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6 April 2009

Dear Mr Picker,

Please find **enclosed** our submission on the Submission to the Justice and Electoral Committee on the Criminal Investigations (Bodily Samples) Amendment Bill 2009. We do not wish to make an oral submission to the Committee.

Yours sincerely,

Patrick Holmes
Chief Executive Officer

Amnesty International Aotearoa New Zealand:

Submission to the Justice and Electoral Committee
on the Criminal Investigations (Bodily Samples)
Amendment Bill 2009

6 April 2009

Amnesty International is an independent movement of over 2.2 million people in more than 150 countries who contribute their time, money and expertise to the promotion human rights and international campaigning to prevent some of the most serious violations.

Amnesty International, recognising that human rights are indivisible and interdependent, also works to promote all the human rights enshrined in the Universal Declaration of Human Rights and other international standards, through human rights education programs and campaigning for ratification of human rights treaties.

Amnesty International's New Zealand section has approximately 8,100 members and regular donors, and active members in some 30 local community groups, specialist groups and various action networks. At any one time its members are working on cases and issues in approximately 90 countries. The work of Amnesty International's New Zealand members is supported by paid staff and volunteers based in Auckland, and the movement's International Secretariat based in London.

Amnesty International is impartial. It is independent of any government, political persuasion or religious creed. It does not support or oppose any government or political system, nor does it support or oppose the views of the victims whose rights it seeks to protect

Amnesty International's policies and plans are discussed and decided at general meetings of the membership and meetings of their elected representatives held every two years (International Councils). In New Zealand their implementation is managed by the Chief Executive Officer overseen by an elected Governance Team. Between International Councils the international affairs of Amnesty International are managed by the Secretary General, who reports to an elected International Executive Committee of members from at least seven different countries.

Amnesty International is financed by its worldwide membership and the public. Strict guidelines exist to safeguard its independence of the organisation; AI does not accept government funds for its campaigning work or organisation.

Amnesty International has formal relations with the United Nations Economic and Social Council (ECOSOC), UNESCO, the Council of Europe, the Organization of American States, the Organisation of African Unity, and the Inter-Parliamentary Union.

Amnesty International was awarded the United Nations Human Rights Prize for "outstanding achievements in the field of human rights" on the 30th anniversary of the Universal Declaration of Human Rights. The movement received the Nobel Peace Prize in 1977 for its contribution to "securing the ground for freedom, for justice, and thereby also for peace in the world".

SUMMARY

- 1.0 Amnesty International Aotearoa New Zealand (AIANZ) welcomes the opportunity to make a submission on the Criminal Investigations (Bodily Samples) Amendment Bill. AIANZ considers that the provisions in the Bill, allowing the expanded collection and retention of DNA samples and profiles, place an unjustifiable and disproportionate limit on New Zealander's right to privacy.
- 2.0 The right to privacy is an important check and balance on the power of the State to intrude into the private lives of citizens. It goes hand in hand with the 'golden thread' of criminal law, which is that we are all innocent until proved guilty in a court of law. This principle is enshrined in Article 11 of the Universal Declaration of Human Rights. Human rights must not be lightly set aside through the expansion of law enforcement powers. AIANZ is consequently concerned that no sound reasons have been provided to sufficiently justify the mandatory collection of DNA on this scale from people in New Zealand who are currently innocent of a crime.
- 3.0 We therefore urge the Committee to amend the Bill so that:
 - 3.1 The current law is retained in relation to the collection and retention of DNA samples and DNA profiles, as this strikes a more reasonable and appropriate balance;
 - 3.2 In keeping with this, the threshold for the compulsory collection of DNA samples must be either being charged with, arrested for, or convicted of an offence (i.e. samples should not be mandatorily collected on the basis of suspicion alone);
 - 3.3 In keeping with the current law, no DNA profiles are added to Police databank/databases for individuals who are not convicted of the relevant offence.

NEW ZEALAND'S HUMAN RIGHTS OBLIGATIONS

- 4.0 As Committee members will be aware, the New Zealand Government has ratified in good faith the International Covenant on Civil and Political Rights (ICCPR). Article 17 of this legal instrument provides that no-one in New Zealand shall be subjected to arbitrary or unlawful interference with their privacy, and that everyone has the right to the protection of the law against such interference.

RIGHT TO PRIVACY CONCERNS RAISED BY THE BILL

- 5.0 Under the current Criminal Investigations (Bodily Samples) Act 1995, the Police obtain DNA samples in the following ways:
 - 5.1 With the consent of the individual (e.g. a suspect) to the sample being taken, and in the case of a young person with the consent of the person and of their parent); or
 - 5.2 With judicial oversight and approval (e.g. in response to a Police application for a suspect compulsion order or a juvenile compulsion order);
- 6.0 Under the current law, DNA profiles (derived from the DNA samples) can only be stored on the DNA profile database once the person has been convicted of the offence (or a related offence). This observes the golden thread of the criminal law, that we are

all innocent until proved guilty in a court of law. It also strikes a reasonable balance between law enforcement and the right to privacy.

- 7.0 However, as we understand the Bill, it proposes that the Police (using reasonable force where necessary) will be able to take DNA samples from all people suspected of committing an offence, without the safeguards of either obtaining subject consent or of having to obtain a compulsion order through the court. In addition the list of 'relevant offences' - for which DNA samples can be taken - is to be broader than those in the current Act. Of concern, it appears that the Police will be able to store DNA profiles (derived from the DNA samples) of suspects, whether or not the individuals are then convicted of the relevant offence.
- 8.0 A balancing is required between the existing human rights standards, and policy goals involving greater powers for law enforcement agencies (along with the expanded retention of personal data). In our view, the Bill does not strike a justifiable and proportionate balance between these two interests, and therefore unjustifiably breaches the privacy rights of people in New Zealand.
- 9.0 In particular, AIANZ is concerned that no justificatory material has been provided to support the view that this expansion of powers is necessary in a democratic society. Nor has it been demonstrated that the Police have difficulty under the current law in obtaining DNA samples from suspects, through either the use of individual consent or the existing forms of compulsion orders and notices. In fact, the Police's Annual Report for the 2007/08 period states (in Part 5.5 at pages 80 to 81) that the vast majority of the DNA samples were provided through the consent of the individual (with some 9,500 provided voluntarily compared with 160 compulsion orders). Of the DNA profiles, some 71,000 were provided by consent, compared to some 14,000 obtained under databank compulsion orders. Nor, as the Annual Report indicates, do any requests for compulsion orders appear to have been declined.
- 10.0 We note that the one statistic that would have provided the requisite insights into the practical value of expanding the collection of DNA is the number of those convicted as a result of such collection. However, this statistic is a noticeable omission from the Annual Report (stated as "not captured nationally" on page 81).
- 11.0 It is significant that as recently in December 2008 – when faced with similar legislative provisions from the United Kingdom – the European Court of Human Rights in *S and Marper v United Kingdom*¹ concluded that:

The blanket and indiscriminate nature of the powers of retention of fingerprints, cellular samples and DNA profiles of persons suspected but not convicted of offences, as applied in the case of the present applicants, fails to strike a fair balance between the competing public and private interests and that the respondent State has overstepped any acceptable margin of appreciation in this regard. Accordingly, the retention at issue [which included the retention of cellular samples and DNA profiles] constitutes a disproportionate interference with the applicants' right to respect for private life and cannot be regarded as necessary in a democratic society.

¹ *S and Marper v United Kingdom* ECHR Grand Chamber, 4 December 2008, at paragraph 125.

- 12.0 Similarly, the Canadian Supreme Court in *R v Rodgers*² has held that the retention of DNA profiles of only those convicted of offences does not appear to breach their right to privacy.

RECOMMENDATIONS FOR CHANGES TO THE BILL

- 13.0 We urge the Committee to amend the Bill so that:
- 13.1 The current law is retained in relation to the collection and retention of DNA samples and DNA profiles, as this strikes a more reasonable and appropriate balance;
 - 13.2 In keeping with this, the threshold for the compulsory collection of DNA samples must be either being charged with, arrested for, or convicted of an offence (i.e. samples should not be mandatorily collected on the basis of suspicion alone);
 - 13.3 In keeping with the current law, no DNA profiles are added to Police databank/databases for individuals who are not convicted of the relevant offence.

² *R v Rodgers* [2006] 1 S.C.R. 554, 2006 SCC 15.