Human Rights Commission
Te Kāhui Tika Tangata

Human Rights Commission Submission on the Use of DNA in Criminal Investigations

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Human Rights Commission submission to Law Commission on the Use of DNA in Criminal Investigations

Introduction

1. The Human Rights Commission (Commission) welcomes this opportunity to make a submission to the Law Commission on the use of DNA in Criminal Investigations. The current policy and practice regime in this area is governed by the Criminal Investigations (Bodily Samples) Act 1995 (the CIBS Act).

2. As the Law Commission has highlighted in its issues paper, the collection of DNA in criminal investigations engages a number of human rights at different stages of the criminal justice process. This begins with the apprehension of the individual and procurement of a DNA sample from them and extends through to the future analysis and use of that DNA sample and its ongoing retention and storage.

3. The Commission welcomes the Law Commission's extensive analysis of the human rights issues that arise in relation to the use of DNA along this continuum. As the Law Commission has identified, key human rights engaged relating to the use of DNA include:

    a. The right to be free from discrimination under section 19 of the New Zealand Bill of Rights Act 1990 (NZBORA)
    b. The right to be secure against unreasonable search and seizure (section 21 NZBORA)
    c. The right to privacy (Article 19, International Covenant for Civil and Political Rights (ICCPR) and the Privacy Act 1993.
    d. The rights of children and young people to special protection in criminal justice procedures (Article 40, United Nations Convention on the Rights of Children (UNCRC))

4. The overarching human rights principles of personal autonomy and dignity are also important considerations in this context.[1]

5. The Commission acknowledges that DNA matching is a powerful and effective tool for investigating and solving crimes. However, procedures for procuring, using and storing a person's DNA information may impose limitations or infringe upon their human rights guaranteed under the NZBORA and international human rights treaties that New Zealand has ratified.

6. It follows that the way in which DNA is obtained from an individual, the use to which it is put and the manner and duration of its storage, must be able to be justified in a way that conforms with human rights standards. Among other things, this requires that procedures are as minimally intrusive and rights-protective as is possible and that a robust, independent oversight mechanism is in place to monitor and report on practices, receive complaints and provide remedial relief for breaches.

[1] See Nowak, M (2003), *Introduction to the Human Rights Regime*, Martinus Nijhoff Publishers, Leiden.

7. Against this context, the Commission makes the following observations:

    a. A new independent statutory body should ideally be established to provide oversight of the use of DNA in criminal investigations. Oversight functions should also include consideration and reporting upon the impact of procedures upon *tikanga Māori*.

    b. Aspects of the current regime appear to be inconsistent with the UNCRC, statutory youth justice principles and the right to freedom from age discrimination under the NZBORA. For example, the Police Manual provides that the fact that a person is aged below 20 may be considered as an *"additional relevant factor"* when deciding to obtain a sample for the "known person" databank.

    c. Furthermore, provisions and procedures that authorise/enable ethnic inferencing and familial searching are likely to amount to unlawful discrimination under the NZBORA.

8. More detail on each of these observations is provided below.

A. Oversight

9. The Commission considers that, ideally, a new independent statutory body should be established to provide oversight of the use of DNA in criminal investigations.

10. The CIBS regime, which is designed to procure, utilise and store personal biometric data, is inherently rights-intrusive. As the UN Office of the High Commissioner has observed:

> *Such data is particularly sensitive, as it is by definition inseparably linked to a particular person and that person's life, and has the potential to be gravely abused. For example, identity theft on the basis of biometrics is extremely difficult to remedy and may seriously affect an individual's rights. Moreover, biometric data may be used for different purposes from those for which it was collected, including the unlawful tracking and monitoring of individuals. Given those risks, particular attention should be paid to questions of necessity and proportionality in the collection of biometric data. Against that background, it is worrisome that some States are embarking on vast biometric data-based projects without having adequate legal and procedural safeguards in place.*[2]

11. Due to the level and nature of state intrusion upon rights that is inherent in this jurisdiction, the Commission suggests that an oversight model similar to the Inspector General (IG) of the Intelligence and Security sector is adopted.

12. The Commission considers that the following features of the IG oversight model make it suitable for adoption to this jurisdiction:

[2] Report of the United Nations High Commissioner for Human Rights, *The right to privacy in the digital age*, A/HRC/39/29 (3 August 2018) at paragraph 14.

a. **It is an independent statutory officer appointed by the Governor-General for a set term**[3]. As such, the IG has the necessary institutional and structural independence and is supported by a well-resourced office, including a Deputy IG, four investigative staff, an IT manager/security advisor and exective assistance/office manager.

b. **It has a broad set of statutory functions similar to those identified by the Law Commission, including human rights monitoring**. These include functions to conduct inquiries into a broad range of systemic, individual and practice matters, including those concerning compliance with human rights law,[4] to deal with complaints,[5] to conduct reviews of procedures and compliance systems,[6] to conduct own-motion reviews of any agency activity,[7] to conduct unscheduled audits of procedures and compliance systems.[8]

c. **It is empowered to consult with relevant external independent statutory officers when carrying out functions.** These include the Auditor-General, the Privacy Commissioner, an Ombudsman and a Human Rights Commissioner.[9]

d. **An independent panel provides external advisory support** . A two-person statutory advisory panel to the Inspector-General is appointed by the Governor-General, on a recommendation of the Prime Minister made after consulting the Intelligence and Security Committee of Parliament.[10]

13. It is notable that many functional aspects of the IG model are identified by the Law Commission as being desirable in this jurisdiction, in particular those regarding inquiries, complaints and reviews of procedures and compliance systems. These can be adapted to include oversight over the retention and destruction of biological and DNA samples, and the auditing of compliance with Treaty of Waitangi, NZBORA, privacy and international human rights obligations.

14. The Commission also supports the Law Commission's suggestion[11] that one of the key features of such a framework would be a central decision-making role for Māori to reflect both the disproprtionate impact that policy and operational decisions in the criminal justice system have on Māori and to uphold Treaty of Waitangi principles. Again, the IG model could be adapted to establish an external independent advisory panel, or similar entity, which advises on the impact of practices upon the *tikanga* rights of Māori over their DNA as guaranteed under the Treaty.

15. In additiion, we recommend that an oversight entity be empowered to provide a restitutionary remedy in the event that its inquiry into a complaint determines that an

[3] Intelligence and Security Act 2017, Part 6, sub-part 1, ss 157-191.
[4] Ibid s 158(1)(a).
[5] Ibid ss 158(1)(e), 171.
[6] Ibid s 158(1)(f).
[7] Ibid s 158(1)(g).
[8] Ibid s 158(1)(h).
[9] Ibid s 161.
[10] Ibid ss 167-170
[11] Law Commission Issues Paper, paragraph 15.3.

individual's rights have been breached or that due process requirements have not been followed. This should include orders that enable DNA samples to be removed from the databank and destroyed. The current framework under the CIBS Act does not provide for any review or remedial avenue outside of the judicial processes, all of which occur at the front end of the process; ie for the purposes of authorising procurement.

16. With regard to whether an existing body could perform the role, we consider that the Independent Police Conduct Authority (IPCA) would be best placed among current independent agencies.[12] This is due to its particular focus on the criminal justice system and its structure – it must be chaired by a judge or retired judge.[13] However, we consider that amendments would need to be made to the Independent Police Conduct Authority Act 1988 in order to to establish a specific set of oversight functions to be discharged by a specialist unit under its auspices, accompanied by the requisite additional resources. The IPCA's current functions are currently too narrowly defined for such a role to be grafted on to it without statutory amendment.[14]

17. The Commission considers that a multi agency oversight model, such as the National Preventative Mechanism (NPM) under the Optional Protocol Convention Against Torture[15], is not likely to be as effective as a sole focal-point statutory office. Existing watchdog agencies are likely to struggle to meet the additional demands that this approach would bear upon their existing baselines. In addition, the complexity and narrow focus of the DNA jurisdiction warrants a specialist oversight approach.

B. Children and young people

18. The criminal investigations jurisdiction extends to the child and youth justice jurisdiction and thus engages the UNCRC, which has been ratified by New Zealand and applies to children and young people up to the age of 18.

19. As a matter of first principle, the UNCRC provides that a youth justice system should be predicated upon the social reintegration/restoration of the child or youth offender, rather than their criminalisation. Article 40 of UNCRC provides that:

> *Every child alleged as, accused of, or recognised as having infringed the penal law has the right to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, reinforcing the child's respect for the human rights and fundamental freedoms of others and taking into account the child's age and the desirability of promoting the child's reintegration and the child assuming a constructive role in society.*

[12] The Human Rights Commission itself currently does not have the expertise, resources or necessary legislative mandate to carry out a principal oversight role. However, with adequate resourcing the Commission could play an advisory role on the human rights aspects of the use of DNA in criminal investigations.
[13] Independent Police Conduct Authority Act 1988, s 5A.
[14] Ibid s 12.
[15] We consider tha the NPM itself, which is vested under the Crimes of Torture Act, is not an appropriate vehicle for an oversight role in the Criminal Investigations (Bodily Samples) Act jurisdiction due to the very specific role it has under the OPCAT to monitor of places of detention.

20. The non-criminalistion principle also heads the set of statutory principles that apply to New Zealand's youth justice system. Section 208(a) of the Oranga Tamariki Act 1989 establishes:

> *the principle that, unless the public interest requires otherwise, criminal proceedings should not be instituted against a child or young person if there is an alternative means of dealing with the matter.*

21. Against this context, Article 16 of UNCROC stipulates that no child shall be subjected to arbitrary or unlawful interference with his or her privacy and has the right to the protection of the law against such interference. The intersection between youth justice and privacy rights under UNCRC is specifically addressed by United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules") Rule 8.1, which provides:

> *The juvenile's right to privacy shall be respected at all stages in order to avoid harm being caused to her or him by undue publicity or by the process of labelling*.

22. While non-binding, the Beijing Rules have been applied by the New Zealand Courts when interpreting the application of criminal justice legislation to a child or young person.[16]

Retention of DNA samples from children and young people

23. The current regime under the CIBS Act authorises the procurement and ongoing retention of DNA from children and young people. It does not appear to integrate or align with, in any meaningful way, the youth justice principles of the Oranga Tamariki Act 1989 and the UNCRC that recognise the vulnerability of the child, and affirm their right to special protections, including non-criminalisation and reintegration.[17]

24. For example, currently DNA profiles from convicted children (11- 13 year olds) are retained indefinitely. For young persons (14-16 year olds), a conviction is not a pre-requisite. They can be required to provide a bodily sample if Police *intend to charge* or *have arrested* the young person in respect of a "relevant offence". These "relevant offences" include relatively low-mid level offences which would ordinarily be dealt with through police diversion or full discharge by the Youth Court.[18]

25. As noted by the Law Commission:

> *The retention of DNA profiles depends on the seriousness of the charge the young person originally faced, the Part under the Act under which their sample was taken and their sentence or order following conviction (or the charge being provide in the Youth Court). The intitial retention periods are four years, 10 years or an indefinte period of retention. A four-year retention period will only apply if the Youth Court discharges a charge against a young person after finding it proved. The 10-year retention period applies for other community-based sentences or orders imposed by a court, and the indefinite period applies if the young person was sentenced to imprisonment or if their sample was obtained under a Part 3 databank compulsion notice.*

[16] See *TV3 v N* (name suppression) (unreported, HC Auckland, 7 July 2006, Winkelmann J); *R v Rawiri & Ors* (Unreported, HC Auckland 19 June 2002), Fisher J.
[17] Oranga Tamariki Act, s 208(a) and (h), Art 40 UNCRC.
[18] Oranga Tamariki Act, s 282.

26. Most children and young people who offend are dealt with by way of diversion or, if they appear before the Youth Court, are required to carry out obligations imposed on them by a plan formulated at a family group conference. The matter is usually finalised − if the young person has satisfactorily completed requirements of the diversion − by the police not prosecuting the offender or the Youth Court discharging the information under section 282 of the Oranga Tamariki Act 1989 so that the charge is never deemed to have been laid. Children and Young people dealt with in this way have no criminal conviction and any identifying details are destroyed.

27. It would be inconsistent to then retain a DNA record for four years in this circumstance. This illustrates the jarring policy imperitives that respectively underpin the criminal investigations legislation and youth justice jurisdiction. It follows that the Commission also strongly agrees with the Law Commissions' conclusion that the indefinite retention of a young persons DNA, if they are sentenced to imprisonment or if their sample was obtained under a databank compulsion notice, is inconsistent with youth justice principles.

28. Furthermore, the retention of DNA in such circumstances almost certainly has a disproportionate impact on Māori rangatahi and tamariki who make up the majority of young people who are apprehended by police and appear in the Youth Court. This again jars with the statutory youth justice principles concerned with strengthening and fostering the ability of whanau, hapu and iwi to deal with offending by their rangatahi and tamariki.[19]

29. Courts in overseas jurisdictions have taken a rights-affirmative approach when considering data/DNA retention cases involving young offenders. In Canada, the Supreme Court in *R v RC*[20] held that retaining the DNA of a first time juvenille offender would be grossly disproportionate, noting that "the taking and retention of a DNA sample is not a trivial matter and, absent a compelling public interest, would inherently constitute a grave intrusion on the subject's right to personal and informational privacy."[21]

30. Similarly, the European Court of Human Rights in *S v Marper*[22] noted that:

> *the retention of unconvicted person's data may be especially harmful in the case of minors given their special situation and the importance of their development and integration into society ... Drawing on the provisions of Article 40 of the United Nations Convention of the Rights of the Child of 1989 and the special position of minors in the criminal justice sphere, the Court considers that particular attention should be paid to the protection of juveniles form any detriment that may result from the retention by the authorities of their private data.*

31. In *R v RC*, the Supreme Court of Canada also observed that, by creating a separate criminal justice system for young persons, Parliament recognised the heightened vulnerability and reduced maturity of young persons and, consistent with Canada's international obligations, sought to extend to them enhanced procedural protections and to interfere with their personal freedom and privacy as littled as possible.[23]

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[19] Oranga Tamariki Act 1989, s 208(c) and (f)(i)
[20] [2005] 3 SCR 99, 2005 SCC 61
[21] Ibid. As the individual concerned was only 13 at the time he committed the crime, the retention of the material was considered in light of the principles and objects of the youth justice regime.
[22] 30562/04 [2008] ECHR 1581 (4/12/08)
[23] *R v RC* [2005] 3 S.C.R 99; 2005 SCC 61 at para 41.

32. This observation is higly salient when applied to the New Zealand context, given the synergy between the UNCRC youth justice principles and those enacted under s 208 of the Oranga Tamariki Act 1989. The Commission therefore considers that reform to the CIBS Act must be aligned with these principles. There should accordingly be a statutory presumption against obtaining and retaining DNA samples from children aged under 18. Exceptions to this presumption must be scaffolded by special protection measures that recognise the vulnerability of children and young people and reflect the principles of non-criminalisation and reintegration. It follows that the Children's Commissioner ought to also have an advisory or consultative role in the oversight in this area.

Collection of DNA profile for the Temporary Databank from those under 20 years – Police Manual

33. On a more specific, yet related, point, the Commission agrees with the Law Commission's analysis that the "additional relevant factor" set out in the Police Manual - namely, whether a person is under the age of 20 – for police to consider when deciding whether to obtain a sample for the known person databank, could amount to age discrimination under the NZBORA. This policy constitutes *prima facie* age discrimination per s 19 NZBORA and Part 1A of the Human Rights Act 1993.

34. In the Commission's view, the above limitation on the s 19 right is not justified and would likely fail a s 5 NZBORA test if considered by the Courts. On its own, the high proportion of matches for those aged 14-16 years does not provide a strong enough justification for weighing age as a factor in favour of obtaining a sample for the known person databank. It is settled law that the Courts will interpet criminal law policy and legislation consistently with the UNCRC wherever possible.[24] Furthermore, 17 year olds are subject to UNCRC protections and, as of 1 July 2019, will be covered by the youth justice jurisdiction under the Oranga Tamariki Act 1989 for almost all offences.

C. Discrimination

Forensic DNA Phenotyping and ethnic inferencing

35. As noted by the Law Commission, ethnic inferencing is currently used to assist in resolving investigations into serious criminal offending and is used in a small number of cases. The Commission agrees with the Law Commission's analysis that ethnic inferencing could amount to discrimination under section 19(1) of the NZBORA. We also agree that the practice raises issues of racial profiling and stigmatisation, particularly for Māori.

36. We thereby strongly support the Law Commission's call for wide public consultation on this issue as part of the law reform process, including that:

> *…This would need to include a central role for Māori in a way that recognises the principles of rangatiratanga, partnership and equity under the Treaty of Waitangi. Those principles would also require Māori to have an active role in development of policies governing use and oversight if forensic DNA phenotyping were ultimately permitted.*[25]

[24] *DP v R* [2016] 2 NZLR 306 at [11].
[25] Law Commission Issues Paper at 6.64.

Familial Searching

37. The Human Rights Act 1993 (HRA) provides that it is unlawful to discriminate against a person on the grounds of "family status".[26] Family status is broadly defined and includes "being a relative of a particular person". Discrimination may be direct or indirect. Direct discrimination involves different treatment that adversely impacts on one of the prohibited groups and is not subject to a specific exception or cannot be justified in terms of section 5 NZBORA. Indirect discrimination is said to occur when an apparently neutral policy or practice has a disproportionate and negative impact on one of the groups identified in the HRA. Indirect discrimination allows a defence of good reason. To establish good reason the policy, practice or requirement must be *necessary* not simply reasonable.[27]

38. Familial DNA searching employs the use of DNA databases and is based on matches between samples for full or partial hits. A full hit means that the test has identified the likely offender. A partial hit means a family member or relative of the person is likely to have committed the offence.

39. Research in other countries suggests that familial searching is not racially neutral. For example, in the United States the Hispanic and African American communities are subject to disproportionate arrest rates.[28] As a result, the DNA of Hispanics and African−Americans is more likely to be added to the databank system than that of other demographic groups and there is more likely to be a partial match once the sample is added to the database. Members of these groups are therefore more likely to be targeted by law enforcement agencies.[29]

40. It is possible that where there is a partial match, family members could be either coerced into giving a sample (for example, being told they will be charged if they refuse to provide a sample) or detained on the suspicion of having committed an offence to allow the collection of their DNA. A familial searching policy could therefore infringe the right to be free from discrimination on the ground of family status as it would allow the targeting and testing of people who were otherwise not connected to the commission of a crime simply because of their relationship to a particular individual.

41. The Commission further considers that effect of a familial searching policy would be to discriminate against Māori both directly and indirectly, given the current highly disproportionate apprehension, arrest and conviction of Māori compared with other ethnicities. We therefore agree with the Law Commission that familial searching has the potential to discriminate on grounds of family status and race under section 19(1) NZBORA.

[26] Human Rights Act 1993 s 21(1)(l).
[27] See *Brookers Human Rights Law* Vol 1 at HR65.01-HR65.10.
[28] D Grimm "The Demographics of genetic surveillance: Familial DNA testing and the Hispanic Community" [2007] Columbia Law Review Vol.107:1164 at 116.
[29] Ibid.