and the prosecutor to further investigate the case. If the search results in a manageable number of candidates the Department of Justice will review non-forensic information to identify any additional evidence bearing on relatedness. Finally, the FSC will examine the case and decide whether the name of the offender should be released.<sup>203</sup>

Several technical requirements also distinguish the Californian Protocol from that of New Zealand.<sup>204</sup> Familial searches of the Californian databank can only be conducted on males. This is because of the requirement that both the potentially related offender sample and the crime scene sample be subject to Y-STR typing.<sup>205</sup> Such analysis is specific to the male Y

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<sup>199</sup> At 1-2.

<sup>200</sup> At 1-2.

<sup>201</sup> Fitzhugh Cantrell “Familial DNA Database Searching” (2010) *Journal of Public Inquiry* 24 at 27.

<sup>202</sup> California Department of Justice, above n 197, at 2.

<sup>203</sup> At 2, 5-6.

<sup>204</sup> At 1-2. The crime scene profile must be a single source profile; the investigative agency must complete Y-STR typing for the crime scene evidence; Y-STR analysis of the database offenders’ profiles must be completed based on prioritisation of relatedness. Only when the Y-STR profiles are consistent between the crime scene evidence and offender sample will the Department of Justice review non-forensic information.

<sup>205</sup> At 1-2.

chromosome.<sup>206</sup> This test increases the reliability of the search, by providing further evidence of kinship prior to any investigation.

For the time being, familial searches in California are limited to convicted offender profiles. However, there is no guarantee that it will stay this way and there is a possibility California will extend this search technique to arrestee profiles.<sup>207</sup>

The policy includes confidentiality conditions for all agencies involved and their employees. It also urges agencies to limit the number of individuals involved in the investigation obtaining the released name and information in order to limit the chance of information being wrongly released. The policy also requires that the potential match only be released if the partial match is considered to be a first degree relative, that is, a full-blooded sibling or parent/child relationship. Extensive documentation is required of all collaborating agencies to ensure proper protocol has been followed.<sup>208</sup>

## 2 Colorado

Colorado adopted specific policies for familial searching in 2009, which share similarities with Californian policies. There are three scenarios when partial matches may be released: if a potential match is found during a general search of the database, if a special request is made for a familial search or during a routine familial search of the database performed by the Colorado Bureau of Investigation (“CBI”).<sup>209</sup>

A special request by the Chief Law Enforcement Officer or by the District Attorney must be made to the CBI. Written certification must be provided showing that a case is unsolved with all investigative leads exhausted, and that the unsolved case has negative public safety

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<sup>206</sup> Myers and others, above n 147. Y-STRs are taken specifically from the male Y chromosome. The Y-chromosomes is only found in males and is passed down by the father, making the Y chromosome in any paternal line practically identical; In *Reekers* it was the DNA profile of a sister that led to the offender, showing this is not the case in New Zealand.

<sup>207</sup> Robert Berlet, “A Step too Far: Due Process and DNA Collection in California after Proposition 69” (2007) 40 UC Davis L Rev 1481 at 1495. Unlike in New Zealand, in California arrestee profiles are permanently retained on the database, regardless of conviction. Therefore it would not be difficult to expand the search of the database to include such profiles.

<sup>208</sup> California Department of Justice, above n 197.

<sup>209</sup> Colorado Bureau of Investigation, above n 116, at 1-2.

implications. A well-documented case history must also be included which outlines the procedures followed for evidence collection and all investigative leads that have been followed without success. In addition the requesting agency must agree to adhere to CBI policy and receive CBI approved training in the use of DNA familial search evidence. Finally, the requesting agency must also make a commitment to the CBI to investigate the case further once the partial match's name is released.<sup>210</sup> The protocol also provides that similar procedures must be followed during analysis, as in California. However, although a Y-STR analysis must be completed for male samples, female candidate results can still be investigated.<sup>211</sup>

An important difference between the Colorado protocol and that of New Zealand is that the Colorado protocol clearly sets out the process to be taken throughout the investigation, not just at the databank search stage.<sup>212</sup>

The protocol specifically requires law enforcement to probe further into familial relationships before a sufficient lead is generated. This will involve a thorough investigation of records, which may include: public records, vital statistic records, previous investigative reports, inmate files and inmate visitor logs.<sup>213</sup> Following this, the law enforcement agency must examine the investigative records of the crime and determine whether any family members are possible suspects. This may include utilising surveillance data, work or employment background, and obtaining DNA surreptitiously.<sup>214</sup>

The protocol states that absent exigent circumstances, family members and relatives should only be contacted after the above steps have been taken. Further, the protocol makes explicit reference to the potential for such searches to expose unknown family relationships. To

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<sup>210</sup> At 2.

<sup>211</sup> At 2.

<sup>212</sup> At 3-4.

<sup>213</sup> At 3. Inmate visitor logs are obtained from the Department of Corrections, and the Colorado Crime Information Centre (CCIC) and National Crime Information Center (NCIC) criminal history records.

<sup>214</sup> Such a technique is prohibited in New Zealand under the Human Tissue Act 2008. However, as exemplified in *R v Jarden*, this can occur when police approval is obtained; see, for example "Cigarette linked man to two rapes" *The Press New Zealand*, above n 154.

address such concerns, the protocol includes various considerations that law enforcement must take into account.<sup>215</sup>

#### ***D The UK***

The National DNA Database consists of profiles from throughout the UK.<sup>216</sup> However, each country within the UK has its own criteria for taking bodily samples.<sup>217</sup> Until the *Marper* decision England and Wales had the greatest scope for retaining and continuously searching samples taken from all criminal suspects.<sup>218</sup>

Despite being the first country to authorise the systematic and deliberate use of familial searches, the UK appears to have very little transparency by international standards regarding familial searching.<sup>219</sup> There is no legislation that specifically allows or mandates the Police to use the technique.<sup>220</sup> Further, although the UK has adopted a memorandum of understanding for utilising familial searches, the details of this have not been publicly disseminated, as it has been considered operationally sensitive.<sup>221</sup> Secondary material suggests such protocols include an approval process, considerations for prioritisation, research of family history and training of law enforcement officers.<sup>222</sup> Unfortunately, due to this lack of transparency, it is not possible to delve further into the circumstances in which familial searches are allowed in the UK.

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<sup>215</sup> Colorado Bureau of Investigation, above n 116, at 4. Such considerations include: the possibility that a father is not aware of the existence of offspring, the possibility that a family might have assumed a child's father is someone else, and the existence of other possible family privacy concerns.

<sup>216</sup> Campbell, above n 163, at 58-59.

<sup>217</sup> See Erica Solange Deray "The Double-Helix Double-Edged Sword: Comparing DNA Retention Policies of the United States and the United Kingdom" (2012) 44 *Vanderbilt J Transnatl L* 745 at 750- 753.

<sup>218</sup> Williams and Johnson, above n 85, at 144; see also Protection of Freedoms Act 2012.

<sup>219</sup> Erica Haimes, "Social and Ethical Issues in the Use of Familial Searching in Forensic Investigations: Insights from Family and Kinship Studies" (2006) 34 *JL Med & Ethics* 263 at 264. Familial searching was first used in the UK in 2003.

<sup>220</sup> C Maguire and others "Familial Searching: A Specialist Forensic DNA Profiling Service Utilising the National DNA Database to Identify Unknown Offenders Via their Relatives- The UK Experience" (2014) 8, *Forensic Sci Int Genet* 1 at 3.

<sup>221</sup> R Williams and P Johnson "Inclusiveness, Effectiveness and Intrusiveness: Issues in the Developing Uses of DNA Profiling in Support of Criminal Investigations" (2006) 34 *JL Med & Ethics* 234 at 243. This followed discussions between the Association of Chief Police Officers, the Home Office, the Information Commissioner, and other representatives.

<sup>222</sup> The Federal Bureau of Investigation "Familial Searching," above n 189.

## **Chapter V**

### **Minimising Concerns Regarding the Use of Familial DNA Searches in Criminal Justice**

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There is a spectrum of regulatory possibilities for administering familial searches. The previous chapters have argued that it would be inappropriate to use this technique extensively. Although the use of familial searches in New Zealand is currently restricted to specific situations, the Act itself does not outline the limits of use, leaving these to be defined through a police Protocol. This Chapter will suggest improvements to the current process, which will better accommodate the issues raised. It is of concern that there are currently no legislative or other limits on police ability to utilise this technology. If further expansion becomes desirable, such expansion should only occur following public discussion and in well-defined, explicit circumstances.

#### ***A Legislation or Regulation?***

Familial searching provides useful intelligence in crime solving and so there will be instances where its use is justified and proportionate. However, in order to monitor and restrict the use of the technique, the concerns addressed in Chapter II and Chapter III should be recognised by introducing clear and explicit guidelines on use, which should be made available for scrutiny. There need to be appropriate limits, safeguards, and oversight to ensure protection of privacy and other fundamental values, and to maintain trust in the justice system.

There are three broad approaches one could take to regulating this technology:

1. Ban the process altogether, via legislation.<sup>223</sup> However, to do so is to ignore the many possible benefits of familial searches. This approach is undesirable, as in specific cases this technology has been successfully used to identify and ultimately convict serious offenders. Further, as the technique has already been utilised in New Zealand, it may be unrealistic to prohibit such use entirely.
2. Allow familial searching under statute, but restrict the use of the technique via policy statements. New Zealand currently adopts this approach.<sup>224</sup>

A significant flaw with such a system of control is that the Police have the ability to alter the current Protocol as they see fit. This concern is amplified by the lack of external oversight in this area. This seems an inherent problem with this particular approach to regulation, especially when one considers both ‘function creep’ and ‘slippery slope’ arguments.

3. Specifically legislate for the restricted use of familial searches. This has occurred in the Netherlands and is being considered in Canada and some USA states.<sup>225</sup>

Realistically, there are two possibilities for change, these being legislative amendment or alterations to the current Protocol. I suggest that legislative amendment would be the preferred avenue, though supported by a revised Protocol. The lack of external oversight in New Zealand makes the need for explicit legislation more significant. Allowing police and laboratories to formulate policies for the use of familial searching in a criminal investigation, without external oversight, is an area of concern.

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<sup>223</sup> See MD Code, Public Safety, §2-506. Maryland intentionally adopted this approach; see also DNA Identification Act SC 1998 c 37. Although Canadian legislation currently bans familial searches, this was not the result of deliberate state action.

<sup>224</sup> Colorado, California and the UK have adopted similar approaches.

<sup>225</sup> See Rushton, above n 89, at 20-22.

Decision-making should occur openly and with considerable public input. Advancements in DNA technology, both in the criminal justice system and generally, are occurring rapidly. Therefore it is important to establish appropriate procedures when dealing with technological advancements at this early stage, in order to establish a precedent for future decision-making. Restrictions should be placed on the use of familial searching so that such use does not become more widespread without consensus and clear intention.

The uses to which forensic DNA databanks can be put have been continually expanding.<sup>226</sup> This has been the subject of minimal public debate in New Zealand so far. Public trust in police use of DNA is essential and therefore debate is crucial and should be implemented for all such techniques. The appearance of agreement between police and citizens would encourage public confidence, and promote awareness of emerging technologies in the criminal justice system. It is important to start these debates and heighten public awareness of potential uses of DNA technology in criminal justice, now and in the future. As highlighted by Judge Tompkins, there needs to be a debate about familial searching before the technique becomes more widespread.<sup>227</sup>

## ***B The Solutions***

### *1 Legislative change*

If genetic information is to be made available for reasons unrelated to the criminal investigation purpose for which the databank was originally established, any expansion should be subject to the legislative power of Parliament and not left to be determined by the Executive or the Police. Familial searches are of sufficient public interest that the parameters of their use should be clearly specified in statute rather than being delegated to the Police. Allowing policy to be the only mechanism of implementation is undesirable, as it constitutes sanctioning ad hoc, informal use of police power in an area pervaded over by contentious and

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<sup>226</sup> For example see Rushton, above n 89, at 25. This provides discussion of predictive DNA testing, an emerging technique in forensic DNA analysis.

<sup>227</sup> Tony Wall "Privacy fear for DNA dragnet" *Sunday Star Times* (online ed. New Zealand, 20 January 2013).

delicate issues. The need for legislative authority was clearly recognised upon the creation of DNA databanks and any extension of power regarding their use should also be made through explicit legislation.

The current CI (BS) Act should be amended to offset concerns about the lack of transparency, and to set a precedent for how the use of future technologies in this field are handled. However, policy should still play a role in defining the technical and policing parameters of the search technique.

(a) What should be legislated?

The basic parameters of familial searching should be specifically legislated for. Enshrining the technique legislatively would be preferable as such mechanisms provide for codified limitations on the technique, to protect against further expansion of its use, unless wide support is obtained. The statute should be drafted to reflect the commonly held view that familial searches should only be used if all other investigative avenues have been exhausted and the crime is of a serious, violent, or serial nature. It would also be useful to codify mechanisms for the approval of the use of familial searching in a given case.

A proposed draft amendment to the current legislation, which could be inserted into Part 3 of the current CI (BS) Act, is:

**“x” Authority to conduct a familial search of the DNA profile databank**

- (1) A familial search of the DNA profile databank may be conducted, and the information resulting disclosed to the Police, only under the following circumstances:
- (a) no identical match for the DNA profile collected from the crime scene can be identified on the DNA profile databank; and
  - (b) the investigation for which the DNA samples were collected at the crime scene is an unsolved serious violent offence;<sup>228</sup> and

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<sup>228</sup> The definition in Sentencing Act 2002, s 86A, should be inserted here, or, as indicated below, in an appropriate definition section; see Appendix D.

- (c) other investigative procedures and techniques-
  - (i) have been tried, but have failed to facilitate the successful conclusion of the Police investigation of the case; or
  - (ii) are unlikely to facilitate the successful conclusion of the Police investigation of the case.<sup>229</sup>
  
- (2) If the investigation for which DNA samples were collected at a crime scene did not involve an unsolved serious violent offence, a familial search of the DNA profile databank may be conducted, and the information resulting disclosed to the Police, if the investigation for which the DNA samples were collected at a crime scene involved a case of-
  - (i) unidentified remains; or
  - (ii) a missing person.
  
- (3) The Police shall adopt written policies and procedures in accordance with this section that-
  - (a) establish the criteria and procedures for requesting a familial search and for evaluating a familial match; and
  - (b) ensure that the privacy interests of all the persons identified in a familial search are reasonably protected.
  
- (4) Section 2(1) is amended by inserting the following definition in its appropriate alphabetical order:

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<sup>229</sup> Such language was used in the Crimes Act 1961, s 312CA and s 312CB (now repealed), which relate to obtaining evidence by interception devices. These sections was repealed by the Search and Surveillance Act 2012, s 25(9), as part of that Act's purpose of drawing together, under one statute, powers that had previously existed under separate laws; see also 18 USC § 2518(3)(c) which relates to procedures for interception of wire, oral or electronic communications. This section states, "normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be to dangerous." See also *United States v Webster* 734 F.2d 1048 (5<sup>th</sup> Cir. 1984) at 15. This wording has been used to "insure that wiretapping is not resorted to in a situation in which traditional investigative techniques will suffice to expose crime"; see also Subcommittee on Crime, Terrorism, and Homeland Security, *HR 3361 "The Utilizing DNA Technology to Solve Cold Cases Act of 2011"* (US Government Printing Office, Washington, 2012) at 51.

“**familial search** means a search of the DNA profile databank in which a DNA profile from an unknown source collected from a crime scene is compared to the national DNA databank to determine if a familial match exists between the DNA profile contained in the national DNA databank and the DNA profile collected from the crime scene.”

“**familial match** means a genetic association that has been determined to present a high probability of familial relation between a DNA profile in the DNA profile databank and a DNA profile collected at a crime scene.”

“**serious violent offence** to be defined pursuant to section 86A Sentencing Act 2002 (*see Appendix D*).”<sup>230</sup>

The explicit limitations of situations where a familial search can be undertaken ensure the use of this technique will not be extended without further input from the legislature. However, such limitations attempt to strike an appropriate balance by not unnecessarily restricting such use. The addition of requirements in s ‘x’ (1) (c) ensures familial searching is not resorted to in a situation in which traditional investigative techniques would suffice to solve crime. Restricting this search technique to the DNAPD prevents the possibility, without legislative approval, of searches of the TD being conducted.

Transparency is facilitated by a duty to publish annual reports. Currently the annual Police reporting requirements, under s 76 CI (BS) Act, do not include any requirement to provide information about the types of searches of the databank. It is instead limited to statistics relating to the taking of samples and storing of profiles. Therefore, there are no publicly published documents specifically analysing how many times familial searches have been requested and allowed, or how many have resulted in useful leads. A clause should also be included to amend s 76 of the Act to extend the requirements for information to be included in the annual report of the New Zealand Police. This would somewhat address issues regarding transparency. It is also recommended that, in their annual report, the Police be

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<sup>230</sup> See Sentencing Act, s 86A for definition of ‘serious violent offence.’ As stated at above n 228, this definition could be incorporated via the definition section of the CI (BS) Act.

required to apprise the number of DNA familial tests undertaken. At a minimum for each search the Police should identify the basis for grant or denial and the results of said search (i.e. how many hits and the outcome).<sup>231</sup> Finally, in order to improve public confidence, as discussed in Chapter III, the written and/or oral notice provided prior to taking bodily samples should be revised to explicitly state the possibility of familial links being made.

(b) What should be left to policy?

Given the dynamic nature of this area of forensic science, allowing policy to govern the technical aspects of familial searching will ensure flexibility as the technology develops, rather than the more rigid and time intensive option of continually changing legislation to keep up with advances in science. As per the Colorado protocol, it would be preferable to have policy focusing on what should happen in investigations following the initial search of the databank.

The Police have stated that they do not contact relatives unless they absolutely need to.<sup>232</sup> However, it would be preferable to explicitly include this in guidelines (as has occurred in Colorado). Also, upon discovery of a familial match between a person who left DNA at a crime-scene and a person listed in the national DNA database, there should be compulsory further genetic testing, where possible, to confirm whether these two persons are actually relatives. For example the mandatory inclusion of Y-STR testing (when analysing a male DNA profile) may go some way to further ensure accuracy in results. ESR currently employs this technique,<sup>233</sup> but does not specifically define its use when conducting familial searches. Where possible this should be used to support a match before police start to identify relatives of the known offender. This could be stated in a protocol, as has occurred in Colorado.<sup>234</sup>

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<sup>231</sup> See also Innocence Project Position on Familial Searching of DNA Databases <<http://www.innocenceproject.org>>. More stringent reporting requirements could be added, as suggested by the Innocence Project, such as collecting data regarding the methods used to narrow the pool of suspects and resulting pool size, the methods used to investigate leads, the costs of those investigations and the number of potential suspects identified.

<sup>232</sup> Email from Inspector John Walker, above n 49; Emails from Detective Inspector John Manning, above n 28.

<sup>233</sup> ESR, above n 12.

<sup>234</sup> Colorado Bureau of Investigation, above n 116, at 2. A Y-STR test must be completed where possible; California Department of Justice, above n 197. In California a Y-STR test is mandatory and so female samples cannot be tested.

As stated in Chapter III, in New Zealand there have been a total of 62 searches in relation to 36 cases, meaning multiple searches are not irregular. Therefore, to further restrict the use of this search technique, it may be appropriate to include time period requirements before future familial searches are carried out on the same unmatched profile, subject to exceptions. For example, it could be stated that a new familial search on a previously searched profile may be conducted upon written request no sooner than 12 months from the date of the first search.

In light of research it might also be appropriate to limit the range of permissible follow up investigation to first-degree relatives as a matter of policy. Such an approach would be sensible from a practical perspective in light of the difficulty in identifying and investigating more remote relatives, and the heightened ethical concerns related to such investigation. It would also ensure any illegitimate leads would not first generate highly invasive and costly investigations. The Protocol, as currently drafted, seems to suggest that the list generated will have the potential of identifying close relatives only.<sup>235</sup> This should be re-worded to recognise the possibility of a more distant relative being included.

In other jurisdictions, the officers investigating the leads generated by the familial search have been trained in methods to ensure that they do not disclose unknown familial connections to family members and to ensure they understand the full capabilities of this search technique.<sup>236</sup> The inclusion of a requirement that investigating officers, in a case involving a familial search, have had specific and appropriate training on the limits of the technology should also be adopted as part of a protocol, so that those conducting any subsequent investigations clearly understand the significance of search results. Such training would also minimise the likelihood of unknown familial relationships being disclosed.

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<sup>235</sup> New Zealand Police “Protocols- Familial Testing,” above n 60.

<sup>236</sup> See California Department of Justice, above n 197; Colorado Bureau of Investigation, above n 116.

## 2 *Alterations to the current Protocol*

Instead of amending the current legislation, a third possibility would be to modify the current Protocol to make it clearer and more restricted. However, I suggest this would not be sufficient in itself unless subject to an external oversight committee. The best approach would be for legislative change alongside amendment to the current Protocol.

For example, the term ‘serious offence’ has no shared meaning throughout New Zealand legislation, and when defined, it is only for the purposes of a specific section.<sup>237</sup> Thus it would be appropriate to provide a definition within the Protocol that restricts its use to specific offences including murder, attempted murder, sexual crimes and serious assault. This could incorporate the list of offences provided in s 86A Sentencing Act 2002. The establishment of an oversight committee would allow for external input and approval before this list was expanded further.

As described in the previous paragraphs, the method and procedures for subsequent investigation following the original search should be outlined within a protocol, in line with Colorado.<sup>238</sup>

## 3 *External oversight*

There is currently no external oversight of genetics in the criminal context in New Zealand. This can be contrasted to the medical field, where there are committees and regulatory bodies that contribute to the regulatory environment of health and disability research. This includes such bodies as the Health Research Council of New Zealand,<sup>239</sup> National Ethics

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<sup>237</sup> For example, under the repealed section 243 Crimes Act 1961 “serious offence” means an offence punishable by imprisonment for a term of 5 years or more; and under s29A (4) Land Transport Act 1988 a “specified serious offence” means murder or a sexual crime under part 7 of the Crimes Act 1961 punishable by 7 or more years’ imprisonment, attempt to murder, counseling or attempting to procure murder, conspiracy to murder, accessory after the fact to murder, wounding with intent, intent to cause grievous bodily harm, robbery etc.

<sup>238</sup> Colorado Bureau of Investigation, above n 116.

<sup>239</sup> Health Research Council of New Zealand <<http://www.hrc.govt.nz/>>. The Health Research Council committees provide advice on gene technology, accredit health and disability ethics committees and institutional ethics committees, monitor the safety of large clinical trials and review applications to use new medicines in trials.

Advisory Committee,<sup>240</sup> and the Ethics Committee on Assisted Reproductive Technology.<sup>241</sup> ESR may be considered to be fulfilling some of the oversight role. However, as it is the sole provider of scientific tools, it cannot be seen as a totally impartial observer.

Legislation and policies can only safeguard rights if there is sufficient scrutiny of whether they are being properly implemented and where there is also scrutiny of the outcomes.<sup>242</sup> The Independent Police Conduct Authority provides independent oversight of police conduct. Its functions include receiving complaints alleging misconduct or neglect of duty by a member of the Police or concerning any police practice, policy or procedure affecting a complainant.<sup>243</sup> This may be of benefit if an investigation following a familial search is inappropriately conducted and an individual feels a complaint should be made. However, the requirement that a person involved must first make a complaint restricts such oversight. Because of the nature of familial searches, much of the investigation process occurs ‘behind closed doors’. Oversight of the entire system would be preferable. Further, the idea of an independent oversight body is appealing because it can be proactive in protecting citizens, rather than placing the onus on them to make a complaint.

#### (a) Audits

When the 2009 Amendments were being debated, the Privacy Commissioner called for either the creation of a statutory oversight or consultative committee, following tested international models, or the empowering of the Privacy Commissioner herself to audit compliance with the

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<sup>240</sup> National Ethics Advisory Committee <<http://neac.health.govt.nz/>>. The statutory functions are to provide advice to the Minister of Health on ethical issues of national significance regarding health and disability research and services, and to determine nationally consistent ethical standards and provide security for such research and services.

<sup>241</sup> Ethics Committee on Assisted Reproductive Technology <<http://ecart.health.govt.nz/>>. Considers and determines applications for assisted reproductive procedures or human reproductive research and keep under review appeals previously given. This Committee liaises with other relevant ethics committees on what to do regarding reproductive procedures and human reproductive research.

<sup>242</sup> See Nuffield Council on Bioethics *The Forensic Use of Bioinformation*, above n 108, at 91. This report emphasised the importance of robust ethics and governance oversight of the forensic database, both as a means to protect the liberty, autonomy and privacy of those whose details are recorded on such databases and also to help engender public trust and confidence in their existence and use as part of the criminal justice system.

<sup>243</sup> Independent Police Conduct Authority Act 1988, s 12.

information safeguards laid out in the Act.<sup>244</sup> In Canada, the DNA databank is subject to auditing by the Office of the Privacy Commissioner at any time.<sup>245</sup>

One concern, as expressed above, is that the reporting duties currently under s 76 CI (BS) Act do not require express comment on familial searches. A further concern is that in previous reports the Police have failed to include a number of key statistics required by the Act, in order to comply with these reporting duties.<sup>246</sup> Under s 13(1)(b) Privacy Act 1993, the Privacy Commissioner can only audit the activities of any agency at the request of that agency. Legislative amendment to the CI (BS) Act, giving the Privacy Commissioner the power to require the Police or ESR to carry out audits, either at request or on a regular basis, could provide some additional oversight and ensure these reporting requirements are met.

(b) Independent oversight committee

Alternatively, either an independent committee overseeing familial searches specifically (as exists in California), or a more expansive committee overseeing DNA databanks generally (which may be more appropriate given the limited application of familial searches), could be established. In California, the FSC not only advises but also decides when it is appropriate for a search to be run, and those results to be provided to Police. This Committee acts independently of police and assesses whether the candidate can be eliminated as being a potential relative of the true perpetrator.<sup>247</sup> The opinion may be that, because familial searches are currently not widely used, such a body should not be established unless technology advances further. Given the proposed limited application of the technique, familial searching may not justify the cost of creating a specific familial search body. Alternatively such a committee could meet on an ad hoc basis thus minimising costs, and it would also benefit from multi-disciplinary membership to ensure that it receives the diverse expertise it requires to make informed decisions.

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<sup>244</sup> The Office of the Privacy Commissioner “Submission to the Justice and Electoral Committee,” above n 126, at 5.

<sup>245</sup> “Privacy and Security” Royal Canadian Mounted Police, above n 172.

<sup>246</sup> The Office of the Privacy Commissioner “Submission to the Justice and Electoral Committee,” above n 126.

<sup>247</sup> See California Department of Justice, above n 197, at 5-12.

A wider committee could be considered, which could cover familial searches as well as the use of DNA in the criminal justice system generally. This would have the advantage that it could respond to a wider set of issues than a simple audit, such as new legal, scientific and ethical developments. The committee could have a role in relation to the setting of standards, a matter highlighted, in the Attorney General's report on the 2009 Amendment Bill, as needing an external element and other oversight and advisory roles.<sup>248</sup> Such a committee could be chaired by a judge and include key statutory watchdogs such as the Privacy Commissioner, the Independent Police Conduct Authority and Human Rights Commission, as well as appropriate experts in the fields of criminal justice, genetic ethics and science.<sup>249</sup>

In Canada, the DNA Data Bank Advisory Committee advises the Commissioner of the Royal Canadian Mounted Police on matters regarding the establishment of the databank, operation of the databank and DNA issues.<sup>250</sup> The role of the Committee is to provide the National DNA Data Bank with strategic guidance and direction concerning scientific advancements, matters of law, legislative change and ethical practices.<sup>251</sup> The Committee consists of a chairperson, a vice chairperson, a representative of the office of the Privacy Commissioner and up to six other members which may include representatives of the Police, legal, scientific and academic communities.<sup>252</sup> The Advisory Committee reports to the Commissioner of the Royal Canadian Mounted Police several times per year on key issues that need to be considered for the National DNA Data Bank to continue its successful operation.<sup>253</sup> This provides an additional safeguard, plus an important transparent link to the public.

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<sup>248</sup> The Attorney General, "Report under the New Zealand Bill of Rights Act 1990," above n 47.

<sup>249</sup> For example see "Privacy and Security" Royal Canadian Mounted Police, above n 172. A representative of the Privacy Commissioner sits on the Canadian National DNA Data Bank Advisory Committee to ensure that the Data Bank has available expert advice in the field of individual privacy.

<sup>250</sup> Regulation 3 DNA Data Bank Advisory Committee Regulations 2000, SOR/2000-181. Oversight bodies also exist in various other countries such as in the UK where the National DNA Database Ethics Group is an independent non-statutory body that advises the government on ethical issues concerning the National DNA Database.

<sup>251</sup> Garry Loeppky *National DNA Data Bank of Canada Annual Report 2011-2012* (The National DNA Data Bank Advisory Committee, Canada, 2012) < <http://www.rcmp-grc.gc.ca/> >.

<sup>252</sup> DNA Data Bank Advisory Committee Regulations 2000, SOR/2000-181.

<sup>253</sup> DNA Data Bank Advisory Committee Regulations 2000, SOR/2000-181.

(c) Court order

A final possibility would be to require a Court order to undergo such a search. Creating a statutory framework, under which law enforcement would apply for judicial authorisation to conduct a familial search, would reduce the possibility of this technique being misused. Under the CI (BS) Act Police can go to court to acquire a suspect compulsion order.<sup>254</sup> A similar process could be required prior to conducting a familial search. Alternatively a warrant could be required before following up on particular relatives after such a search. As familial searching should be rare, judicial oversight of the process should not be unduly cumbersome. In Canada, approval of the Court is required prior to a bodily sample being taken and stored in the databank. As familial searches are meant to have limited application, surely it would not be too onerous on the judicial system to include such a requirement here.

(d) Summary

Any increase in police powers should be accompanied by a corresponding increase in oversight of the system to ensure that the potential for abuse and harmful consequences are minimised. Therefore, establishing one of the above forms of external oversight to monitor the current police regime (and this area of the criminal justice system generally) would mitigate the concerns raised regarding the current regime and provide a sufficient alternative to specific legislation. Alternatively such oversight would also be valuable to supplement the legislative changes suggested above.

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<sup>254</sup> Under CI (BS) Act, section 13, an application may be made to a District Court Judge for an order requiring a suspect who is over the age of 17 years to give a bodily sample in any case where there is good cause to suspect that the suspect has committed an imprisonable offence; and the suspect has refused to consent to the taking of a bodily sample in response to a suspect request.

## Conclusion

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This dissertation has assessed the use of familial searches generally, and the extension of the search capabilities of New Zealand's DNA Databank as a result of adopting this technique. I have argued that although familial search methods show substantial promise for aiding investigations, such methods also raise serious concerns.

In permitting this search technique, under the current Act, there has been a failure to set explicit boundaries on the extent to which this technology can be used. The current Protocol does attempt to strike a workable balance between concerns raised by the technology and the desirability to catch criminals. However, the conclusions reached in Chapter II and Chapter III suggest that allowing the Police to self regulate the use of this technique is inappropriate. If it is accepted that familial searches should be used, albeit in limited circumstances, then it is important to have restraints on such use to avoid inadvertent expansion, and to ensure any intended expansion is subject to adequate control and direction. Sophisticated technological methods of investigation call for sophisticated means of coordination and control. Improved regulation would go a long way to mitigate concerns.

Parliament should ensure that any technological expansion has true legitimacy. Legitimacy depends not only on a careful, considered balancing of the many public goods at stake, but also on public authorisation and transparency. Therefore, I have suggested that the parameters of familial searches should be specifically defined in legislation. Policy should be used to define technical and policing parameters.

Such technological expansion is an example of people being increasingly brought into the criminal justice system by way of their DNA. While police have the right to generate suspects to a crime, there has also been a tradition of protecting the privacy and rights of individuals who would not otherwise be under suspicion, and upholding the presumption of innocence. The ability of familial searches to expand the reach of DNA databanks is just one example of the many potential uses of DNA in criminal justice. By focusing on this one use, I have sought

to highlight the need for robust and informed public debate about the appropriate limits on the uses of DNA databanks and DNA profiling generally. There has been a radical shift in recent years, in which DNA is starting to look much more like a surveillance tool than a tool for criminal investigation. Discussion of this particular use of the DNA databank therefore focuses questions on the extent to which we, as a society, will accept wider use of such technologies, and the types of safeguards that should be put in place in response to such expansion.

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<[www.nec.com/en/press/201306/global\\_20130607\\_01.html](http://www.nec.com/en/press/201306/global_20130607_01.html)>.

Simon Power “Parliament Passes DNA Law” (press release, 28 October, 2009)  
<[beehive.govt.nz](http://beehive.govt.nz)>.

### **Letters and Email Correspondence**

Email from Aphra Green, Criminal Law Policy Manager, Ministry of Justice, in response to questions regarding the review of the Criminal Investigations (Bodily Samples) Act 1995 (9 October 2013).

Email from Kevin Glubb, Partner at Meredith Connell, in response to questions regarding the Prosecution’s arguments in *Police v Reekers* (22 July 2013).

Emails from Detective Inspector John Manning, Police- ESR Liaison Adviser, in response to statistical queries, (4 July to 15 July 2013).

Email from Tim McBride, civil liberties and human rights lawyer, in response to questions regarding the use of familial searches in New Zealand (25 July 2103).

Email from Judge Arthur Tompkins, District Court Judge and honorary member of Interpol's DNA Monitoring Expert Group, in response to questions regarding the use of familial searches in New Zealand (1 October 2013).

Email from Inspector John Walker, Manager: National Forensic Services, in response to statistical queries (8 July 2013).

Email from Dr Jill Vintiner, Forensic Programme Manager, in response to questions regarding the science behind familial searches (5 July 2013).

### **Unpublished papers**

Chantal Bernier, Assistant Privacy Commissioner of Canada “Challenges to Privacy: what should keep you up at night” (speech delivered at the Access & Privacy Workshop, St. John's, Newfoundland and Labrador, May 16 2011).

Chantal Bernier, Assistant Privacy Commissioner of Canada “Privacy and DNA Databanks: Harnessing the Power of DNA Analysis in a Democratic Society” (speech delivered at the Toronto Police Centre of Forensic Sciences, Toronto, March 10 2010).

Chantal Bernier, Assistant Privacy Commissioner of Canada and Carman Baggaley, Strategic Advisor “Appearance Before the Senate Standing Committee on Legal and Constitutional Affairs on the Study of the Provisions and Operation of the DNA Identification Act” (statement to Parliament, Ottawa, Ontario, April 22 2009).

Thomas Callaghan, Chief of the CODIS Unit, Federal Bureau of Investigation (presentation before the FBI Symposium on Familial Searching and Genetic Privacy, Arlington, VA, March 17-18, 2008).

Fingerprint Profiles and DNA Samples in Forensic Science” (presentation before the International Symposium on Technology and Society: Social Implications of Emerging Technologies, Singapore, 2010).

David O'Dwyer “DNA and the Criminal Process: ‘Striking the Right Balance’: The Case for a ‘Reflective’ Approach” (PHD Thesis, University of Limerick, 2012).

### **Other sources**

California Department of Justice, Division of Law Enforcement “DNA Partial Match (Crime Scene DNA Profile to Offender) Policy” (Information bulletin no. 2008-BFS-01, 2008).

Colorado Bureau of Investigation “DNA Familial Search Policy” (Policy Statement, 22 October 2009).

David Lazer “Searching the Family Tree for Suspects: Ethical and Implementation Issues in the Familial Searching of DNA Databases” (Policy Brief, Harvard University, Taubman Center, March 2008).

New Zealand Police “Intention to Charge (Part 2B)- Operational Guidelines” (sent as email attachment by Inspector John Walker on 1 October 2013).

New Zealand Police “NZ Police request for a familial search of the NZ DNA Profile Databank” (sent as email attachment by Detective Inspector John Manning on 4 July 2013).

New Zealand Police “Protocols- Familial Testing” (Police Protocol sent as email attachment by Detective Inspector John Manning on 4 July 2013, 25 September 2012).

## Appendices

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### *Appendix A: New Zealand Police Operational Guidelines*

#### **Intention to Charge (Part 2B) - Operational Sampling Guidelines**

##### **Discretion to obtain a Temporary Databank sample**

Part 2B of the Act does not require Police to take Temporary Databank Samples from every adult or youth they intend to charge. The Act provides Police Officers with discretion as to whether they will use this power or not. The discretion must be exercised appropriately with consideration given to each case on an individual basis which must be justifiable.

**A supervisor** must approve the submission of the sample to ESR for obtaining the temporary databank profile, to assist in maintaining the integrity of the DNA process and to confirm appropriate use of the statutory discretion. A DNA sampling qualifying charge must be filed prior to submission for analysis.

A number of factors are relevant when deciding whether or not to take a bodily sample from a certain person under the Part 2B provisions.

##### **Risks**

There are legal risks to Police if the powers in Part 2B of the Act are not used appropriately.

<b>If...</b>	<b>Then...</b>
Police discretion is not appropriately used	the Courts may decide that the suspect was subjected to an unreasonable search and seizure.
the power of detention is abused or is used in a way that breaches the NZ Bill of Rights Act	claims of unlawful detention against Police may result.
Police operate outside of what is legislatively acceptable	it may result in costs being awarded against Police and/or the dismissal of serious charges.

Constables and supervisors must work within the boundaries of the law, and be guided by the criteria outlined in this chapter in order to maintain the integrity of the DNA process.

##### **Factors relevant when deciding whether or not to take a sample**

These factors (or questions) must be considered when deciding whether or not to take a sample.

##### **Do the legislative criteria exist?**

The legislation allows Police Officers to compel a person aged 17 years or over to provide a DNA sample for the temporary DNA databank if they 'intend to charge' them with an 'imprisonable

offence' or offence against any of the provisions

listed in Part 3 of the Schedule. They have the same power to take DNA from an individual who is under 17 years of age, but only if they intend to charge them with a 'relevant offence'.

An officer must not, therefore, take a bodily sample if:

- the offence for which a person has been detained is not an 'imprisonable offence' or offence against any of the provisions listed in Part 3 of the Schedule, or
- if the person is less than 17 years old and the offence is not a relevant offence, or
- the constable has not (yet) decided that they will charge the person with this offence.

**Note:** A DNA profile for the Temporary DNA Databank cannot be derived from a sample until after a charge for the appropriate imprisonable or offence against any of the provisions listed in Part 3 of the Schedule or relevant offence is filed. It is unlawful for a constable to take a DNA sample under Part 2B from a person they do not intend to charge as such a sample cannot be used.

### **Are there reasons not to take a sample?**

In each case when considering whether or not to take a Part 2B DNA sample officers should ask themselves:

- Am I able to obtain a valid sample under the circumstances? (e.g. is an appropriate sampling kit available)
- Will obtaining a sample pose any risks to the health of the alleged offender?
- Will taking a sample compromise the safety of anyone else?
- Is the taking of the sample permitted by law?

It is not possible to anticipate all the situations when it will not be appropriate to take a Part 2B sample (although they are likely to be rare).

### **Is a DNA profile already held for this individual?**

If a DNA sample has been taken from a person since 2000 and the DNA profile of a person is already held on either the National DNA Profile Databank or on the Temporary Databank, it will already have been searched against unsolved crime scene profiles and is not needed again for this purpose.

A constable should **not** take a bodily sample from a person they 'intend to charge' if a DNA Databank profile is already held for the person.

### **Are there particular circumstances relating to the offence or suspect that support the taking of a DNA sample?**

If the legislative criteria exist and there are no reasons against taking the sample (including those above) then officers can choose to take a Part 2B DNA sample if:

- the particular circumstances, or
- nature of the current offence, or
- the particular suspect, give the officer:
  - reasonable grounds to suspect that the individual has committed other offending, and

- that the other suspected offending is the type of offending where DNA evidence would be relevant.

**Does the current offence indicate reasonable grounds to suspect other offending where DNA would be important evidence?** If a person has been apprehended for a DNA qualifying offence, in particular a serious offence or an offence for which DNA is often a factor, it is more **likely** that their DNA profile will link to a DNA profile derived from an unsolved crime scene.

These offences are generally also those offences that society has a greater interest in solving and include:

- Serious violent offences;
- Sexual crime;
- Firearms offences;
- Burglary; and
- Class A drugs offences.

Officers should take a Part 2B DNA sample from persons that they intend to charge with an offence in one of these offences, unless there is a reason not to.

**Are there personal characteristics that indicate reasonable grounds to suspect other offending where DNA would be relevant evidence?**



## **Protocols - Familial Testing**

The Criminal Investigations (Bodily Samples) Act 1995 (CI(BS) Act), provides the legislative framework for the collection of samples from individuals for the purpose of storing DNA profiling information onto a NZ DNA Profile Databank (DPD).

The legislation does not extend to providing a framework for forensic utilisation of the DPD. In its absence, ESR and NZ Police have developed agreed procedures for operational activities involving the NZ DPD.

### ***Familial searching:***

1. A familial search of the DPD may be considered for a serious offence where there is no DNA link resulting from a specific crime profile search.
2. Familial searching does not contravene the CI(BS) Act however, it is recognised by both ESR and the NZ Police that this type of search has important ethical implications and should only be considered on a case-by-case basis.
3. As this type of search explores familial relatedness it shall only be undertaken where it is considered necessary and proportionate in a particular case.
4. NZ Police shall have an authorisation process for familial search requests to ESR which considers the seriousness of the offence and whether a familial search is appropriate for the investigation.
5. NZ Police shall provide ESR with the necessary documentation which demonstrates the search has been authorised and should proceed. Authorisation shall be via completion of the proforma “NZ Police Request for a Familial Search of the NZ DNA Profile Databank”.
6. A familial search will result in a list of potential close relatives to the offender and will contain sensitive personal information.
7. The list is ranked statistically on the basis of how likely a person will be a relative of the offender. ESR shall assist NZ Police in the scientific interpretation of these results.
8. Access to this list shall be restricted to Police and ESR staff involved in the investigation.
9. ESR shall keep a record of familial search requests made by NZ Police and shall provide a summary of these in an annual NZ DNA Profile Databank Report.

25 September 2012



### **NZ Police request for a familial search of the NZ DNA Profile Databank**

Before proceeding with a familial search please check the O/C is aware that authorisation for a familial search must be obtained from the District Crime Manager. A record of that authorisation must be submitted to Inspector John Walker, National Forensic Services Adviser at PNHQ, along with this familial search request.

A familial search will be charged at the advanced analytical hourly rate & is additional to other ESR forensic charges associated with the case. Please check that the O/C is aware that these additional charges will apply.

Police case name/Operation name:

DOCLOC number:

O/C case:

Familial Search Authorised by:

Please indicate here that cost implications have these been raised with (O/C's name) & the additional cost has been approved:

Date of request:

ESR case number:

Biology case manager:

Date search undertaken:

Date results provided to police:

## **86A Interpretation**

...

**serious violent offence** means an offence against any of the following provisions of the Crimes Act 1961:

- (1) section 128B (sexual violation):
- (2) section 129 (attempted sexual violation and assault with intent to commit sexual violation):
- (3) section 129A(1) (sexual connection with consent induced by threat):
- (4) section 131(1) (sexual connection with dependent family member under 18 years):
- (5) section 131(2) (attempted sexual connection with dependent family member under 18 years):
- (6) section 132(1) (sexual connection with child):
- (7) section 132(2) (attempted sexual connection with child):
- (8) section 132(3) (indecent act on child):
- (9) section 134(1) (sexual connection with young person):
- (10) section 134(2) (attempted sexual connection with young person):
- (11) section 134(3) (indecent act on young person):
- (12) section 135 (indecent assault):
- (13) section 138(1) (exploitative sexual connection with person with significant impairment):
- (14) section 138(2) (attempted exploitative sexual connection with person with significant impairment):
- (15) section 142A (compelling indecent act with animal):
- (16) section 144A (sexual conduct with children and young people outside New Zealand):
- (17) section 172 (murder):
- (18) section 173 (attempted murder):
- (19) section 174 (counselling or attempting to procure murder):
- (20) section 175 (conspiracy to murder):
- (21) section 177 (manslaughter):
- (22) section 188(1) (wounding with intent to cause grievous bodily harm):
- (23) section 188(2) (wounding with intent to injure):
- (24) section 189(1) (injuring with intent to cause grievous bodily harm):
- (25) section 191(1) (aggravated wounding):
- (26) section 191(2) (aggravated injury):
- (27) section 198(1) (discharging firearm or doing dangerous act with intent to do grievous bodily harm):
- (28) section 198(2) (discharging firearm or doing dangerous act with intent to injure):
- (29) section 198A(1) (using firearm against law enforcement officer, etc):
- (30) section 198A(2) (using firearm with intent to resist arrest or detention):
- (31) section 198B (commission of crime with firearm):
- (32) section 200(1) (poisoning with intent to cause grievous bodily harm):
- (33) section 201 (infecting with disease):
- (34) section 208 (abduction for purposes of marriage or sexual connection):
- (35) section 209 (kidnapping):
- (36) section 232(1) (aggravated burglary):
- (37) section 234 (robbery):
- (38) section 235 (aggravated robbery):
- (39) section 236(1) (causing grievous bodily harm with intent to rob or assault with intent to rob in specified circumstances):
- (40) section 236(2) (assault with intent to rob)

