PRINCIPAL YOUTH COURT JUDGE FOR NEW ZEALAND
TE KAIWHAKAWĀ MATUA O TE KŌTI TAIOHI
Judge John Walker

10 December 2019

Donna Buckingham
Law Commissioner
New Zealand Law Commission
Level 9 Solnet House, 70 The Terrace
Wellington

Dear Donna

Retention of child and young person DNA profiles

1. Thank you for taking the time to meet with me on 5 August 2019. At that time I gave some initial views on the retention of child and young person DNA profiles as Principal Youth Court Judge. Since that meeting I had the opportunity to raise this issue with my Advisory Group ("PYJAG") and the following reflects the input from that group. This group is made up of nine senior Youth Court Judges from throughout the country.

2. In considering this issue we have referred to the memorandum provided by [redacted] Senior Legal & Policy Advisor, dated 1 August 2019. We thank you also for providing the views expressed by young people [redacted].

3. We recognise that retaining DNA pursues the legitimate purpose of detecting and preventing crime, and that there is an inherent tension with the protection of personal liberties. This tension is amplified when dealing with children and young people.

4. We are of the view that a more nuanced regime for the handing of DNA retention would be a significant improvement. We respectfully express the following views:

   4.1. We support no retention of DNA for children and young people who are given a s 282 order under the Oranga Tamariki Act 1989 ("OTA").
   4.2. We support discretionary retention for those made subject to a s 283 order, determined at disposition. We would defer to any academic evidence as to appropriate timeframes.
   4.3. We support discretionary retention for those who are convicted and transferred to the District Court with mandated timeframe thresholds. Again, we would defer to any academic evidence as to appropriate timeframes.
   4.4. We place importance on ensuring consistency between the OTA and Criminal Investigations (Bodily Samples) Act 1995 ("CIBS").

[redacted]

4.5. We place importance on ensuring that tikanga and te ao Māori considerations applicable under the OTA are strengthened and supported through the application of CIBS.

4.6. We place importance on developing best practice guidelines and processes around the manner in which DNA of children and young people is obtained in light of the vulnerabilities of this cohort.

5. I now deal with each of the issues in more detail.

Issue 1: Retention of DNA profiles for children and young people given a Youth Court order under s 282

6. Section 282(1) OTA provides Youth Court judges with the discretion to, after inquiring into the circumstances of a case, discharge the charge against the child or young person. Section 282(2) states that when a charge is discharged under subs (1), the charge is deemed never to have been filed.

7. In *Police v JL* [2006] DCR 494 the Judge considered the unique wording of s 282 to have "but one meaning".[1] Namely, the provision employs strong language deemed sufficiently clear to mean that the charge has been quashed, annulled, or made null and void. We agree with this interpretation of s 282. We are of the view that no DNA retention should take place in such circumstances.

8. In *S. and Marper v The United Kingdom* [2008] ECHR 1581 the European Court of Human Rights determined that the holding of DNA samples for individuals who had been arrested but were later acquitted (or where the charges were dropped) was a violation of their right to privacy under the European Convention on Human Rights.[2] Retention in the circumstances also compromised Article 40 of the UN Convention on the Rights of the Child 1989.[3] In our view this does not support retention where a s 282 order has been made by a New Zealand Youth Court.

9. It is acknowledged that in New Zealand a s 282 order may be made in cases where the charge has been proved, usually by admission at the family group conference. This is not uncommon, and we acknowledge that s 282 orders may be made in circumstances where the offending is be more than minor, including instances of sexual offending. Upon the successful completion of the child or young person's Family Group Conference ("FGC") plan, a s 282 order will be deemed appropriate where the Court is satisfied that the child or young person's general culpability in the widest sense is such that their case is to be treated as though "the charge had never been filed".

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[1] *Police v JL* [2006] DCR 494 at [48].

[2] While New Zealand is not a signatory to the European Convention on Human Rights, the issue central to *S v Marpur* was the application of Article 17 ICCPR to which New Zealand is a party.

[3] New Zealand is a signatory to the United Nations Convention on the Rights of the Child. Article 40 states that it is the right of every child alleged to have infringed penal law to be treated in a manner consistent with the promotion of the child's dignity and worth, reinforcing the respect for the child's human rights and fundamental freedoms.

The public interest (which includes public safety) is one of the four considerations which must be weighed up by the Youth Court Judge in determining whether a s 282 order is appropriate.[4]

10. We view the wording of the provision as a clear indication that Parliament intended to enable children and young people to have a clean slate moving forward in appropriate circumstances.

We do not support DNA retention for children and young people where a s 282 discharge has been ordered for the reasons provided.

Issue 2: Retention of DNA profiles for children and young people made subject to a Youth Court order under s 283

11. Section 283 provides a hierarchy of orders available to a Youth Court Judge at disposition. The charge against a child or young person must have been proved.[5] These orders range from a admonish and discharge,[6] through to supervision with residence.[7] The most serious order able to be made by the Youth Court is s 283(o), conviction and transfer to the District Court. We deal specifically with this at Issue 3. If orders are made under s 283 this is usually because the charges have been proved and the offending is sufficiently serious to warrant a higher end response. A criminal record is thereby created.

12. A Youth Court Judge must consider the s 4A primary considerations at disposition. These are the well-being and best interests of the child or young person; and the public interest (which includes public safety); and the interests of any victim; and the accountability of the child or young person for their behaviour. In applying these considerations, the Judge will be guided by principles in ss 5 and 208. Additional principles under s 284 must be applied at sentencing and if an order under s 283(o) is considered.[8]

13. The focus on diversion and alternative action for youth offending means a significant amount of offending by young people does not reach the Youth Court.[9] Within this group which does, the risk posed to the community and therefore the public interest in retention can vary. We are

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[4] Section 4A(2)(b) Oranga Tamariki Act 1989 ("OTA").

[5] On first appearance in the Youth Court no plea is entered. However, if the child or young person does "not deny" the alleged offending a number of procedural matters are triggered. The court is required to direct a family group conference ("FGC"). At the family group conference the offending behaviour will be discussed and there will an opportunity for the child or young person to "admit" their offending. This constitutes a finding of "proved" at the time of disposition and is usually noted on the file as "proved by admission at the FGC".

[6] Section 283(a) OTA.

[7] Section 283(n) refers to a "youth justice residence" which is established by s 364 OTA.

[8] Section 283(o) order is a conviction and transfer to the adult jurisdiction.

[9] Approximately 80% of offending by children and young people is dealt with by police via diversionary means and does not result in Youth Court action.

therefore in favour of a discretion that is applied at disposition so the Judge may address the specific circumstances and nature of offending. This is a decision that would take into account the appropriate factors.

14. We would defer to any academic evidence as to appropriate timeframes.
15. We are supportive of a presumption in favour of automatic destruction of DNA retention when a determined timeframe is concluded, rather than being contingent upon the child, young person or their lawyer making an application to the court for destruction of DNA evidence.

We support a judicial discretion at disposition to determine whether DNA retention for a child or young person charged under s 283 is appropriate. We would defer to any academic evidence as to appropriate timeframes.

Issue 3: Appropriate retention of samples for children and young people transferred to the District Court or High Court

16. The Youth Court must impose the least restrictive response adequate in the circumstances when a child or young person offends, having regard to the principles and objects of the OTA.[10]

17. In some circumstances the seriousness or nature of offending will be such that Parliament has determined the ambit of Youth Court outcomes cannot adequately respond to the charges.

18. Children and young people will have their cases dealt with in the District Court or High Court if one of the following circumstances apply:
    - the charge is murder or manslaughter;
    - an order under s 283(o) OTA is deemed necessary;[11]
    - the young person is aged 17 and is charged with a Schedule 1A offence;
    - in some cases of joint offending; or
    - where the child or young person elects to be tried by a jury.

19. The youth justice principles in the OTA have no direct application after a committal to the District Court or High Court under s 275, or after a transfer to the District Court for sentence or decision under s 283(o). However, the age of a defendant or an offender remains an important consideration in these processes by virtue of s 8 of the Sentencing Act 2002 and the UN Convention on the Rights of the Child 1989 ("UNCROC"), which New Zealand ratified in 1993.[12]

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[10] Section 289 OTA.

[11] The Youth Court may exercise this power in regard to a young person of or over the age of 15 years, or where the young person is aged 14 and the charge proved against them is a category 4 or category 3 charge with a maximum penalty including life imprisonment or for at least 14 years: s 283(o) OTA.

[12] *Pouwhare v R* [2010] NZCA 268; (2010) 24 CRNZ 868; and *R v M* [2011] NZCA 673.

20. Once transferred to the District Court or High Court a young person is subject to the adult legislative framework.[13] On this basis it is accepted that a more prescriptive regime for young persons will usually be appropriate.

We recognise that children and young people transferred to the District Court or High Court are subject to those legislative frameworks.

Issue 4: Ensuring consistency between the CIBS and the OTA principles when determining discretionary retention in the Youth Court

21. We place importance upon ensuring consistency between the OTA and Criminal Investigations (Bodily Samples) Act 1995 ("CIBS"). In my view specific reference in CIBS to the principles in ss 4A, 5 and 208 OTA would best enable consistency across the two pieces of legislation.

22. We also place importance on ensuring that tikanga and te ao Māori considerations applicable under the OTA are strengthened and supported through the application of CIBS. As noted in the memorandum provided by Clair Trainor, rangatahi Māori constitute approximately 68% of all Youth Court appearances. The value of retention must be carefully considered against the infringement of personal privacy, and this is heightened by tikanga considerations.

We place importance upon ensuring consistency between the OTA and Criminal Investigations (Bodily Samples) Act 1995 ("CIBS").

Issue 5: Manner of obtaining DNA

23. The manner in which DNA is obtained must account for cultural considerations and ensure the child or young person is informed, respected and given opportunities to understand processes occurring that affect them.

24. The presence of disability, intellectual disability, mental health conditions, neuro-disability, and acquired brain injury, in addition to the under developed brain, requires special consideration when it comes to court process. The research shows that young people have demonstrably different brain architecture than adults.[14] Between 50% and 75% of youth involved in the justice system meet diagnostic criteria for at least one mental or substance use disorder.[15] This is in contrast to 13% of youth generally. One in five has a learning disability, and youth offenders are three times more likely than non-offenders to have experienced a traumatic brain injury.

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[13] Sentencing Act 2002.

[14] Elise White and Kimberly Dalve "Changing the Frame: Practitioner Knowledge, Perceptions, and Practice in New York City's Young Adult Courts" (Center for Court Innovation, New York, 2017).

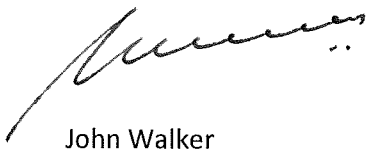
[15] Dr Ian Lambie "It's never too early, never too late: A discussion paper on preventing youth offending in New Zealand" (Office of the Chief Science Advisor, Wellington, 12 June 2018).

25. In light of this evidence, there is a need to ensure that steps are taken to address cognitive limitations. Section 10 of the OTA requires that in any proceedings under the OTA where a child or young person appears before the Youth Court, the court shall explain in a manner and in language that can be understood by the child or young person the nature of the proceedings and satisfy itself this information is understood.[16] Where an order is being made under s 283, the Court is also required to explain to the child or young person and any parent or guardian the nature and requirements of the order, any provisions for variation of the order and any of rights of appeal.[17]

We place importance on ensuring that tikanga and te ao Māori considerations applicable under the OTA are properly recognised in the application of CIBS.
We also place importance upon developing best practice guidelines and processes around the manner in which DNA of children and young people is obtained in light of the vulnerabilities of this cohort.

It is hoped that these views assist discussion and I am happy to clarify any points further should you require.

Ngā mihi



John Walker
Principal Youth Court Judge

[16] Section 10(1)(a)-(b) OTA.

[17] Section 10(1)(c).