

What Authority should Police have to detain Suspects to take Samples?¹

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It is an understatement to say that DNA profiling represents a revolution in forensic technology. It is probably the single most significant forensic development since fingerprinting became a generally accepted means of identification. At this time the process provides access to information that is individual specific at one level and species specific at another. In the future, given the nature of the information accessed by DNA technology, it is probable that a great deal more information about individuals will become available.

It is obvious that DNA information can be of immense value in inculcation of persons charged with offences. Not as obvious to many, is that DNA-derived data can also be of equal value in exculpation. Indeed, given the current difficulties of capacity of the criminal justice system to deal with expert evidence and recent controversial cases involving such evidence, it appears that exculpation is of greater actual and potential value than inculcation.

Comparison of the authority to obtain DNA evidence available in New South Wales, with that applicable in England, reveals a vastly different philosophy behind the provisions. The *New South Wales Crimes Act 1900*, provides police with access to body samples only **after** charge, whereas the British Police and Criminal Evidence Act 1984, makes provision for access **before** charge² for the dual purpose of inculcation and exculpation.

A further issue is the question of force. Legal policy makers have in the past chosen to adopt a 'force' perspective to the taking of forensic samples. This view is erroneous and reflects a period when the police were seen only in terms of force. The Police and Criminal Evidence Act 1984 (UK), offers an alternative based upon an interplay between consent and adverse inference.

The British Police and Criminal Evidence Act 1984, has a lot to offer Australia, in that it represents an attempt to balance, in a very realistic way, the rights of an accused person against the need for police to have adequate powers for law enforcement. The author does not support the view held by many, in New South Wales at least, that any increase in police authority and powers necessarily represents a loss of individual rights.

Authorities presented by the need for police to address particular problems requiring provision of body samples for investigative purposes, should be dealt with in rational terms, rather than being simplistic rhetorical appeals suggesting loss of individual rights. It is necessary in dealing with such proposals that the dangers that

flow from not granting adequate authority are appreciated. For example, the encouragement of unlawful behaviour by law enforcement officers and the possibility of exclusion of evidence so gained, can only punish the innocent victims of crime and fail to convict the guilty.

There are certain dangers to the justice system from wrongful conviction of the innocent, but there are great dangers faced by the justice system in allowing obviously guilty persons to escape justice.

Presentation of expert evidence before Australian courts has been surrounded by substantial recent controversy. Adoption of relatively recent developments in Britain requiring advance notice of expert evidence, access to exhibits and results, has the potential to bring about significant improvement to this situation.

An additional issue is that of media treatment of DNA profiling. It is already apparent that the media are constructing a view in the minds of the public that the DNA profiling technique is a panacea to the high levels of reported crime. Nothing could be further from the truth. DNA profiling will have relevance to a very small number of cases. The danger in media treatment to date is that expectations will be created that cannot be fulfilled. These expectations represent dangers for police, scientists and for the criminal justice system itself.

Current Police Powers in New South Wales

In New South Wales police power to take fingerprints, photographs and to make medical examinations of persons in custody upon a charge are provided by section 353A of the *Crimes Act* 1900. Subsection 2, reproduced below, provides authority for police to use reasonable force to allow a medical practitioner to make an examination and take samples.

s.353A(2) When a person is in lawful custody upon a charge of committing any crime or offence which is of such a nature and is alleged to have been committed under such circumstances that there are reasonable grounds for believing that an examination of his person will afford evidence as to the commission of the crime or offence, any legally qualified medical practitioner acting at the request of any officer of police of or above the rank of sergeant, and any person acting in good faith in his aid and under his direction, may make such an examination of the person so in custody as is reasonable in order to ascertain the facts which may afford such evidence.

Two aspects of the section are particularly relevant to the present discussion, first, is that of force, and second, is the requirement that the person to be medically examined be in custody upon a charge.

Force

Dealing firstly with the question of force, it has been held that the section provides authority for police to use such force as is reasonably necessary to enable a medical practitioner to carry out the examination (*McAneny v. Kearney* [1966] Qd R 306). While it may be convenient for legal policy makers to provide for the exercise of *force* to facilitate, through a medical examination, the taking of samples, there are obviously finite limits to the application of force. There is a point beyond which force cannot be exercised in response to a person who is intent upon resistance. Is a resisting person to be treated with continuing reciprocal force on an increasing scale until unconsciousness and then a medical examination be conducted? This approach is not regarded as a satisfactory solution to the situation but it seems to be the fashion.

Exercise of force by peace officers in Canada is proposed by the Law Reform Commission of Canada. There are no current provisions in the Canadian Criminal Code for the taking of forensic samples. The Law Reform Commission in their Report on Obtaining Forensic Evidence (1985) has proposed that samples be obtained generally by consent, but from an unwilling suspect on judicial order. However, in the case of more serious offences (an offence punishable by penal servitude for 5 years or more), where there is danger of loss or destruction of evidence, if the time is taken to obtain a judicial order and there is no less invasive procedure, available samples may be taken by force by a peace officer (exercise of force by the peace officer is to facilitate the taking of required samples by a suitably qualified person).

The British experience is that force is unnecessary. Persons suspected of crimes, when given the alternative of consent or adverse inference, almost always opt for consent. It is true that it is possible to argue at length about the reality of the consent and whether it is truly freely given. However at the end of the day, most suspects conform and provide the samples as requested.

Additionally, it can be expected in the not too distant future, that at least some members of the medical profession will refuse to conduct examinations under such circumstances on ethical grounds.

The British approach, in response to what are termed intimate samples, requiring consent of the person in police detention (detention is distinguished from charge) before an examination can take place, offers a far more realistic approach than either Canada or New South Wales.

In custody upon a charge

New South Wales provisions require that a person, from whom samples are to be taken without consent, is to be in custody upon a charge. This necessarily requires arrest and charge before samples can be taken from a non-consenting person. This contrasts with the English provisions that allow samples to be taken from persons in police detention where there is a reasonable belief that the sample will tend to confirm or disprove involvement. It is clear that this is intended to facilitate inculpation. It is also clear that the taking of samples is intended to assist exculpation.

Police and Criminal Evidence Act 1984 UK

The Police and Criminal Evidence Act, 1984 (UK), unlike the *Crimes Act*, 1900 in New South Wales makes expansive provision for detention of persons suspected of committing arrestable offences. Arrestable offences are those: for which the sentence is fixed by law; and offences for which a person over the age of 21 years may be sentenced to a term of five years. Detention must be to secure or preserve evidence of the commission of an offence.

Detention in police custody

Before discussing authority for the taking of body samples it is necessary to understand the general detention provisions of the Police and Criminal Evidence Act.

Detention of suspects is permitted for periods up to 96 hours for investigation of offences. A suspect may be detained on reasonable grounds for up to 24 hours on the authority of a custody officer (Sergeant), up to 36 hours on the authority of a Superintendent, and up to the maximum of 96 hours with judicial authority. A review officer (Inspector or Superintendent) conducts a review of the justification for continued detention at six hours initially and subsequently at nine hour intervals.

On the completion of a period of detention the suspect must be either released, without charge or on bail, or be charged. Where the person is charged and there are other offences that require investigation, an application may be made under the *Magistrates Courts Act* for a further period of detention in police custody for up to three days.

Taking of body samples

The British provisions allow for exercise of force in some cases and consent in others. Body samples are classified into two groups by the Act, intimate and non-intimate. Section 65 of the Act defines an intimate sample as: a sample of blood, semen or any other tissue fluid, urine, saliva or pubic hair, or a swab taken from a person's body orifice; and a non-intimate sample: a sample of hair other than pubic hair; a sample taken from a nail or from under a nail; a swab taken from any part of a person's body other than a body orifice.

Body samples may only be taken in cases where involvement of the suspect in a 'serious arrestable offence' is suspected on reasonable grounds. A serious arrestable offence is defined by the Act and relates to more serious offences. Section 116: offences include treason, murder, manslaughter, rape, kidnapping, incest, buggery, and indecent assault. Also included are arrestable offences which involve the security of state, interference with justice or investigation of offences, death, serious injury, substantial financial gain and serious financial loss.

Non-intimate samples s. 63

Non-intimate samples may be taken from persons in police detention without consent with the authority of a police officer of superintendent rank.

The officer giving consent must have reasonable grounds for suspecting that the person from whom the sample is to be taken is involved in a serious arrestable offence and have reasonable grounds for believing that the taking of the sample will tend to confirm or disprove that person's involvement s. 63 (1)-(4).

The detained person must be given advice that the authorisation has been given and the grounds for giving it. These same details must be recorded in the detained person's custody records s. 63 (6)-(9).

Intimate samples s. 62

Intimate samples may only be taken from a person in police custody with the authority of a police officer of Superintendent rank and the written consent of the detained person s. 62 (1), (4).

Authorisation by the Superintendent is based upon reasonable grounds for suspecting that the detained person was involved in a serious arrestable offence and reasonable belief that taking of the sample will tend to confirm or disprove involvement of the detained person s. 62 (2).

Where the consent by the detained person is refused without 'good cause', the court, and the court and jury, may draw inferences that may amount to corroboration of any evidence against the person in relation to the refusal s. 62 (10).

Caution upon refusal

Persons who refuse to comply with requests for the provision of samples are cautioned in the following form of words:

You do not have to (provide this sample) (allow this swab to be taken), but I must warn you that if you do not do so, a court may treat such a refusal as supporting any relevant evidence against you.

Adverse inference from non-consent to intimate samples

The Police and Criminal Evidence Act provisions for inference to be drawn from 'a refusal without good cause' is an ideal approach to the problems presented by exercise of force on an unwilling suspect. Few innocent persons will refuse to give blood or other samples if the situation is fully explained to them. A different situation of course applies in cases where the suspect is guilty: he or she may not wish to give consent to the taking of intimate samples; the suspect must, however, weigh the possible cost.

Do 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?

This seems to be a far more reasoned manner of approaching the question of taking samples from suspects, rather than giving authority to police who, with the aid of a medical practitioner, are empowered to forcibly take the sample, but realistically cannot exercise that authority.

Comparison of New South Wales and British Provisions

While consent is not a factor in the decision to seek similar samples from a person in custody in New South Wales, the *Crimes Act* permits 'medical examination' on the authority of a member of the police force of or above the rank of sergeant.

Realistically, however, regardless of the authority provided to police, acting in this case through a medical practitioner, where a person refuses to submit to, for example, the taking of blood or other 'intimate samples' what are police to do? Are they to use force and hold the person down while the sample is taken from the person in custody? The scenario is compounded by the need for police to find a cooperative medical practitioner who will agree to take part in the forceful taking of blood or other samples.

The philosophy behind the Police and Criminal Evidence Act sections in relation to intimate and non-intimate samples is clearly intended as a mechanism to confirm or disprove involvement, whereas the New South Wales *Crimes Act* provisions, due to the need to 'be in custody upon a charge', seem to be based only upon proving involvement. It seems desirable to have a provision that will allow early elimination of suspects by the taking of intimate samples, with appropriate safeguards such as consent, than be required to charge before such samples can be taken. The capacity for a court to draw inference from a refusal without good cause seems to protect the innocent suspect in detention and also to aid investigation of the crime.

Advance Notice of Expert Evidence

A further feature of relevant British legislation is the requirement that advance notice be given by both parties of intention to lead expert evidence.

The Police and Criminal Evidence Act 1984 makes provision for Crown Court Rules, amended in 1987, to require both prosecution and defence to give notice of intention to call expert evidence (Rule 3 (1)).

The rules require that upon committal for trial, or the making of an order for retrial, that any party intending to call expert evidence give notice to the other party of this intention. The required notice must be in writing.

A statement in writing indicating the result of any examination must be conveyed to the other party where it is intended to use the results of any examination in evidence. The other party must be afforded a reasonable opportunity to record any observation, test, or calculation that it is intended will be offered in evidence.

Where a party believes on reasonable grounds that release of details of the expert evidence to be called at the trial will lead to intimidation or attempted intimidation of a witness intended to be called, then that party does not have to comply with the rule requiring advance notice (Rule 4). Where this situation exists, the party withholding details of the evidence must give notice as to the refusal and the grounds relied upon. Evidence withheld in these circumstances will only be accepted at the discretion of the court.

Chamberlain Royal Commission

Commenting on presentation of evidence before the Royal Commission of Inquiry into the Chamberlain Convictions, Justice Morling (1987) praised the manner in which arrangements had been made to ensure that work and tests conducted by the Victorian State Forensic Science Laboratory could be observed by experts nominated by both parties (p. 311).

On the testing of 'blood' on the Chamberlain's vehicle by experts for the Crown, Justice Morling commented adversely:

Apparently the various experts did not consult together to decide precisely what was established by the tests. Before the Commission, no witness would take responsibility for what was put to the jury. The error appears to have been the result of lack of expertise by some experts, lack of proper equipment and lack of consultation between all the experts involved in this important part of the Crown case (p. 314).

Any matters in dispute related to the tests, examinations, results, and conclusions could be discussed by the experts during the examination and then again before the case commences in court. Agreement would be reached about many matters and the areas of continuing dispute would be known by both parties and if necessary an expert with competence, accepted by both parties, could be obtained to conduct the examination or examinations required.

There would, of course, be situations where agreement could not be reached. In these cases it would be necessary for the Director of Public Prosecutions to consider the matter in the light of the disputed examinations, procedures or experts and revise any decision to proceed in light of the dispute. The important difference being that the Director of Public Prosecutions would be making such a decision with greatly improved information available on which to base that decision.

In an Australian context, introduction of similar rules would have two major potential benefits, the first, relating to court time, and the second, relating to dispute before the courts and to the possibility of later upset of any findings of the court.

COURT TIME With current proposals in New South Wales to do away with the committal process, there will be no opportunity to test the quality, or indeed the competence, of expert witnesses prior to the matter coming before the court for trial. Advance notice of expert evidence has the potential to improve the management of cases before the higher courts considerably. Disputes and their extent will be known to both parties prior to commencement of the trial.

DISPUTE AND UPSET OF COURT FINDINGS There have been a number of recent upsets in Australian cases involving expert evidence, these include *Splatt* in South Australia and *Chamberlain* in the Northern Territory/Commonwealth. It is possible to adopt the attitude to these cases that they are the problem of the state or territory involved; however, it is more realistic to interpret these difficulties as those of the Australian legal system and its capacity to deal with difficult cases, particularly those involving forensic or expert evidence.

The entire criminal justice system is discredited where there is a tendency of the system to either release too many persons perceived as guilty by most of the population, or not convict persons perceived as guilty. Similar judgments are made by the population about cases where persons are convicted and later released after an inquiry or Royal Commission.

The system would be better served in the context of the present discussion, particularly on disputed expert or scientific evidence if the number of instances where persons are convicted and later released due to doubt, were reduced. Introduction of provisions similar to those in operation in England requiring advance notice of expert evidence would probably go a long way to addressing the concerns expressed by Justice Morling.

Conclusions

New South Wales *Crimes Act* provisions are based upon the person, from whom samples are to be taken, being in custody charged with an offence before samples can be taken without consent. They are also based upon the exercise of force by members of the police force upon a non-consenting accused. While a request could be made to a person before charge, the provisions are focussed only upon exculpation.

Situations where force is exercised by members of a police force upon citizens should be minimised. Force should only be resorted to if there are no other practical alternatives to gain the samples required. The English experience provides a clear indication that there are alternatives to the exercise of force to obtain body samples.

The English Police and Criminal Evidence Act arrangements for detention and obtaining body samples, support exculpation as well as inculpation. They are based upon consent by the detained person. Where consent is not forthcoming, in the case of non-intimate samples force is not available, and the detained person is cautioned about the implications of not giving consent. Where consent is not given, inference may be drawn by the court and the jury at any subsequent hearing. The inference may amount to corroboration of any evidence against the person that relates to the refusal.

Introduction of advance notice of expert evidence has the potential to reduce dispute over matters involving forensic evidence. It also has the capacity to reduce court backlogs by simplifying hearings and has particular application to New South Wales where there is active discussion on removal of committal hearings.

Footnotes

1. This paper is based on research supported by the Law Foundation of New South Wales.
2. The Police and Criminal Evidence Act 1984 (UK) provides for detention for various periods after arrest for the purpose of investigation. A suspect may be released without charge if there is insufficient evidence available upon which to base a charge.

References

Law Reform Commission of Canada 1985, *Obtaining Forensic Evidence: Investigative Procedures in Respect to the Person*, Ottawa.

Report of the Commissioner, the Hon. Justice T.R. Morling 1987, *Royal Commission of Inquiry into Chamberlain Convictions*, Government Printer of the Northern Territory, Darwin.

The Police and Criminal Evidence Act 1984 (UK) and the Codes of Practice (s.66).