Te Hunga Rōia Māori o Aotearoa

The Māori Law Society

Response to NZLC Issues Paper | He Puka Kaupapa 43

The Use of DNA in Criminal Investigations

Te Whakamahi I te Ira Tangata I ngā Mātai Taihara

Introduction

1. Kei ngā mana o te Aka Matua o te Ture, tēnā koutou katoa.

2. This brief submission of Te Hunga Rōia Māori o Aotearoa – The Māori Law Society (THRMoA) seeks to address the issues raised in the Law Commission Issues Paper, He Puka Kauapa 43: The Use of DNA in Criminal Investigations. This submission seeks to distil some of the whakaaro conveyed by members of THRMoA's Criminal and Youth Justice Sub-committee in their skype hui with the Commission's DNA team on 7 March 2019.

Ka pū te ruha ka hao te rangatahi – As the old net withers, a new one is remade

3. THRMoA supports the call for reform of the Criminal Investigations (Bodily Samples) Act 1995 (CIBS). As the whakataukī above illustrates, the law in this area is no longer fit for purpose, it does not reflect developments in science in this area, and it does not accord properly for the place of Te Tiriti of Waitangi or Māori, and this is especially important in the context of Māori over-representation in the criminal justice system.

Fit for purpose

4. In relation to the core objectives of the review, THRMoA would submit that in order to be considered fit for purpose, the law governing the use of DNA in criminal investigations must clearly articulate the rights and obligations in a way that ensures adequate protections for the defendants. Alongside ensuring the law is fit for purpose, THRMoA would like the Commission to ensure that any recommendations ensure that Policing in this area is attuned to issues such as unconscious bias in the exercise of Police discretion in respect of Māori, and consideration of tikanga Māori in the context of DNA collection.

5. As is widely accepted, and acknowledged in the Law Commission Issues Paper on this review, Māori are overrepresented in the criminal justice system. In particular, Māori are over represented in our country's Youth Courts, where young Māori have their first introduction to this country's DNA law and the Databank system. Ministry of Justice Youth Court Statistics in 2018 show that Māori make up 51% of those who appear before the Youth Court.

6. As pointed out in the Commission's material on this issue, 67% of young people whose DNA is retained on the Data Base are Māori. Quite aside from the issue of retention of the DNA of young people in the system for extended periods (which is dealt with below), what this issue shows is the importance that Policing practise can have in an area like DNA collection.

7. Whilst the law can be changed to ensure it is fit for purpose, THRMoA's concern is also in the way the law is Policed. The Police have admitted that there is "unconscious bias" within the Police which operates against Māori. To the extent that there is discretion to be exercised in the context of collection of DNA, it is almost certain that against that context the discretion will more often than not be exercised against individual Māori interests. Given the issues that arise from DNA phenotyping particularly with respect to ethnic inferencing, as well as familial searching, the implications of discretionary power being exercised by the Police have impact on whānau, hapū, and iwi.

Constitutionally Sound

8. In order to be constitutionally sound, due consideration must be given to not just the principles of the Treaty of Waitangi but also the United Nations Declaration on the Rights of Indigenous Peoples. This includes providing Māori with a central role in any independent agency overseeing this area of law (addressed below), as well as considering the role Te Tiriti o Waitangi has to play in the rule of law in Aotearoa New Zealand.

9. It is notable that the conversation appears to be starting from the premise that intrusions upon tikanga Māori are necessary for law enforcement as there does not yet appear to have been an exploration as to whether the criminal justice system and customary systems can walk side by side. However, given the subject matter of the law, it is difficult to imagine the two co-existing. THRMoA notes reference in the Commissions material to the observance of tikanga in taking of DNA samples, for example the practice of karakia (meaning prayer or ritual incantation) during the process of taking a DNA sample to ensure the tapu tinana/inherent sacredness of the body is upheld. THRMoA has difficulty imagining how this could be done in practice. The nationality and cultural competency of New Zealand's Police force is not such that THRMoA would have confidence that every Police officer collecting DNA from a Māori suspect would have the inclination let alone, ability to carry out this process appropriately.

10. As is recognised in chapter 15, even under a reading of the principles of the Treaty of Waitangi alone, it would secure the active participation, protection and partnership in any oversight regime must provide a central role for Māori and careful consideration must be given to what this looks like within this Pākehā context.

Access to justice

11. From experience working within and around the criminal justice system, it is submitted the lack of clarity at present creates confusion and situations where, for example, once a sample is placed on the databank, it is unclear if how or when this can be taken off or by what process it will be disposed of.

12. This can be highly distressing for many Māori as this sample can represent their whakapapa/ancestry, tūpuna/ancestors, atua/gods and all of which are taonga/treasures to be treated and disposed of accordingly.

13. Some of the members of our Criminal and Youth Justice sub-committee have been present when DNA samples have been requested from adults and young people. It is not uncommon for adults as well as young people to be confused by the language provided for in Police forms which explain DNA rights and Police obligations. It would seem that in this area, the temptation is to focus on the science, procedure, and process, however the law is not drafted in a way that considers who it is that is actually impacted by these laws, i.e who are the people that are subject to its Policing? It doesn't appear that consideration is given to their background, and how that may impact on their engagement in that process.

14. In order to illustrate that point, THRMoA refers to the report of the Prime Minister's Chief Science Advisor, *Using evidence to build a better justice system: The challenge of rising prison costs*

(attached to the submissions of Ms Pecotic for *Ms Phillips*) (**the Gluckman Report**), the interacting risk factors often present in those before the criminal justice system are discussed.[1]

15. Those involved in the criminal-justice system have faced multiple risk factors and vulnerabilities, such as:[2]

    (a) 77% have been victims of violence;

    (b) 53% of women and 15% of men have experienced sexual abuse;

    (c) 52% of women and 40% of men have a lifetime diagnosis of post-traumatic stress disorder (PTSD).

    (d) Individuals who have experiences such abuse and trauma face neurophysiological differences that make it harder to regulate their emotions, as well as tending to act more aggressively.

    (e) Socio-economic disadvantage has been linked to criminal justice outcomes across the life course.

16. In relation to Māori, the Gluckman Report notes:[3]

    (f) There are multiple and complex reasons for Māori over-representation in the criminal justice system, not least because Māori tend to experience disproportionately many of the interacting risk factors covered in the report and highlighted above.

    (g) Identity and self-esteem play an important role in how individuals live within a society, and contributing to their resilience and confidence.

    (h) The enduring impact of colonisation and dominant cultural norms in most aspects of New Zealand life, especially the criminal justice system, can contribute to undermining these protective factors for Māori youth in myriad ways.

    (i) Socioeconomic deprivation increases the likelihood of offending; and Māori are more likely to live in highly deprived areas. This is compounded by the relatively young age of the Māori population, where 26% of the population are aged 15 to 29 years. It is notable that one third of all adults sentenced in the year ending June 2017 were aged 18-24.

    (j) At all points along the prison pipeline, from the arrest of a young person through to imprisonment, rates are disproportionately higher for Māori than for similar offences by non-Māori peers. Evidence from Australia indicates that indigenous status remains a significant predictor of an imprisonment sentence even after controlling for measured legal factors.

[1] Peter Gluckman *Using evidence to build a better justice system: The challenge of rising prison costs*, (29 March 2018) [the Gluckman Report].
[2] Ibid at [54]–[56].
[3] Ibid pp 18 – 22.

17. As a result of the interacting risk factors that bring people before our Courts, in recent times all Courts have seen the influx of defendants with cognitive, and speech and language difficulties,[4] this can result in the use of a Communication Assistant appointed under s 80 of the Evidence Act.[5] In order to ensure the law in this area is fit for purpose, and that access issues are addressed, THRMoA would submit that "easy-read" versions of the legislation be created alongside visual aids, that Police officers and lawyers be trained in communicating these complex concepts with the assistance of this material.

Regulation of forensic DNA phenotyping: ethnic inferencing

18. The immediate concern in this area is the lacuna in the law that currently surrounds the operation of the science. As identified in the paper, in the absence of any existing prohibition, the Police have already analysed DNA found at the crime scene to establish the likely ethnicity of the source of the DNA eleven times and, significantly, they have denied doing so.

19. It is now possible to analyse someone's entire genome sequence, so in theory there is nothing stopping Police from doing an entire genome analysis of crime scene DNA. It is therefore critical to think about how the issues and potential solutions we are discussing compound the existing prejudicial stereotypes and bias in the system when setting the parameters of the law.

20. Phenotypic analysis clearly presents a risk of compounding the bias that already exists within the system. An example of this is overrepresentation of Māori in the system, and phenotype analysis could compound that, especially with current policing practise.

21. Investigating officers are the face of this policing as they are the hands doing the work and engaging with people. Whilst an officer cannot be expected to have the legal training of a lawyer, it is pertinent to ask, given the opportunity presented, to what extent can the new Act and associated Regulations and Practice Notes really drill down on some of these problems in policing?

22. It is recognised that Police are largely on board about addressing some of these issues in that they recognise the bias that exists. However, this understanding needs to reach the standard investigating officer, and there is a long chain of command that this must travel down to get to the ground level.

23. It is further concerning that the Police are now exploring the prospect of analyse an entire genome of a person, which they appear to perceive as being within the current law. The concern here is that this is in philosophical opposition to the current ethos of DNA profiling: that you should only get genes that do not code for anything.

24. As it is understood, the DNA analysis as it stands now operates to intentionally cast aside all genes that code for a phenotype in order to use non-coding genes alone as the basis for confirmation.

[4] To the extent that this phenomenon is an actiual "influx" as opposed to the system being more educated in areas such as adolescent brain development, FASD, cognitive functioning, and other characteristics is arguable. What is clear is there are more cases now before the Court where it has been identified that the defendant has complex needs.

[5] To this end THRMoA would direct the Commission to the work done by *Talking Trouble* a group of speech and language therapists routinely appointed as communication assistants. Samples of the work they have done in the Youth Justice area are available at: www.talkingtrouble.co.nz

Put simply, one shouldn't be able to take a DNA sample and know if the individual is more likely should to have breast cancer or be Māori.

25. Phenotyping therefore presents a risk of a breach of privacy and will disproportionately affect Māori as they have greatest contact with the criminal justice system.

26. There is also a potential of damage in relationship between ethnic groups. This is against the context of the way our media treats crime and Māori in relation to that crime, which is not always factored into policy decisions.

27. In particular, there is a tendency of media to sensationalise criminal reporting involving Māori, and not just even just criminal reporting. For example, the NZ Herald just published an article with the headline "67% of Māori support cannabis legislation."

28. This has a constitutional impact, and when thinking about whether our regime is constitutionally sound we need to think about how this material will be portrayed to the public, and what level of education is available to the public in this area. Media have an important part to play in the way we perceive our relationships within the community, particularly when it comes to law and order.

Familial searching

29. The prospect of familial searching raises concerns on both individual and collective privacy interests in DNA. In Māori terms, it impacts whakapapa, whanau, hapū, and iwi.

30. The concern for both is that when you only take samples for the databank from those that encounter police, this practice is going to impact Māori more than others because of the disproportionately high contacts that they have with the criminal justice system.

31. As a thought experience, one can imagine a rangatahi Māori (perhaps whose first language is te reo Māori), voluntarily giving Police their DNA sample without understanding as to the consequence. In this scenario the Police then have all the information about that kid's whānau and would not need to approach someone else. Further, according to some of the cases in the issues paper, police, on the basis of familial searching, can then apply for a search warrant to get the DNA of the immediate person of interest. This would result in even more of the whakapapa being on the databank.

32. Familial searching is the type of investigative tool that if not legislated strictly, will be a lever pulled to compound the existing systemic bias against Māori. Because of the existence of that bias, and the already high representation of Māori in the criminal justice system, enacting a law which allowed for familial searching would be contrary to section 19 of the New Zealand Bill of Rights Act 1990. It would in essence be discriminatory because its effect will be felt most keenly by Māori, and what makes the proposition worse, is that that outcome would be entirely predictable given what we know about our system.

33. Once on the databank, there does not appear to be any tikanga treatment in relation to the keeping of and disposing of DNA. It is not clear whether the ESR have developed a practice around this. However, it is unlikely they have consulted with Māori about it. This is one of many areas where an independent oversight agency which gives Māori a central role could play a crucial role.

Retention

34. Section 282 of the Oranga Tamariki Act states that a Court may discharge any charging document laid against a child or young person in the Youth Court. A charging document discharged under s 282 of the Oranga Tamariki Act is deemed to "have never been laid". THRMoA supports the proposition that any DNA collected from a child or young person in the course of or prior to proceedings which lead to a s 282 discharge should be destroyed following the discharge, and removed from the data base.

35. This would be in line with the diversionary scheme of the Oranga Tamariki Act as well as its rehabilitative objects and principles. In light of the large number of Māori samples (67%) held in the data bank for young people, the retention of these samples beyond youth court proceedings is another lever which is capable of continuing to compound Māori criminal justice rates, or conversely if pulled in line with the scheme of the Oranga Tamariki Act as well as the United Nations Convention on the Rights of the Child, and the Beijing Rules, could in a principled way, help stem the flow of Māori in the criminal justice pipeline.

36. A young person's sense of time is also important in the context of investigations via s 5(f) of the Oranga Tamariki Act. Sometimes, DNA or fingerprint evidence can surface long after the actual offence is committed, and sometimes after a young person has been before the Court on other charges, completed a rehabilitative plan and been discharged. The issues which lead to this can often be resource related in terms of Police investigations, but holding on to DNA samples beyond a s 282 discharge can lead to this sort of circumstance arising, where the young person is bought back into the system.

37. THRMoA also notes this argument is applicable to the "Clean Slate" legislation.

Independent oversight

38. THRMoA supports the call for an independent agency that oversees the way DNA is used in criminal proceedings. It also supports the call for Māori to be given a central role in such an agency. THRMoA's submission is that such an agency should be legislated for.

39. THRMoA submits that legislation establishing such an agency should include reporting provisions. In particular reporting provisions regarding compliance with Te Tiriti o Waitangi, and monitoring of the impact of the parent legislation on Māori.

40. By way of analogy, THRMoA refers to the Police ability to take voluntary finger prints from children and young people under the Policing Act. Those voluntary prints are evidential prints, and they remain in the Police data base indefinitely. In a recent case, where one of our members was acting for a young person in an aggravated robbery case, it was discovered that the fingerprint taken from the young person was a voluntary print taken from him when he was approximately 10 years old. It was at a time when he was at a CYFS placement with non-kin caregivers, and he had roamed away from his placement. This child has serious PTSD and FASD, and on inquiry the voluntary print taken was not done so in line with the Practice Note for voluntary taking of fingerprints from children and young people.

41. As a result of that case, an OIA request was made to the Police National Fingerprint Database regarding the total number of voluntary fingerprints taken and the ethnicity of those whose prints were taken, the Police response was that ethnicity was not recorded. This raises a concern, where by analogy if the Police are exercising discretionary powers in relation to DNA collection, they should be required to take a note of ethnicity and an independent agency overseeing the exercise of those practises able to monitor and periodically report on the same.

42. By way of example the Oranga Tamariki Act has been amended to include a reporting provision, specifically in relation to Māori. From 1 July, the Act will require:

> 7AA Duties of chief executive in relation to Treaty of Waitangi (Tiriti o Waitangi)
>
> (1) The duties of the chief executive set out in subsection (2) are imposed in order to recognise and provide a practical commitment to the principles of the Treaty of Waitangi (te Tiriti o Waitangi).
>
> (2) The chief executive must ensure that—
>
> (a) the policies and practices of the department that impact on the well-being of children and young persons have the objective of reducing disparities by setting measurable outcomes for Māori children and young persons who come to the attention of the department:
>
> (b) the policies, practices, and services of the department have regard to mana tamaiti (tamariki) and the whakapapa of Māori children and young persons and the whanaungatanga responsibilities of their whānau, hapū, and iwi:
>
> (c) the department seeks to develop strategic partnerships with iwi and Māori organisations, including iwi authorities, in order to—
>
> (i) provide opportunities to, and invite innovative proposals from, those organisations to improve outcomes for Māori children, young persons, and their whānau who come to the attention of the department:
>
> (ii) set expectations and targets to improve outcomes for Māori children and young persons who come to the attention of the department:
>
> (iii) enable the robust, regular, and genuine exchange of information between the department and those organisations:
>
> (iv) provide opportunities for the chief executive to delegate functions under this Act or regulations made under this Act to appropriately qualified people within those organisations:
>
> (v) provide, and regularly review, guidance to persons discharging functions under this Act to support cultural competency as a best-practice feature of the department's workforce:
>
> (vi) agree on any action both or all parties consider is appropriate.

(3) One or more iwi or Māori organisations may invite the chief executive to enter into a strategic partnership.

(4) The chief executive must consider and respond to any invitation.

(5) The chief executive must report to the public at least once a year on the measures taken by the chief executive to carry out the duties in subsections (2) and (4), including the impact of those measures in improving outcomes for Māori children and young persons who come to the attention of the department under this Act and the steps to be taken in the immediate future.

(6) A copy of each report under subsection (5) must be published on an Internet site maintained by the department.]

43. Whilst the legal context is different, and s 7AA is yet to come into force, it is clear from the provision that what is envisaged is a greater accountability on Oranga Tamariki as it relates to Māori. THRMoA submits that any independent agency established for the purpose of overseeing any new DNA investigation legislation have such a provision enacted into legislation so that the commitment to giving Māori a central role in oversight is transparent and capable of enforcement.

44. It was intended that THRMoA would make contact with the Iwi Chairs Group via Rahui Papa in order to possibly conjoin a submission on this issue. Unfortunately, to due to time restraints and other events such as tangihanga that has not been able to be done. However, THRMoA recommends that the Law Commission does make direct contact with the Iwi Chairs to seek their views if possible. THRMoA understands Jason Ake of the Commission's Māori advisory group has had some preliminary contact with them about the issue. If the Commission is of the view that THRMoA involvement in consultation with the Iwi Chairs would be of assistance, Chris Merrick is available to assist.