



GRIFFITH JOURNAL OF
LAW & HUMAN DIGNITY

GRIFFITH JOURNAL OF
LAW & HUMAN DIGNITY

Editor-in-Chief
Isaac Avery

Executive Editors
Leanne Mahly
Alexandria Neumann
Josephine Vernon

Editors

Vanessa Antal
Myles Bayliss
Mark Batakin
Elizabeth Englezos
Jason Estival
Taylor Henderson
Danyon Jacobs

Kim Johnson
Ashleigh Leake
Jacklin Molla
Juliette Murray
Lisa Neubert
Yassamin Olson
Andrea Rimovetz

Consulting Executive Editor
Dr Allan Ardill

Volume 5 Issue 1
2017

Published in September 2017, Gold Coast, Australia by the *Griffith Journal of Law & Human Dignity*

ISSN: 2203-3114

CONTENTS

WILL POTTER	<i>AG-GAG LAWS: CORPORATE ATTEMPTS TO KEEP CONSUMERS IN THE DARK</i>	1
JOSHUA KROOK	<i>THE REAL SOCRATIC METHOD: AT THE HEART OF LEGAL EDUCATION LIES A FUNDAMENTAL MISUNDERSTANDING OF WHY SOCRATES ASKED SO MANY QUESTIONS</i>	32
BETHNEY BAKER & ANGELA DWYER	<i>UNDERTAKING FORENSIC PROCEDURES WITH, AND DATABASING DNA FROM, YOUNG OFFENDERS: FUTURE DIRECTIONS FOR HUMAN RIGHTS PROTECTIONS</i>	44
MARIE ISKANDER	<i>THE DESERVING AND THE UNDER-SERVED: A COMMENT ON THE OVERSUPPLY OF LAW GRADUATES, DIVERSITY IN THE LEGAL PROFESSION AND ACCESS TO LEGAL REPRESENTATION</i>	66
GREG BARNES & KAYLENE DOWNEY	<i>PARTICIPATION IN SOCIAL MEDIA BY POTENTIAL JURORS</i>	88

UNDERTAKING FORENSIC PROCEDURES WITH, AND DATABASING DNA FROM, YOUNG OFFENDERS: FUTURE DIRECTIONS FOR HUMAN RIGHTS PROTECTIONS

BETHNEY BAKER* AND ANGELA DWYER**

Forensic procedures and DNA profiling are commonly used policing techniques employed to solve crimes and prosecute offenders. In more recent times, there has been a focus on the implications of these processes with alleged young offenders. This paper discusses the broader human rights issues for young offenders around these procedures and processes in relation to a specific case study: legislative frameworks in Queensland, Australia. First, the paper overviews what forensic procedures and DNA databases are, generally, and the types of information that can be gleaned from DNA collected through forensic procedures and subsequently databased. Second, the paper analyses Queensland legislative frameworks in terms of human rights issues raised by conducting forensic procedures and DNA databasing with alleged young offenders. The paper concludes by considering possible future directions around forensic procedures and DNA databasing with alleged young offenders, with reference to existing legislative frameworks.

CONTENTS

I	INTRODUCTION.....	45
II	WHAT ARE FORENSIC PROCEDURES AND DNA SAMPLING, ANALYSIS, AND DATABASING, AND WHAT INFORMATION DOES IT MAKE IT POSSIBLE TO EXTRAPOLATE?	48

* With a somewhat eclectic approach, Bethney Baker is a PhD Candidate and Sessional Academic with the School of Justice, Faculty of Law, at the Queensland University of Technology. Her thesis explores attitudes of the Australian public towards asylum seekers in detention, and she has tutored criminology units for seven years.

** Dr Angela Dwyer is an Associate Professor, Police Studies and Emergency Management, School of Social Sciences, University of Tasmania. She is an Adjunct Professor with the Crime and Justice Research Centre at the Queensland University of Technology. Angela conducts research on the intersection between sexuality, gender diversity, and criminal justice.

III	ELABORATING THE ISSUES THROUGH A CASE STUDY: FORENSIC PRACTICES, DNA DATABASING, YOUNG OFFENDERS AND THE <i>POLICE POWERS AND RESPONSIBILITIES ACT 2000</i> (QLD).....	50
	A <i>What Issues are Raised Around Forensic Procedures with Young People?</i>	50
	B <i>What Issues are Raised Around DNA Databasing with Young People?</i>	55
IV	FUTURE DIRECTIONS.....	57

I INTRODUCTION

The nexus between forensic science and policing — particularly in regard to forensic procedures, DNA collection and analysis, and DNA profile retention — continues to be characterised by controversy. The establishment of DNA databases alone has proliferated worldwide, including in Australia.¹ Western nations are leading the development of the nexus between these practices in policing and criminal processing systems. For example, as early as 2009, the United States saw the implementation of pre-conviction DNA collection.² This means that those who have not even been convicted of crimes are subject to these measures. They now have the largest DNA database in the world with the FBI's Combined DNA Index System (CODIS). This situation could only be outdone by recent moves in the United Kingdom — the country that initially lead the international field by creating the world's largest DNA database — where a recent government White Paper proposed 'the creation of a universal "BioBank" of genetic profiles, taken at birth.'³

Forensic procedures, DNA profiling, and DNA databasing all involve a complex skein of assumptions and ethical ideas, with many competing viewpoints about the value of these practices. For instance, DNA databasing has been lauded as a useful resource because such databases provide "cold hits" — unexpected matching between a crime scene DNA profile

¹ Angela Lavoipierre, 'NSW Police take DNA from Hundreds of Ex-Offenders to Build Crime-Solving Database', *ABC News* (online), 24 August 2015 <<http://www.abc.net.au/news/2014-09-29/nsw-police-take-dna-from-hundreds-of-ex-criminals/5775990>>.

² Sarah B Berson, 'Debating DNA Collection' (2009) *National Institute of Justice (NIJ) Journal* 264, November <<http://www.nij.gov/journals/264/pages/debating-DNA.aspx>>.

³ Carole McCartney, 'Forensic DNA Sampling and the England and Wales National DNA Database: A Sceptical Approach' (2004) 12(2) *Critical Criminology* 157, 157.

already stored on the database — to introduce a new suspect into the investigation.⁴ Further, forensic procedures, DNA profiling, and DNA database searches have assisted with the exoneration of those falsely convicted and imprisoned, such as young people of colour in the United States convicted of crimes they did not commit.⁵ There is no doubt that these outcomes are benefitting the community by controlling crime, prosecuting offenders, and ensuring innocent people are exonerated. In contrast to these perspectives, others have argued that forensic procedures, DNA profiling, and DNA databases all impinge on the human rights of offenders and can be used in unethical ways by policing services. Chief amongst the concerns about breaching individual human rights through DNA databasing is privacy, which has its genesis in the law, with commentators arguing that retention of DNA profiles is an ‘unjustifiable infringement on an individual’s privacy.’⁶

While all these issues impact on a range of people of all different ages, backgrounds, and capacities that have been charged or convicted of crimes, our focus in this paper is young people under the age of 18. Depending on their circumstances, most adults will have more capacity than young people to understand the processes involved in fully consenting to a forensic procedure, and subsequent DNA profiling and databasing processes, in terms of fully comprehending how the material will be used and the implications of this process. This is not always possible for young people as a category of vulnerable person,⁷ particularly those young people considered marginalised or whom are experiencing significant and often multifarious disadvantages. Forensic procedures alone raise important questions about the extent to which a young person may be fully capable of consenting to these processes. For instance, specific to young people, “trawling” processes employed by police organisations using DNA databases raise significant concerns about “net-widening”, with some commentators arguing the mere existence of an individual DNA profile on a database ‘is to treat them as a suspect for any future crime.’⁸ Other concerns raised include the potential to harass, stigmatise, socially exclude, and discriminate against

⁴ Helen Wallace, ‘The UK National DNA Database’ (2006) 7 *European Molecular Biology Organization Reports* 26, 27.

⁵ Edwin Grimsley, *Lessons about Black Youth and Wrongful Convictions: Three Things You Should Know* (1 May 2015) Innocence Project <<https://www.innocenceproject.org/lessons-about-black-youth-and-wrongful-convictions-three-things-you-should-know/>>.

⁶ Beverley Steventon, ‘Creating a DNA Database’ (1995) 59(4) *Journal of Criminal Law* 411, 417.

⁷ Nicole L Asquith and Isabelle Bartkowiak-Theron, ‘Vulnerability and Diversity in Policing’ in Isabelle Bartkowiak-Theron and Nicole L. Asquith (eds), *Policing Vulnerability* (Federation Press, 2012) 3.

⁸ Wallace, above n 4, 27.

young offenders.⁹ Some have even argued storing DNA samples is ethically contentious because the samples are being used for genetic research,¹⁰ including the possible identification of a ‘criminal gene’.¹¹ All these concerns have the capacity to impact on the lives of young offenders long-term.

This paper examines the human rights issues raised for young people around forensic procedures, DNA retention, and databasing. For the purpose of this paper, human rights are defined as those ‘[r]ights inherent in every individual on the basis of humanity’ and are underpinned by the recognition of the universal eligibility to be treated with both dignity and equality.¹² To further explore these issues, this article briefly analyses aspects of the *Police Powers and Responsibilities Act 2000* (Qld) (“PPRA QLD”),¹³ and the *Juvenile Justice Act 1992* (Qld),¹⁴ and draws on other associated legislation, to discuss the issues pertaining to these processes and practices with young people (such as privacy, age, informed consent, and capacity). The analysis is informed by understandings of human rights as outlined by the *Convention on the Rights of the Child* (CRC) (UN 1989),¹⁵ and the *Standard Minimum Rules for Administration of Juvenile Justice (Beijing Rules)* (UN 1985),¹⁶ as benchmarks for appropriate treatment of young offenders. Arguments related to forensic procedures and DNA sampling, analysis, and retention raise complex issues and competing factors, and we suggest more research is needed to examine in detail the implications of these issues for the lives of young offenders in particular. To do this, the paper begins by defining forensic procedures (used for collecting DNA samples) and subsequent DNA profiling databasing, including a discussion of the types of information that can be extrapolated from these procedures. Following this, the paper analyses pertinent sections of the PPRA QLD to demonstrate the key human rights concerns that require further investigation. The paper

⁹ Andrei Semikjodskii, *Dealing with DNA Evidence: A Legal Guide* (Routledge, 2007); Helen Wallace, ‘Prejudice, Stigma and DNA Databases’ (2008) 21(3–4) *GeneWatch* 14.
<<http://www.councilforresponsiblegenetics.org/genewatch/GeneWatchPage.aspx?pageId=60&archive=yes>>.

¹⁰ Wallace, above n 4, 27.

¹¹ Andrew Haesler, ‘DNA and Policing’ (2001) 79 *Australian Law Reform Commission - Reform Journal* 27, 30.

¹² Peter Butt (ed), *Butterworth’s Concise Australian Legal Dictionary* (Lexis Nexis, 3rd ed, 2004) 205.

¹³ *Police Powers and Responsibilities Act 2000* (Qld).

¹⁴ *Juvenile Justice Act 1992* (Qld).

¹⁵ *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

¹⁶ United Nations General Assembly, *United Nations Standard Minimum Rules for the Administration of Juvenile Justice (“The Beijing Rules”)*, GA Res 40/33, UN GAOR, 40th sess, 96th plen mtg, UN Doc A/RES/40/33 (adopted 29 November 1985).

concludes with the consideration of future directions regarding the use of DNA databases and the importance of balancing all the issues and competing factors.

Queensland, Australia, has been chosen as the context for this discussion as it represents a uniquely conservative political climate. For instance, with the election of the Liberal National Party in 2013, a range of amendments were passed in relation to youth justice legislation to produce a more punitive criminal processing system for young people aged 10 to 16 years. This included the removal of detention as a last resort; opening the proceedings of the Children's Court; facilitation of moving 17-year-old offenders to adult prisons; and the introduction of new bail offences and mandatory boot camp orders.¹⁷ Beginning on 11 November 2016, the *Youth Justice and Other Legislation (Inclusion of 17-year-old Persons) Amendment Act 2016* received royal assent and will commence by proclamation, which is expected to occur within 12 months of its passing. This will align Queensland with the other states in treating 17-year-olds as young people, rather than as adults.

II WHAT ARE FORENSIC PROCEDURES AND DNA SAMPLING, ANALYSIS, AND DATABASING, AND WHAT INFORMATION DOES IT MAKE IT POSSIBLE TO EXTRAPOLATE?

To more fully understand the issues, it is important to define the key concepts. For this purpose, we draw on definitions from the PPRA QLD and generic definitions where required. Forensic procedures collect physical samples from the human body in the form of bodily fluids and tissues, including 'blood, semen, saliva, hair roots and scalp detritus, flesh, skin, vaginal fluids, and nasal secretions'.¹⁸ The PPRA QLD defines a forensic procedure as: (a) an intimate forensic procedure; or (b) a non-intimate forensic procedure.¹⁹ Surprisingly, this definition fails to describe precisely what a forensic procedure is other than to distinguish between intimate and non-intimate. In defining a non-intimate forensic procedure, we learn that it is 'a procedure performed on a person'.²⁰ These samples collected through forensic procedures carry deoxyribonucleic acid (DNA); 'the genetic material of living organisms that determines every individual's hereditary

¹⁷ Terry Hutchinson, '“A Slap on the Wrist”? The Conservative Agenda in Queensland, Australia' (2015) 15(2) *Youth Justice* 134.

¹⁸ Robin Williams, 'DNA Profiling' (2008), in Tim Newburn and Peter Neyroud (eds) *Dictionary of Policing* (Willan, 2008) 86, 86.

¹⁹ *Police Powers and Responsibilities Act 2000* (Qld) sch 6.

²⁰ *Ibid.*

characteristics, and exact copies of this material are found in every living cell' of the human body.²¹

The forensic material taken in the samples collected through these procedures can be analysed through a process of DNA profiling, typing, or fingerprinting. The Australian and New Zealand Policing Advisory Agency, on their website discussing forensic sciences, defines DNA profiling or typing as the process used 'to distinguish between individuals based on differences in their DNA'.²² This involves a scientific process whereby the "fingerprint-like" structure of the DNA of a person can be mapped — 'the chemical structure of an individual's DNA encodes information about that individual's inherited characteristics.'²³ This typing process does not allow police officers to "see" the precise characteristics of a person whose DNA has been located and sampled at a crime scene — they cannot know if they are looking for someone with brown eyes as opposed to blue eyes. Rather, DNA profiling enables police to make comparisons between other DNA profiles found at a crime scene (for instance, discerning between DNA from the victim and suspects) and between DNA profiles they have retained because DNA in a person's body 'is identical throughout a human body but variable between any two humans, making it a natural alternative to artificial human identifiers, such as names or tax-file numbers.'²⁴ This means that DNA profiling has 'become the "gold standard for identification"',²⁵ and is now a routine part of police criminal investigation work. While people who are biologically related share elements of their DNA structure with other biological relatives, a DNA structure is unique in every human being with the exception of 'identical twins, who develop from a single fertilised cell and hence have identical nuclear DNA.'²⁶ When such fluids and tissues are found at a crime scene, an individual's DNA profile is collected and analysed in addition to a range of other evidence to determine suspects involved in an offence.

²¹ Williams, above n 18, 86.

²² Australia and New Zealand Policing Advisory Agency 'Laboratory Sciences' <<http://www.anzpaa.org.au/forensic-science/forensic-sciences/forensic-science-disciplines/laboratory-sciences>>.

²³ Jeremy Gans and Gregor Urbas, 'DNA Identification in the Criminal Justice System' (Research Paper, No 226, Australian Institute of Criminology, May 2002), 1.

²⁴ Ibid.

²⁵ Williams, above n 18, 86.

²⁶ Gans and Urbas, above n 23, 1.

These processes in police work have now moved beyond simply identifying suspects in a case, as more and more police organisations have the technological capacity 'to construct digital representations of profiles and store them in continuously searchable computerized databases',²⁷ and use those databases for the purposes of police investigative processes.²⁸ This is called a DNA database, and they can be searched by police to find matches between forensic samples they have collected at a crime scene or from a victim, and the DNA they have profiled and retained as digitised DNA profiles.

III ELABORATING THE ISSUES THROUGH A CASE STUDY: FORENSIC PRACTICES, DNA DATABASING, YOUNG OFFENDERS AND THE *POLICE POWERS AND RESPONSIBILITIES ACT 2000* (QLD)

To examine the issues raised through these processes specifically in relation to young people, real world insight can be gained by analysing sections of the PPRA QLD, and other related legislative frameworks. This legislation raises a whole range of ethical and human rights issues when dealing with young people in criminal processing systems.

A What Issues Are Raised Around Forensic Procedures with Young People?

According to the PPRA QLD, there is a difference between intimate and non-intimate forensic procedures. Intimate forensic procedures are defined as:

all or any of the following procedures—

(a) a procedure performed on a person's external genital or anal area, buttocks or, for a female, breasts, that involves—

(i) an external examination of the relevant part of the body; or

(ii) taking a sample from the relevant part of the body, by swab, washing, vacuum suction, scraping, or by lifting by tape; or

(iii) photographing the relevant part of the body; or

(iv) making an impression or cast from the relevant part of the body; or

(v) measuring the relevant part of the body;

²⁷ Williams, above n 18, 86.

²⁸ Robyn Lincoln, 'Human Rights (and Wrongs) of DNA Testing and Evidence' (2001) 7 *The National Legal Eagle* 3; Mairi Levitt and Floris Tomasini, 'Bar-coded children: an exploration of issues around the inclusion of children on the England and Wales national DNA database' (2006) 2(1) *Genomics, Society and Policy* 41; Liz Campbell and Nessa Lynch, 'Competing Paradigms? The Use of DNA Powers in Youth Justice' (2012) 12(1) *Youth Justice* 3.

- (b) a procedure performed on a person that involves—
 - (i) an internal examination of a body cavity; or
 - (ii) taking a sample of the person's hair from—
 - (A) the genital or anal area; or
 - (B) the buttocks; or
 - (C) if the person is a female—the breasts; or
 - (iii) taking a sample, by swab or washing, from a body cavity other than the mouth; or
 - (iv) removing a substance or thing from a body cavity other than the mouth; or
 - (v) taking an X-ray of a part of the person's body; or
 - (vi) taking a dental impression; or
 - (vii) taking a sample of the person's blood or urine.²⁹

There is no doubt that these procedures are intimate and that they would be considered invasive to a person's privacy and to a person's body. Interestingly, the definition of a non-intimate forensic procedure is not hugely different. While these procedures are perhaps less intimate in terms of the areas of the body they focus on, they still require access to intimate parts of the body and invasive procedures to a person's body:

a procedure performed on a person, other than an intimate forensic procedure, that involves all or any of the following—

- (a) an examination of an external part of the person's body, that requires clothing to be removed or contact with the person's body;
- (b) taking a sample from a part of the person's body, by swab, washing, vacuum suction, scraping, or by lifting by tape;
- (c) photographing a part of the person's body;
- (d) making an impression or cast of a part of the person's body;
- (e) taking a DNA sample;
- (f) taking a sample of saliva;

²⁹ *Police Powers and Responsibilities Act 2000* (Qld) sch 6.

- (g) taking a sample from, or from under, a fingernail or toenail;
- (h) taking identifying particulars.³⁰

Although these definitions raise questions about what it means to be intimate and how invasive these processes are, it is how these procedures relate to privacy and consent that are the primary consideration of this paper.

One of the key concerns we raise about forensic procedures with a young person, and this could be a child of at least 14 years or a child under 14 years, is that of privacy. The PPRA QLD notes there are special requirements for children in Part 2 of Chapter 17 of the Act dealing with Forensic Procedures and obtaining consent for such procedures. Section 450(4) refers to the consideration for privacy that a child must be given, stating, 'if it is reasonably practicable to do so.'³¹ It is reasonable to contend that a part of providing a child with 'special protection' is to also ensure privacy is guaranteed as a part of procedural fairness. Under article 40 of the *Convention on the Rights of the Child* it is stated within section 2(b)(vii) that a child has a right 'to have his or her privacy fully respected at all stages of the proceedings.'³² This position is further supported under the *United Nations Standard Minimum Rules for the Administration of Juvenile Justice* that indicate any proceedings be conducted in a manner which allows the young person to express themselves freely.³³ The right to privacy should be in accordance with such rights and absolute. The PPRA QLD seems to fall short of such an inclusion, and the wording of the Act raises questions by noting that the right to privacy needs to be afforded 'if it is reasonably practicable to do so.'³⁴

A further key issue raised with forensic procedures is the securing of informed consent. In order to secure informed consent, it is essential to ensure that the nature and implications of the forensic procedure are clearly communicated to, and understood by, the young person. With further reference to the PPRA QLD, s 453(1) stipulates that the police officer concerned has the discretion to determine what is a 'reasonable time to consider the

³⁰ Ibid.

³¹ *Police Powers and Responsibilities Act 2000* (Qld) s 450(4).

³² *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 40.

³³ United Nations General Assembly, *United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules")*, GA Res 40/33, UN GAOR, 40th sess, 96th plen mtg, UN Doc A/RES/40/33 (adopted 29 November 1985).

³⁴ *Police Powers and Responsibilities Act 2000* (Qld) s 450(4).

explanation' in relation to seeking permission for a forensic procedure given under s 454.³⁵ It may be reasonable to consider that such discretion is too wide-ranging and that the legislation needs to stipulate a minimum period of time for such consideration to not only apprise the alleged young offender of their rights, but also allow communication with an independent support person. Further, the young person may wish to consider whether they want legal advice and/or parental involvement. In addition, s 455(2) refers to the consent for a forensic procedure to be written and signed by the person giving consent. This clause may need to ensure signing and consent takes into consideration the literacy and comprehension skills of the alleged offender.³⁶

With respect to the alleged offender granting, or not granting, permission to proceed with the forensic procedure, s 458(1) of the PPRA QLD raises an interesting point of contention.³⁷ Ireland highlights the adverse influence from non-consent to the provision of DNA samples by asking: '[d]o they consent and give the sample and have forensic evidence provide valuable support to the prosecution case, or do they refuse to cooperate, and risk the court drawing adverse inference from the refusal to give consent?'³⁸ Sections 458(1) and 488(4)(a)(b),³⁹ it may be asserted, are based on an abrogation of the presumption of innocence, a core principle in the *United Nations Standard Minimum Rules for the Administration of Juvenile Justice*.⁴⁰ In this instance, within the context of the PPRA QLD, this means that there is no adherence to an integral underlying principle of criminal processing systems. Further, with continuing reference to s 488(7)(b), it is indicated that '[i]t is not a reasonable excuse for the child to contravene the order that complying with it may tend to incriminate the child'.⁴¹ This too may be considered an abrogation of the rights of the child

³⁵ Ibid s 453(1), s 454.

³⁶ Ibid s 455(2).

³⁷ Ibid s 458(1).

³⁸ Steve Ireland, 'What Authority Should Police Have to Detain Suspects to Take Samples?' (Paper presented at the DNA and Criminal Justice conference, Australian Institute of Criminology, 30-31, (30-31 October 1989) <<http://www.aic.gov.au/publications/previous%20series/proceedings/1-27/02.html>>, 81.

³⁹ *Police Powers and Responsibilities Act 2000* (Qld) s 488(4)(a)-(b) governs the taking of DNA evidence from a child.

⁴⁰ United Nations General Assembly, *United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules")*, GA Res 40/33, UN GAOR, 40th sess, 96th plen mtg, UN Doc A/RES/40/33 (adopted 29 November 1985).

⁴¹ *Police Powers and Responsibilities Act 2000* (Qld) s 488(7)(b).

in that it encroaches on the principle of the privilege against self-incrimination as well as the right to silence. As Freckleton states:

Our legal system has insisted upon the primacy of the privilege against self-incrimination and has orchestrated a balance between defense and prosecution with this as its' basis. The prosecution has to prove its case without assistance from the accused person.⁴²

Therefore, again within the Queensland context, the legislation places the alleged young offender at a distinct disadvantage.

Another unclear part of the PPRA QLD is that which deals with the 'capacity' to give consent for forensic procedures under ss 450 to 452.⁴³ Capacity is defined generally as the '[p]ower, ability, competence of a person or body'.⁴⁴ This is well demonstrated in the principle of *doli incapax*, 'a principle dating back to the 14th century which assumes that under a certain age children are incapable of knowing right from wrong and therefore cannot be held criminally responsible for their actions'.⁴⁵ In the PPRA Qld, s 450 refers to a '[s]pecial requirement for a child of at least 14', s 451 refers to a '[s]pecial requirement for a child under 14', and s 452 notes a '[s]pecial requirement for a person with impaired capacity'.⁴⁶ This paper argues there is not necessarily a clear point of delineation between those individuals who fall into each of these sections (by virtue of their age). It contends there are grey areas and regions of overlap with respect to the *capacity* as it relates to the *developmental levels* of alleged child offenders. Levitt and Tomasini have raised this as an issue in relation to the National DNA Database ("NDNAD") in the United Kingdom and how individuals aged 13–20 years' experience '[i]dentity experimentation that they grow out of after being characteristically rebellious and possibly experimenting with minor delinquency'.⁴⁷ Consequently, Levitt and Tomasini conclude '[i]ncluding children on the NDNAD may be inappropriate for developmental reasons... they are in a state of transition, in which their intellectual development is complicated by socio-emotional development. It

⁴² Ian Freckleton, 'DNA Profiling: Forensic Science Under the Microscope', (Paper presented at the DNA and Criminal Justice conference, Australian Institute of Criminology, (30-31 October 1989) <<http://www.aic.gov.au/publications/previous%20series/proceedings/1-27/02.html>>, 31.

⁴³ *Police Powers and Responsibilities Act 2000* (Qld) s 450-452.

⁴⁴ Butt, above n 12, 61.

⁴⁵ John Muncie, *Youth Crime* (Sage Publications, 3rd ed, 2009) 395.

⁴⁶ *Police Powers and Responsibilities Act 2000* (Qld), sch 6.

⁴⁷ Levitt and Tomasini, above n 28, 51.

is controversial to consider them criminally responsible'.⁴⁸ This viewpoint is supported by research demonstrating that young people's brains are still developing the capacity to reason and rationalise as late as 25 years of age.⁴⁹

B What Issues Are Raised Around DNA Databasing with Young People?

Human rights issues are also raised by the storage of DNA profiles. Retaining an individual DNA profile on a database may have the potential to leave the individual vulnerable to being earmarked as a suspect for any future crime. Some argue this creates an avenue for 'individual surveillance',⁵⁰ an exercise of power of the state over the individual whereby those in power gather information on those considered to be subordinates.⁵¹ In the case of DNA databases, the state and governing bodies like police, gather information on arrestees and suspects via DNA profiles, wielding considerable power over the individual. It needs to be considered whether the use of DNA databases by such governing bodies for individual surveillance indicates a lack of restraint with respect to individual human rights, despite the argument of enhancing protection for the broader community.

The first major concern we raise about DNA databasing with young offenders relates to storing the DNA profiles of young people. In Queensland, it has been reported that in a period of less than five years, approximately 1300 DNA samples were collated in a Queensland Police Service database.⁵² This directly opposes the presumption of innocence, which is ordinarily meant to be conferred on all alleged offenders, and which also comes under the ambit of human rights, specifically article 14(2) of the ICCPR.⁵³ This in turn produces a range of implications for young people who are part of these databases and sometimes indefinitely "marked" as criminal and assumed guilty rather than innocent. This is especially the case given that ss 454(1)(g)(i) and (ii) make reference to limiting the

⁴⁸ Ibid 54.

⁴⁹ Charlotte Walsh, 'Youth justice and neuroscience: a dual use dilemma' (2011) 51(1) *British Journal of Criminology* 21.

⁵⁰ Wallace, above n 4, 30.

⁵¹ Nicholas Abercrombie, Stephen Hill and Bryan Turner, *The Penguin Dictionary of Sociology* (Penguin Group Publishing, 5th ed, 2006).

⁵² Sarah Vogler, 'DNA Tag for Kid Crims', *The Sunday Mail* (Australia), 10 January 2010, 1.

⁵³ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

'purposes' for which the DNA analysis may be used.⁵⁴ It stipulates that if the person does *not* limit the 'purposes' then the DNA analysis may be included in the Queensland DNA database. Given the gravity of such an inclusion, this clause may need to be explained in a manner that clearly allows adequate comprehension of the intent of the legislation by the alleged young offender, as may the whole of s 454 of the Act.⁵⁵ Kimmelman has argued that storing DNA profiles like this 'injures the trust relationship between a government and its subjects',⁵⁶ because trust comes with being able to act in the absence of surveillance – DNA databasing of the DNA profiles of alleged young offenders amounts to surveillance in this manner, and we suggest therefore this process ultimately erodes trust. It also raises further ethical questions discussed by Kimmelman about how these databases are populated by police actions. Will this mean that more young people will be arrested by police as suspicious in relation to more minor offences because they can get the young person to consent to a forensic procedure, have the DNA analysed and digitised as a profile in a DNA database, and then compare this profile against profiles collected from unsolved crimes in a 'trawling' process,⁵⁷ simply because alleged young offenders do not have an adequate understanding of limiting 'purposes'? Questions like these challenge general principles around how contacts between law enforcement agencies and a young person shall be managed in such a way as to respect the legal status of the juvenile, promote the well-being of the juvenile, and avoid harm to them with due regard to the circumstances of the case.⁵⁸

A second concern we raise with reference to determining who perpetrates crime through the investigation process is the interface existing between the Queensland Police Service DNA database and CrimTrac (the National DNA database executive agency) for the purposes of information sharing and comparison. Section 492(1) of the PPRA QLD entitled notes information to be transmitted from the Queensland Police Service DNA database to its national counterpart.⁵⁹ The concern with this provision is if an alleged young offender does not understand the implications of 'limiting the purposes' of a DNA profile (referred

⁵⁴ *Police Powers and Responsibilities Act 2000* (Qld) s 454(1)(g)(i)-(ii).

⁵⁵ *Ibid* s 454.

⁵⁶ Jonathan Kimmelman, 'Risking Ethical Insolvency: A Survey of Trends in Criminal DNA Databanking' (2000) 28(3) *Journal of Law, Medicine and Ethics* 209, 215.

⁵⁷ David Kaye, 'Trawling DNA Databases for Partial Matches: What is the FBI Afraid Of?' (2009) 19(1) *Journal of Law and Public Policy* 145.

⁵⁸ United Nations General Assembly, *United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules")*, GA Res 40/33, UN GAOR, 40th sess, 96th plen mtg, UN Doc A/RES/40/33 (adopted 29 November 1985).

⁵⁹ *Police Powers and Responsibilities Act 2000* (Qld) s 492(1).

to above), then it may be reasonable to conclude they may also not comprehend the implications of having their DNA profile included in a larger, national database. As Lincoln suggests, there are privacy concerns regarding the information stored on DNA databases in relation to who has access to such information, which may have been provided unwittingly.⁶⁰

A third key point of contention highlighted by the requirements in the PPRA QLD relates to age. Given the gravity and implications of taking a DNA sample by way of a forensic procedure (as part of a police investigation), it is reasonable to suggest the age of the child be confirmed *before* proceeding with the collection of any DNA sample. With respect to the Queensland context, s 451(1) of the PPRA QLD deals with special requirements for children less than 14 years of age and stipulates that the section applies 'if a police officer reasonably suspects the relevant person is a child who is under 14 years.'⁶¹ To suspect or have suspicion of a child's age is not positive confirmation of the child's age. Rule 10.3 of the *United Nations Standard Minimum Rules for the Administration of Juvenile Justice* reaffirms the vulnerability of children with reference to police investigations.⁶² Of particular importance here is how most young people and children processed by youth justice systems around the world are considered a vulnerable group.⁶³ We have ample evidence to suggest that children and young people engaged in offending behaviours often do not have the capacity to fully comprehend policing processes like DNA databasing because they are often marginalised in terms of their literacy levels and other life circumstances which impede their capacity.⁶⁴

IV FUTURE DIRECTIONS

This paper has indicated that there are a number of concerns related to undertaking forensic procedures and DNA databasing with young people, including the lack of regard

⁶⁰ Robyn Lincoln, 'Human Rights (and Wrongs) of DNA Testing and Evidence' (2001) 7 *The National Legal Eagle* 3, 5.

⁶¹ *Police Powers and Responsibilities Act 2000* (Qld) s 451(1).

⁶² United Nations General Assembly, *United Nations Standard Minimum Rules for the Administration of Juvenile Justice* ("*The Beijing Rules*"), GA Res 40/33, UN GAOR, 40th sess, 96th plen mtg, UN Doc A/RES/40/33 (adopted 29 November 1985).

⁶³ Asquith and Bartkowiak-Theron, above n 7.

⁶⁴ Chris Cuneen, Rob White and Kelly Richards, *Juvenile Justice: Youth and Crime in Australia* (Oxford University Press, 5th ed, 2015).

for privacy, the lack of consideration for the variation in individual capacity to provide informed consent, the abrogation of the presumption of innocence, stigmatization from labelling as young offenders, and the potential for unwarranted individual surveillance. As such, with respect to future directions of DNA profiling with young offenders, serious consideration needs to be given to how we reconcile the use of DNA databases in policing whilst at the same time upholding the rights and well-being of young people. Having examined the provisions of the Act relating to undertaking forensic procedures to collect DNA samples, and then retaining these DNA profiles from alleged young offenders, the evidence presented suggests that the well-being and rights of young people are not adequately protected under the Act. Further, it may also be argued that when measured against aspects of the principles of the *Convention on the Rights of the Child*,⁶⁵ and the *Standard Minimum Rules for Administration of Juvenile Justice*,⁶⁶ the PPRA QLD falls short of those principles in some respects. With a view to addressing the issues raised in this paper, it would have great potential benefit to consider the following courses of action.

In reviewing the relevant legislation in Queensland, it may be possible to better safeguard the rights and well-being of young people. Specifically, the examination of Chapter 17 of the *Police Powers and Responsibilities Act* highlighted the need to enhance privacy to fully respect this right under the *Convention on the Rights of the Child*.⁶⁷ Confirming the age of the alleged young offender may better ensure appropriate treatment under the legislation. In considering the issue of informed consent, stipulating a minimum time to consider explanations regarding DNA collection and retention may better safeguard against a young person being unduly pressured into providing consent. Further, throughout the Act, various provisions make reference to the presence of a support person for the alleged offender, but only if that young person agrees. It may prove beneficial to make the attendance of a fully independent support person (themselves fully apprised of the legislation) mandatory, to enhance and safeguard the decision making process. Lastly, the acknowledgement of

⁶⁵ *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

⁶⁶ United Nations General Assembly, *United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules")*, GA Res 40/33, UN GAOR, 40th sess, 96th plen mtg, UN Doc A/RES/40/33 (adopted 29 November 1985).

⁶⁷ *Police Powers and Responsibilities Act 2000* (Qld) ch 17; *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

variations in the developmental decision making capacity of individuals needs to be more fully considered.

To justify any further expansion of DNA databases, with regards to those young people dubbed as the '[n]ext generation of criminals',⁶⁸ dedicating resources towards a *cost-benefit analysis* of the Queensland Police Service DNA database may be appropriate,⁶⁹ or at the very least extensive, in-depth research around these concerns like that conducted by McCartney in the United Kingdom.⁷⁰ This may provide greater clarity in the debate as to whether having a DNA profile on such a database is a real deterrent to committing further crime, or whether there should be a refocusing of crime prevention on early interventions, rehabilitation and diversion from the criminal justice system. This latter consideration could be the subject of further exploratory research with the use of, for example, focus groups (parents, young people and criminal justice professionals) to facilitate the collation of feedback as to the perceived usefulness of DNA databases and the best way to deter young people from criminal activity. Further, comparative research across international jurisdictions, and across different Australian state jurisdictions, may also facilitate improvements and continuity with respect to the use of DNA databases.

Given the varying developmental stages of young people, and their varying understanding of processes involved in forensic procedures and DNA databasing, it may be beneficial to have legislation that accommodates or makes provision for a test specifically dealing with the recognition of individual differences with respect to the capacity and maturity of young people, like that in the context of health law termed Gillick competence. Originating from case law in England, Gillick competence addresses the ability of the individual young person to consent to treatment in accordance with their capacity, intelligence, and maturity. The precedent set in the case, *Gillick v West Norfolk and Wisbech Area Health Authority*,⁷¹ has been applied and approved in Australia in *Marion's case*.⁷² In handing down its majority decision, the court held that '[a] minor is capable of giving informed consent when he or

⁶⁸ Vogler, above n 52, 1.

⁶⁹ Nuffield Council on Bioethics, *The Forensic Use of Bioinformation: Ethical Issues* (September 2007); Freckelton, above n 42.

⁷⁰ Carole McCartney, 'The DNA Expansion Programme and Criminal Investigation' (2006) 46(2) *British Journal of Criminology* 175.

⁷¹ *Gillick v West Norfolk and Wisbech Area Health Authority* [1985] All ER 402.

⁷² *Department of Health and Community Services (NT) v JWB and SMB (Marion's case)* (1992) 175 CLR 218.

she achieves a sufficient understanding and intelligence to enable him or her to understand fully what is proposed'.⁷³ It is tenable this competence test may also be applied in the context of young people consenting (or not) to forensic procedures such as the collection of DNA. Gillick competence has been challenged in terms of its usefulness. Morss indicates, for instance, that whilst Gillick competence emphasises the acknowledgement of variations for psychosocial development between individuals, it is also incremental in nature and therefore needs to be evaluated on a case by case basis.⁷⁴ As Morss asserts, 'a child's capacity in law depends upon that child's individual circumstances and in spite of increasing capacity, commensurate with age and other factors, major barriers still exist in children exercising their legal rights'.⁷⁵ However, it is also plausible that a Gillick-esque standard or test may be incorporated into relevant aspects of *Police Powers and Responsibilities Act* in the Queensland context to better accommodate variation in psychosocial development between individuals.

Ultimately, it is clear that forensic procedures, and subsequent DNA profiling and databasing, require further discussion around how we continue to engage in these practices with alleged young offenders and simultaneously continue to balance this with the human rights concerns raised for these offenders. For instance, what happens in the event that a young person refuses to consent to a forensic procedure, and police then proceed to gain a court order to have this procedure completed? What human rights issues are raised when the young person breaches the order and is criminalised as a result of this? What happens to informed consent with alleged young offenders when their rights are disregarded in these processes? In what ethical space must we move if we consider the infringements on human rights elaborated above as acceptable in light of being able to detect and prevent crime generally, in addition to acquitting those wrongly accused of particular crimes? How do we think through the possibility that having an alleged young offenders' DNA profile entered into a database may be considered as a deterrent for engaging in different types of crime? These are key questions in this debate that we would suggest need to be considered

⁷³ Ibid 237-238.

⁷⁴ John R. Morss, 'But for the Barriers: Significant Extensions to Children's Capacity' (2004) 11(2) *Psychiatry, Psychology and the Law* 319.

⁷⁵ Ibid, 321 quoting B & B and Minister for Immigration and Multicultural & Indigenous Affairs [2003] Fam CA 451, [376].

in light of how we support young people so they fully understand these processes in the future.

REFERENCE LIST

A Article/Books/Reports

- Abercrombie, Nicholas, Stephen Hill and Bryan Turner, *The Penguin Dictionary of Sociology* (Penguin Group Publishing, 5th ed, 2006)
- Asquith, Nicole L. and Isabelle Bartkowiak-Theron, 'Vulnerability and Diversity in Policing' in Isabelle Bartkowiak-Theron and Nicole L. Asquith (eds), *Policing Vulnerability* (Federation Press, 2012) 3
- Butt, Peter (ed), *Butterworth's Concise Australian Legal Dictionary* (Lexis Nexis, 3rd ed, 2004)
- Campbell, Liz and Nessa Lynch, 'Competing Paradigms? The Use of DNA Powers in Youth Justice' (2012) 12(1) *Youth Justice* 3
- Cuneen, Chris, Rob White and Kelly Richards, *Juvenile Justice: Youth and Crime in Australia* (Oxford University Press, 5th ed, 2015)
- Gans, Jeremy and Gregor Urbas, 'DNA Identification in the Criminal Justice System' (Research Paper, No 226, Australian Institute of Criminology, May 2002)
- Haesler, Andrew, 'DNA and Policing' (2001) 79 *Australian Law Reform Commission - Reform Journal* 27
- Hutchinson, Terry, "'A Slap on the Wrist"? The Conservative Agenda in Queensland, Australia' (2015) 15(2) *Youth Justice* 134
- Kaye, David, 'Trawling DNA Databases for Partial Matches: What is the FBI Afraid Of?' (2009) 19(1) *Journal of Law and Public Policy* 145
- Kimmelman, Jonathan, 'Risking Ethical Insolvency: A Survey of Trends in Criminal DNA Databanking' (2000) 28(3) *Journal of Law, Medicine and Ethics* 209
- Levitt, Mairi and Floris Tomasini, 'Bar-coded children: an exploration of issues around the inclusion of children on the England and Wales national DNA database' (2006) 2(1) *Genomics, Society and Policy* 41
- Lincoln, Robyn, 'Human Rights (and Wrongs) of DNA Testing and Evidence' (2001) 7 *The*

National Legal Eagle 3

McCartney, Carole, 'Forensic DNA Sampling and the England and Wales National DNA Database: A Sceptical Approach' (2004) 12(2) *Critical Criminology* 157

McCartney, Carole, 'The DNA Expansion Programme and Criminal Investigation' (2006) 46(2) *British Journal of Criminology* 175

Morss, John R., 'But for the Barriers: Significant Extensions to Children's Capacity' (2004) 11(2) *Psychiatry, Psychology and the Law* 319

Semikjodskii, Andrei, *Dealing with DNA Evidence: A Legal Guide* (Routledge, 2007)

Steventon, Beverley, 'Creating a DNA Database' (1995) 59(4) *Journal of Criminal Law* 411

Walsh, Charlotte, 'Youth justice and neuroscience: a dual use dilemma' (2011) 51(1) *British Journal of Criminology* 21

Williams, Robin, 'DNA Profiling' (2008), in Tim Newburn and Peter Neyroud (eds) *Dictionary of Policing* (Willan, 2008) 86

Wallace, Helen, 'The UK National DNA Database' (2006) 7 *European Molecular Biology Organization Reports* 26

B Cases

B & B and Minister for Immigration and Multicultural & Indigenous Affairs [2003] Fam CA 451

Department of Health and Community Services (NT) v JWB and SMB (Marion's case) (1992) 175 CLR 218

Gillick v West Norfolk and Wisbech Area Health Authority [1985] AII ER 402

C Legislation

Criminal Code Act 1899 (Qld)

Juvenile Justice Act 1992 (Qld)

Police Powers and Responsibilities Act 2000 (Qld)

D *Treaties*

Convention on the Rights of the Child, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990)

International Covenant on Civil and Political Rights, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976)

E *Other*

Freckelton, Ian, 'DNA Profiling: Forensic Science Under the Microscope', (Paper presented at the DNA and Criminal Justice conference, Australian Institute of Criminology, (30-31 October 1989) <<http://www.aic.gov.au/publications/previous%20series/proceedings/1-27/02.html>>

Grimsley, Edwin, *Lessons about Black Youth and Wrongful Convictions: Three Things You Should Know* (1 May 2015) Innocence Project
<<https://www.innocenceproject.org/lessons-about-black-youth-and-wrongful-convictions-three-things-you-should-know/>>

Ireland, Steve, 'What Authority Should Police Have to Detain Suspects to Take Samples?' (Paper presented at the DNA and Criminal Justice conference, Australian Institute of Criminology, 30-31, (30-31 October 1989)
<<http://www.aic.gov.au/publications/previous%20series/proceedings/1-27/02.html>>

Lavoipierre, Angela, 'NSW Police take DNA from Hundreds of Ex-Offenders to Build Crime-Solving Database', *ABC News* (online), 24 August 2015
<<http://www.abc.net.au/news/2014-09-29/nsw-police-take-dna-from-hundreds-of-ex-criminals/5775990>>

Nuffield Council on Bioethics, *The Forensic Use of Bioinformation: Ethical Issues* (September 2007)

United Nations General Assembly, *United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules")*, GA Res 40/33, UN GAOR, 40th sess, 96th plen mtg, UN Doc A/RES/40/33 (adopted 29 November 1985)

Vogler, Sarah, 'DNA Tag for Kid Crims', *The Sunday Mail* (Queensland), 10 January 2010

Wallace, Helen, 'Prejudice, Stigma and DNA Databases' (2008) 28 *GeneWatch*

<http://www.councilforresponsiblegenetics.org/genewatch/GeneWatchPage.aspx?pageId=60&arc_hive=yes>