Justice Legislation Amendment (Police & Other Matters) Bill 2019 ("the Bill")

We oppose the following areas of the Bill:

1. Taking DNA samples without judicial oversight

Under the proposed legislation new powers will be added to the Crimes Act 1958 for police to take DNA samples from adults (18 and over) & from children (15 to 17 years of age), without consent or a court order, but rather with authorisation from a senior police officer.

a. Adults suspects & DNA samples
In regard to adults (18 and over) the Bill will enable police to take a DNA sample from a person suspected of committing any indictable offence, either with their consent or with the authorisation from a senior police officer. Currently an adult suspect can give consent to providing a DNA sample or a court order is required.

b. Child (15 to 17) suspects & DNA samples
In regard to young people aged 15 to 17 the Bill will enable police to take a DNA sample from a person suspected of committing a wide range of indictable offences described as 'DNA sample offences'. 'DNA sample offences' includes serious violent, sexual and drugs offences including gross violence offences, rape, home invasion, dangerous driving causing serious injury, carjacking, trafficking in a drug of dependence, armed robbery and aggravated burglary.

Under the Bill a child (together with their parent or guardian) can provide their consent to the police officer taking the DNA sample. Currently a person under 18 cannot give consent to providing DNA and a court order is required.

There are very limited safeguards:

- *Section 464 SC(2):(2) A police officer may request a DNA person, who is a child, to give a DNA profile sample only if the police officer is satisfied that the taking of the sample* ***is justified in all of the circumstances…****,*
- If a child and their parent /guardian does not consent then a police officer must obtain authorisation from a senior police officer (from the same station) to take the sample (clause 55 inserts section 464SE of ***Crimes Act***).
- If a child is not charged within 12 months of the sample being taken with a relevant offence, the Chief Commissioner must destroy any sample taken however a police officer may before the 12 months is up, apply, without notice to any other person, to the Magistrates' Court or the Children's Court for an order extending that period. This requires the court to consider the seriousness of the circumstances of the offence and that the making of the order is justified.
- If a young person (15 to 17-year-olds) is found guilty of a specified DNA sample offence, police must apply (not later than 6 months after the final determination of proceedings) to the Court for an order permitting the retention of any sample taken.

Concerns/ calls for amendments
It is the position of Youthlaw that in regard to obtaining a DNA sample from a child the current law be maintained – i.e. that a court order should be required at all times and that consent is not sufficient.
The current law is an important and necessary protection given the vulnerability of children, the imbalance between a police officer and a child suspect and the potential for undue influence.

Some argue for consistency between obtaining DNA samples and fingerprints (Currently fingerprints can be taken without consent from suspects 15 years and over) however the two procedures are very different. Obtaining DNA is a far more invasive procedure than fingerprinting. DNA samples are a source of much more personal and private information and the impact of misuse much greater. It is our position that stronger protections should be applied to the collection, use and destruction of DNA.

We are concerned and believe the community at large would be concerned about the very real possibility of DNA samples not being destroyed and DNA data being collected on members of the community without criminal conviction. The bill is silent however about how the person from whom the DNA sample has been taken will know that their DNA sample has been destroyed or that a court order has been sought to retain the DNA.

Some suggested amendments

a. **Part 8 - DNA profile samples and senior police officer authorisations**—
Amend clauses 52 - 59, and any consequential clauses (eg. 67), that permit, or refer to, the taking of DNA from a child (including those clauses relating to informed consent provided relation to a child)

b. Amend clause 55 to delete subsection (1) of new inserted section 464SC *Crimes Act* " *is suspected on reasonable grounds of having committed the indictable offence*" and any other clause referring to suspects or suspected

2. Introduction of new criminal offence of intimidation of officers or a family member

Under the Bill (Part 2 Clause 3) a new Section 31D of the Crimes Act would introduce an offence of intimidation of a police officer, PSO, police custody officer, custodial officer, youth justice custodial officer or a family member. This offence will be punishable by a maximum of 10 years imprisonment.

We are of the view that these reforms are unnecessary. There are already criminal offences, with significant maximum sentences, that deal with such conduct including reckless conduct endangering life, reckless conduct endangering serious injury, assault of an emergency worker on duty (which includes police officers and PSOs and assault generally.

We oppose this new offence and hold concerns it will result in over-charging young people, often from disadvantaged parts of our community.

The offence allows a charge to be made out even where the victim did not experience apprehension or fear, and where the accused did not intend to place the victim in such a state.

The Bill states in section 31D(3)(a) that a person uses intimidation if: "*the person engages in conduct that could reasonably be expected to arouse apprehension or fear in the victim for the safety of the victim; and either the person knows, or ought to have known, that such conduct would be likely to arouse that apprehension or fear"*.

The removal of the mental element, or mens rea, of specific intent is an unacceptable particularly given the penalties contemplated.

While it may not be the intention of the offence it is likely to be used against those exhibiting low level antisocial language or behaviour. We can also envisage it being use where young people are acting erratically due to intoxication or mental health issues. Another likely context is using the offence as pretext for a stop & search.

This offence will only entrench more young people into the criminal justice system. It will not promote a safer community or environment in youth detention centres.

Some suggested amendments:

Part 2 - Discharging firearm and intimidation offences and common assault—

c. Delete clause 3 (new section 31D of *Crimes Act)* namely the new offence of Intimidation of a law enforcement officer or a family member of a law enforcement officer and any consequential amendments

Or if that isn't possible

d. In clause 3 - amend section 31D Crimes Act (3) so that the person engages in conduct with *intent* to arouse apprehension or fear in the victim for their safety i.e require a mental element, or mens rea, of specific intent.

3. Reduction of the commercial quantity of heroin

In Part 3 of the Bill "Drugs of dependence and commercial trafficking offence" clauses reduces the commercial quantity of heroin from 250 grams to 50 grams and introduces a new offence of trafficking for an organisation.
Our grace concern is that the significant quantity adjustment will put a large number of vulnerable heroin users in the commercial trafficking offence category. Several concerning consequences will flow from this significant adjustment, as those people who will now be charged as commercial quantity traffickers will not be able to be heard in the summary jurisdiction, not be eligible for diversion, the drug court, and not receive a Community Correction Order without conviction – options which are critically significant in helping users to rehabilitate, recover from their addiction and be supported to steer away from the criminal justice system. These changes will impact on young heroin users as well, and will result in young people caught with 50gm of heroin being uplifted out of the children's court as well.

This proposal does not align with well accepted harm minimisation approaches.

Suggested amendment

Part 3 - Drugs of dependence and commercial trafficking offence

e. Delete amending definitions in clause 9, including the reduction of the commercial quantity of heroin from 250 grams to 50 grams.