



The Use of DNA in Criminal Investigations

SUBMISSION TO Te Aka Matua o te Ture / the Law Commission

REGARDING The Use of DNA in Criminal Investigations

SUBMISSION BY YouthLaw Aotearoa Inc

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1 Introduction

- 1.1 YouthLaw Aotearoa (“YouthLaw Aotearoa”) is a Community Law Centre vested under the Legal Services Act 2000. We are part of the nationwide network of twenty four community law centres throughout Aotearoa / New Zealand.
- 1.2 YouthLaw Aotearoa was established in 1987 as a national centre providing free legal advice and advocacy specifically for children and young people under 25 years of age. We provide four main services to children and young people:
 - Legal advice via our 0800 UTHLAW (884 529) advice line;
 - Legal information on our website and through other resources;
 - Education sessions for young people and those who work with them; and
 - We work to make law changes that will improve access to justice for children and young people.
- 1.3 We help with issues such as school suspensions, employment problems, family issues, debt, bullying, and minor criminal cases. Our lawyers can support children and young people with basic information and advice to help them resolve an issue themselves and, where the case is more complex, we may provide legal representation at hearings and tribunals. We run preventative legal education workshops and publish youth-friendly information resources. We also make submissions on youth-related law.
- 1.4 This submission is informed by YouthLaw Aotearoa’s insights through working with children and young people across New Zealand. Due to funding limitations we do not have the capacity to make detailed submissions in relation to the Law Commission’s *Issues Paper 43: The Use of DNA in Criminal Investigations Te Whakamahi i te Ira Tangata i ngā Mātai Taihara*¹ (“the Issues Paper”). However, we will briefly address some key issues for children and young people as discussed with Law Commission staff on 20 March 2019. We have also **attached** a copy of our submission to Te Uepū Hāpai i te Ora / the Safe and Effective Justice Advisory Group (“Te Uepū Hāpai i te Ora submission”) which sets out our views in relation to the wider issues with the criminal justice system and the youth justice system in particular.

2 Consent Samples

- 2.1 As discussed, YouthLaw Aotearoa have significant concerns in relation to the ability of young people to consent to the taking of DNA samples. In particular, we agree with the concerns raised in the Issues Paper in relation to:
 - The inherent power imbalance between the suspect and the requesting officer;
 - The complexity and volume of information that needs to be provided to the suspect; and
 - The difficulty of obtaining appropriate legal advice.
- 2.2 Where the suspect is a young person, and by this term we mean both those between 14 and 17 and those under the age of 24, there are concerns in relation to their ability to evaluate the information they are provided and to give informed consent. The neurological and psychological evidence that development of the frontal lobes of the brain does not cease until around 25 years old is particularly compelling. It is this area

¹ Te Aka Matua o te Ture Law Commission (2018) *Issues Paper 43: The Use of DNA in Criminal Investigations Te Whakamahi i te Ira Tangata i ngā Mātai Taihara* (Wellington, New Zealand)

of the brain which helps to regulate decision-making.² Such evidence has led to calls from senior paediatricians to redefine 'adolescence' as the period between ages 10 and 24, and to reframe laws, social policies and service systems accordingly³ and we have made submissions in this regard in the context of our Te Uepū Hāpai i te Ora submission.

- 2.3 It is also now widely accepted by those working in the youth justice system that many of the young people in the Youth Court have a neuro-disability or mental illness. No prevalence study of this issue has been undertaken in New Zealand but a study by the Children's Commissioner for England in 2012 canvassed several studies on specific conditions worldwide.⁴ The report points out the overrepresentation of neuro-disability amongst youth offenders, especially when compared with the wider population. For example, one study found a 15% prevalence rate of conditions on the autistic spectrum among young people in custody, compared with between 0.6% and 1.2% in the general population. It also noted rates of between 10.9% and 11.7% of Foetal Alcohol Syndrome Disorder (FASD) among young offenders, compared to 0.15% in the general population.⁵ Overall, the report found that youth offenders in the UK are 10 times more likely to have a learning disability than young people generally: 60 to 90% have a communication disorder.
- 2.3 A recent New Zealand study also found that 92% of young people in youth-justice residences showed significant difficulties in at least one area of achievement (IQ, attention, literacy, numeracy, verbal abilities) with reading skills being particularly low (mean ability at 4th percentile).⁶ We also have concerns in relation to the prevalence and impact of language and communication disorders. A systematic review of research in this area in 2016 found that language disorder affects 50 to 60% of young people in youth justice settings independent of cognitive impairment.⁷
- 2.5 Put simply, how can a young person consent if they do not understand what they are being asked? In our Te Uepū Hāpai i te Ora submission, we argue that it is essential that young people are screened for any neuro-disabilities, mental health disorders or communication disorders upon entry to the youth justice system because of the immediate impact that such disorders may have.⁸ Requests for consent are just one aspect of this. We also argue that resources and mechanisms must be put in place so that young people assessed as having a neuro-disability, mental disorder or

² Blakemore S-J, Choudhury, S (2006), Development of the adolescent brain: implications for executive function and social cognition. *Journal of Child Psychology and Psychiatry*, 47:3, 296–312.

³ Sawyer, S.M., Azzopardi, P.S., Wickremarathne, D. and Patton, G.C. (2018), The age of adolescence. *The Lancet Child & Adolescent Health*, 2(3): 223-228.

⁴ Children's Commissioner, "Nobody made the connection: the prevalence of neurodisability in young people who offend", October 2012. Retrieved from: <https://www.childrenscommissioner.gov.uk/wp-content/uploads/2017/07/Nobody-made-the-connection.pdf> (accessed 22 February 2019)

⁵ Kesia Sherwood, a PhD student at the University of Otago, is currently researching the lack of appropriate legislation for dealing with young offenders with FASD, with the aim of drafting policy that could give the justice system a mandate to check for FASD, then deal with young offenders accordingly. See: <https://www.stuff.co.nz/national/health/90139279/foetal-alcohol-spectrum-disorder--an-invisible-generation-of-sufferers> (accessed 5 March 2019)

⁶ Rucklidge JJ, McLean AP, Bateup P (2013) Criminal offending and learning disabilities in New Zealand youth: Does reading comprehension predict recidivism? *Crime & Delinquency* 59(8): 1263-1286.

⁷ Anderson, S. A. S., Hawes, D. J., & Snow, P. C. (2016). Language impairments among youth offenders: A systematic review. *Children and Youth Services Review*, 65, 195–203. <https://doi.org/10.1016/j.childyouth.2016.04.004>.

⁸ Youthlaw Aotearoa, (2019) *Hurt People, hurt people: Submission to Te Uepū Hāpai i te Ora / the Safe and Effective Justice Advisory Group* (YouthLaw Aotearoa, Auckland) at page 17.

communication disorder are provided with appropriate support.⁹ For young people with mental disorders, they should be provided with appropriate mental health services. For those with a neuro-disability or communication disorder, a communication assistant should be provided to facilitate their understanding.

2.6 YouthLaw Aotearoa also have concerns that parental consent is not a sufficient safeguard for both the reasons set out above at paragraph 2.1, as well as the following factors specifically relating to the parent:

- We agree with the concerns raised in the Issues Paper in relation to previous research showing that parents may encourage their children to cooperate, the impact of the parent / child relationship and more practical issues in relation to how the required written and oral information is provided to the young person.
- Parents or caregivers may have little experience or understanding of the law, what is at stake and the implications of the decision in terms of how this may affect their child in the future.
- In practice we have also seen that where young people have some form of neuro-disability or mental health diagnosis, their parents or caregivers will also have similar issues which limit their ability to understand what they are being asked and give informed consent.

3 Access to Legal Advice

3.1 In our Te Uepū Hāpai i te Ora submission, we outline the concerns raised by those working within the youth justice system that intention-to-charge FGCs are frequently convened prior to the appointment of a youth advocate. This means that young people are therefore presented with allegations of offending from the police without having had the benefit of legal advice leading to pressure on the young person to admit responsibility for offending as a means of gaining access to the diversionary outcomes of a successful FGC.¹⁰ If young people are also being asked to consent to the taking of a DNA sample at this point these concerns only increase.

3.2 As discussed, the amendments to the Oranga Tamariki Act 1989 coming into force on 1 July 2019 include an obligation for a youth advocate to be appointed where an intention-to-charge FGC occurs involving a charge with a maximum term of 10 years or more imprisonment.¹¹ We welcome the spirit of this amendment but we consider that it does not go far enough. Our view is that children and young people should have the benefit of advice from a youth advocate both before and at any intention-to-charge FGC, regardless of the level of their alleged offending.

3.3 We believe that the youth advocate should be appointed before the intention-to-charge FGC takes place, so the youth advocate has the opportunity to read any papers, prepare appropriately for the FGC, and discuss the possible charge with the young person ahead of the FGC. We consider that having a young person meet their youth advocate for the first time on the day of the FGC may defeat the purpose of representation at that stage, given that the environment lends itself to pressure on the young person to admit the offence. The youth advocate will also need to discuss

⁹ Ibid.

¹⁰ If the child or young person does not admit the offence, then the FGC cannot proceed with any plan or recommendation that requires them to assume that they committed the offence.

¹¹ New section 248A Oranga Tamariki Act 1989, added by section 108 Oranga Tamariki Legislation Act 2017

possible plans with the young person before the FGC, to give them the best chance of obtaining a good outcome at the end of the process.

4 Young people aged 18-24

- 4.1 From 1 July 2019, some 17 year olds will be included in the Youth Court jurisdiction. Although this amendment is welcome and much-needed, our view is that it does not go far enough given the neurological and psychological evidence discussed above at paragraph 2.2. Given this, in our Te Uepū Hāpai i te Ora submission we seek the extension of the jurisdiction of the Youth Court to include young adults up until their 25th birthday, or the introduction of a transitional court for 18-24 year olds. We also seek corresponding changes to the treatment of those in this age group in all aspects of the justice system including the collection and retention of DNA samples.

5 Known Person Databank

- 5.1 As discussed, we have significant concerns in relation to the conflict between the retention regime and the rehabilitative focus of the youth justice regime. We also support the Law Commission's goals in recommending reform.
- 5.2 In particular, we are concerned that requiring a person's age to weigh in favour of their profile being added to the known person databank is discrimination on the basis of age. We disagree with the Law Commission's assessment that this policy is justified by the proportion of criminal justice apprehensions and matches between profiles of those aged 14-16 and those on the Crime Sample Databank because this policy must be viewed in the context of the wider youth justice system, where the focus is on reducing youth offending and promoting rehabilitation.
- 5.3 Our concerns increase in relation for rangatahi Māori who are grossly overrepresented in criminal justice statistics. In 2017/18 Māori children and young people made up 65% of all children and young people with charges finalised in court.¹² This overrepresentation is also getting worse - although the overall numbers of children and young people in Court have decreased over the last ten years, the number of rangatahi Māori has decreased at a lower rate resulting in increased disparity between Māori and non-Māori.¹³
- 5.4 The Crown has an obligation under the Treaty of Waitangi to address this disparity rather than making it worse by cycling young people back into the criminal justice system. The Waitangi Tribunal, in its 2017 report on the Crown and Disproportionate Reoffending Rates¹⁴, found that the overrepresentation of Māori in the criminal justice system was "clear, disturbing and in need of an urgent response".¹⁵ It stated:

"The grossly disproportionate, decades-long, and increasing Māori overrepresentation in the nation's prisons is a devastating situation for Māori, and for the nation. Disproportionate Māori reoffending and reimprisonment rates contribute to this. That this has come to be seen as normal only heightens

¹²Youth Justice Indicators Summary Report, April 2018

<https://www.justice.govt.nz/assets/Documents/Publications/children-and-young-people-in-court-data-highlights-jun2018.pdf> (accessed 22 February 2019)

¹³ Ibid.

¹⁴ Waitangi Tribunal, *Tū Mai Te Rangī! Report on the Crown and Disproportionate Reoffending Rates*, 2017, (Legislation Direct, Wellington). Retrieved from: <https://bit.ly/2TezYxD> (accessed 1 March 2019)

¹⁵ Ibid at 2.3

the need for the Crown to meet its obligations under the Treaty principles of active protection and equity."¹⁶

5.5 More specifically, we consider that this policy falls at the proportionality hurdle. In particular:

- We acknowledge that the data is that 40% of criminal justice apprehensions are of people aged 15-24. However, this is a broad age range and does not tell us how many of those apprehensions fall outside the scope of this policy (i.e. those aged 20 and over).
- There is also a lack of data on how many profiles obtained from 17-19 year olds match profiles on the Crime Sample Databank.
- When weighed up against the overall aims of the youth justice system of rehabilitation and diversion / early exit as set out in the Youth Crime Action Plan and the Crown's obligations to reduce disparities, this policy is disproportionate overall.

5.6 We also agree with concerns raised in the Issues Paper in relation to the lack of transparency in relation to this policy.

¹⁶ *Ibid* at 5.1.2