

For discussion
on 11 February 1999

LegCo Panel on Security

Proposed Legislation on
Taking of Intimate and Non-intimate Samples

Purpose

This paper seeks Members' views on the Administration's proposed legislation on the taking of intimate and non-intimate samples.

Background

2. The Law Reform Commission (LRC) Report on Arrest recommended that the Police and other law enforcement agencies should adopt a number of provisions in the United Kingdom's Police and Criminal Evidence Act (PACE) 1984, which set out detailed procedural requirements and safeguards governing the operation of law enforcement agencies to avoid possible abuse of powers. The Government formed a Working Group (WG) consisting of the then Security Branch and other concerned departments to study the LRC Report on Arrest and arrived at its own proposals. In so doing, the WG has taken into account the circumstances of Hong Kong and endeavoured to strike a balance between the need for effective law enforcement and the protection of rights of individuals.

3. In October 1996, the Government conducted a two-month public consultation on the WG's proposals. The majority of respondents including the then LegCo Panel on Security, the Fight Crime Committee, District Fight Crime Committees and District Boards supported the proposals. In June 1997, the then Governor in Council decided to implement the WG's proposals in a phased manner over the next three years.

4. Currently, there is no statutory provision governing the taking of intimate or non-intimate samples. The current practice is based on a consensual approach i.e. if the Police asks a suspect for a sample, it could be taken only if the suspect concerned gives consent.

5. Under our proposals (paragraph 17 refers), intimate sample means a sample of blood, urine, semen or any other tissue fluid, or pubic hair, a dental impression or a swab taken from a person's body orifice other than the mouth. Non-intimate sample means 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 including the mouth but not any other body orifice, saliva, a footprint or a similar impression of any part of a person's body other than a part of his hand.

LRC Report on Arrest Concerning Intimate and Non-intimate Samples

6. The LRC recommends that intimate samples may be taken from a person in Police detention if-

- (i) consent is given; and
- (ii) authorised by an officer at the rank of Superintendent or above who has reasonable grounds for suspecting the person's involvement in a serious arrestable offence i.e. an offence for which the term of imprisonment is 5 years or more and for believing that the sample will confirm or disprove his involvement.

Prior authorisation from a magistrate should be obtained for the taking of intimate samples with consent in all non-urgent cases. This may be waived if prior authorisation is not possible or impractical. Adverse inferences could be drawn by the court if consent was refused by the person without good cause.

7. The LRC further recommends that non-intimate samples may be taken from a person-

- (i) if consent is given; or
- (ii) without consent if the person is in Police detention or is being held in Police custody and the taking of non-intimate sample is authorised by an officer at the rank of Superintendent or above who has reasonable grounds for suspecting the person's involvement in a serious arrestable offence and for believing that the sample will confirm or disprove his involvement.

8. It should be noted that prior judicial authorisation for non-consensual taking of non-intimate samples is neither part of PACE nor the recommendation of the LRC Report on Arrest. It was then considered by the Working Group that in view of the potential intrusiveness of non-consensual taking of non-intimate samples, the mechanism of judicial authorisation should be introduced.

Advancement of Technology in DNA Profiling - Buccal Swab

9. The purpose of our proposals is to make use of DNA analysis to enhance the capability of our law enforcement agencies in detecting and investigating crimes. Indeed this has become a very effective tool used by law enforcement agencies. Some examples of the successful use of DNA profiling in Hong Kong and overseas countries are at Annex.

10. Analysis of the DNA material extracted from intimate and non-intimate samples will give a DNA profile of the subject in the form of a series of numbers that is highly specific to a person. The DNA profile can therefore be used to identify a person with a high degree of certainty.

11. DNA profiling technology has advanced tremendously in the last decade, and in particular, in the past few years. In the past, DNA profiling required relatively large amount of samples (usually blood and semen) and was very time-consuming. With the advancement of technology, it is now possible to obtain a buccal cell sample by wiping a purpose-designed swab along the inside of the cheek part of the mouth of

the subject. This technique has been chosen since the degree of interference is relatively low, entirely painless, quick and efficient to carry out and will produce sufficient DNA material for a full profile using sophisticated analytical instruments.

12. Since DNA profiling results can be obtained from various bodily secretions and body cells (blood, semen, skin secretions, flakes of skin such as dandruff) that may be left behind at a crime scene by a criminal, profiling of these samples and comparison of the results with a profile of a suspect can implicate the suspect with a high degree of certainty, or it can exonerate him absolutely as the source of the material.

Review

13. The advancement of technology means that we can rely on the taking of buccal swab (a non-intimate sample) with a relatively low degree of interference to achieve our objective of enhancing the investigation of crimes. It represents no more than a step for identification of a suspect for crime investigation purpose.

14. From a practical point of view, the wide application of the buccal swab technique would mean that the court could conceivably be burdened with thousands of cases if judicial authorisation is required. This will clearly render the mechanism impracticable for implementation and delay investigation of crimes. Such scenario is not unlikely because the

suspect, if he is indeed the culprit, would have every incentive of not giving consent to the taking of samples to avoid being identified.

15. Taking into account of the above, we therefore propose that judicial authorisation should not be required for the non-consensual taking of non-intimate samples. However, in order to better safeguard the right of a suspect, there should be strict procedures governing the manner in which non-intimate samples are taken in a non-consensual manner.

16. As regards the taking of intimate samples, judicial authorisation should be retained in view of its intrusiveness. We propose, however to remove the power to draw adverse inference from a suspect's refusal to consent to taking of an intimate sample without good cause as this is no longer considered necessary.

Legislative Proposals

17. Our legislative proposals are as follows -

- (a) intimate samples can be taken from a suspect only if written consent is given by a suspect and if authorised by an officer at the rank of Superintendent or above (or comparable rank) who has reasonable grounds for suspecting the person's involvement in a serious arrestable offence i.e. an offence for which the term of imprisonment is 5 years or more and that the sample will confirm or disprove his involvement in crime;

- (b) in addition to (a), judicial authorisation is required for the taking of intimate samples. The magistrate will have the power to conduct inter-part hearing if necessary;
- (c) there would be strict procedures laid down to ensure that the suspect is informed of the grounds for taking his intimate samples and his rights to refuse to do so. This will ensure that consent is given freely and voluntarily;
- (d) non-intimate samples can be taken from a suspect if authorised by an officer at the rank of Superintendent or above (or comparable rank) who has reasonable grounds for suspecting the person's involvement in a serious arrestable offence i.e. an offence for which the term of imprisonment is 5 years or more and that the sample will confirm or disprove his involvement in crime;
- (e) in taking non-intimate samples, the suspect will be clearly informed of the grounds for taking the non-intimate samples and the authorisation being given;
- (f) intimate sample (except urine) has to be taken by a medical practitioner. As regards non-intimate sample, it may taken by medical practitioners or trained law enforcement officers;

- (g) where a sample has been taken from a suspect who has been arrested for a serious arrestable offence, it will immediately be compared against the database of samples held on record to ascertain if the suspect has been involved in any other crimes until it is destroyed as detailed below;
- (h) if the suspect is convicted of a serious arrestable offence, his DNA profiles would be stored in a DNA database to assist in the detection and investigation of crimes in future;
- (i) if the suspect is not convicted on that occasion, and has never previously been convicted of a serious arrestable offence, his sample will be destroyed as soon as reasonably practicable; and
- (j) the Police would be empowered to take non-intimate sample from a person convicted of a serious arrestable offence if such sample has not been taken before.

Way Forward

- 18. We intend to introduce this piece of legislation in this legislative session.

Security Bureau

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Examples of Successful Use of DNA Profiling in Hong Kong

Case 1

For a year between April 1992 and April 1993, fear struck Tuen Mun residents when a series of sexual attacks occurred in housing estates in the district. The attacks, which initially took the form of violent rapes, progressed to rape and homicide with at least two young females killed in 1993. The notorious Tuen Mun Rapist, as he was known at the time, was found by DNA profiling to be responsible for eight such cases. Later on in the year, a serial sexual attacker became active in the Hung Hom area. Police were able to make an early arrest in August 1993 when two offences had been reported. His DNA identified him to be the Tuen Mun Rapist. He was charged with ten counts ranging from indecent assault, rape and homicide. The defendant pleaded guilty on all charges and he is now serving a life sentence.

Case 2

In 1989, a series of rapes on nightclub hostesses were reported. In each case, the assailant posed as a taxi driver and picked victims finishing work in the early hours of the morning. Four years later, in 1993, police arrested a lighting technician on suspicion of the offences. DNA profiles from seminal stains preserved from five cases back in 1989 were found to match that of the suspect. An expert from England was employed by the defence to scrutinize and challenge the DNA evidence. However, it was the expert's opinion that there was nothing to fault on the practices and performance of the Government Laboratory. The defendant was tried and found guilty of the five counts of rape. He is now serving a life sentence.

Case 3

A man serving an eighteen year sentence for a charge of rape and robbery committed in 1991 strongly contested his conviction and in 1993, in the light of the then recently introduced DNA profiling technique in Hong Kong, requested a re-examination of relevant exhibits using the technique. A seminal stain on an undergarment worn by the victim preserved from 1991 was analysed alongside samples from the convict, the victim and her husband. DNA evidence proved that while the semen could not have originated from the husband of the victim and hence should have been left by the perpetrator, it did not match the convict either. With this new evidence, the man made a successful appeal, had his conviction quashed and regained his freedom.

Case 4

A series of indecent assaults on young women in their teens or early twenties were reported between June and December 1997 in Mongkok and Shamshuiipo areas. The assaults invariably took place at staircases of residential buildings with the victims being forced to masturbate the assailant, sometimes resulting in ejaculation on their bodies. DNA profiling on the semen linked four such incidents to the same culprit. A male was subsequently apprehended for the offences but unfortunately he refused to submit a control sample for comparison. Nevertheless, semen found on his shoes that bore the same DNA profile provided a positive association between him and the semen on these victims. Confronted with the evidence the suspect pleaded guilty to the charges and in January 1999 he was sentenced to seven years' imprisonment.

International DNA Cases of Interest

Case 1 (United Kingdom)

Julia BIANES, an 18 year old girl, parted from her friends in Wakefield City Centre around 2.00 a.m. on Friday 29th October 1993 intending to walk home. Julia never arrived at her home and her body was subsequently discovered on the following Sunday on waste ground on the outskirts of Wakefield. She had been raped and severely beaten and afterward strangled to death. As a result of offender profiling, several hundred males in the Wakefield Divisional area were targeted in order to obtain blood samples from them. This mass screening resulted in the identification of a man named Shaheed Mahmood WALLIAT, who was the 111th person to be profiled. The DNA test pointed to him as the offender in this case and he was arrested and charged with this offence.

Case 2 (United Kingdom)

In September 1995, 15 year old Naomi SMITH failed to return home. Her body was found on a recreation ground at Ansley Common near Nuneaton. She had died from horrific internal injuries and a cut throat. A DNA sample was obtained from a minute piece of foreign skin from the area of a bite on the victim's breast. Arrangements were made from DNA mass screening of young males in the area utilising offender profiling techniques. As a result of this mass screening, the offender was identified, arrested and charged with this offence. The strong DNA evidence was supported by the evidence of an odontologist. The offender duly stood trial at Birmingham Crown Court in January 1997 at which time he was found guilty.

Case 3 (United Kingdom)

In July 1995, a burglary occurred at the home of an elderly couple in Plymouth where over £2,500 in cash and jewellery were stolen. The offender was disturbed by the occupiers who managed to grab hold of a handful of hair, despite the elderly male being dragged down the stairs by the offender. The offender made good his escape but the hair was forwarded for inclusion in the national DNA database. A profile was obtained and entered into the database which led to the identification of the offender, who was charged and appeared at Plymouth Crown Court where he was found guilty.

Case 4 (Spain)

From 1993 to 1996, a number of sexual assaults were committed in a suburb of a big city. In each case, the assailant took the victims to a dark and isolated place, so none of them was able to identify him. The evidences (sperm cells taken from the vaginal swabs) were analysed using DNA profiling. The search in the evidence database showed that the same person was involved in the sexual assaults. This information led to the further development of the investigation that resulted in the arrest of a suspect. The DNA analysis of his blood sample confirmed his involvement. The man was accused of more than 20 rapes.

Case 5 (Italy)

During a robbery the robbers were wounded. Bloodstains and two female stockings with some hairs were recovered from the car used for the robbery.

Collected and analysed intelligence allowed the investigators to obtain an authorisation for collecting and analysis of cigarette ends from two suspected persons. The DNA profiles obtained from those cigarette ends were compared with those from the evidences collected from the vehicle. The first suspect's DNA profile matched the hairs found in stockings and the second suspect's profile matched the bloodstain, which led to the prosecution of both persons.

Case 6 (Belgium)

Since 1990, about 10 rapes had been committed in a park in Ciney, Belgium. The investigation had attributed them all to the same man who had been formally identified by one victim in 1997. The genetic analyses, which have recently been made on traces of sperm taken both on the victims and the scenes of crime at the time when the crimes were committed, confirmed the theory of one serial aggressor. The DNA analysis proved that the suspect, who had been detained since his arrest, was innocent. The investigation then continued on seven other individual who were known by the police for having committed minor crimes. One of them was betrayed by his genetic profile which identified him as being responsible of all the rapes.

Case 7 (Hungary)

There were two seemingly separated explosion attempts in few weeks' time. They were committed at public places about 30 kilometres apart. In the same time period, several blackmails were received by three different entrepreneurs. Using DNA analysis, it was established that all six blackmailing letters originated from the same man. This information allowed to limit the number of suspects significantly. It resulted in the arrest of the suspect in a very short

time. The suspect's DNA profile, which matched the saliva traces of the envelopes and stamps used in the blackmail letters, has a statistical frequency of 1 in 143 000 000 000 000 based on Hungarian population data.

Case 8 (Slovakia)

In 1996, the body of a taxi driver was discovered near a river in Bratislava. A young man was subsequently arrested and admitted the murder. The jeans of this suspect, stained with a very small amount of blood, were found in the flat of his father. By using DNA analysis, it was established that the blood on jeans originated from the victim. This was the only material evidence that was accepted by the court and the suspect was sentenced to 20 years imprisonment.

Case 9 (USA)

In the early 1990's an individual in Florida had been breaking into apartments and houses occupied by single women. The victims were tied up with barbed wire, mutilated and raped. The series of attacks came to a sudden end with no leads and no suspects. In 1996, a convicted burglar in another state was routinely DNA profiled prior to release. Eight days before his parole was finalised the DNA results identified him as the sex attacker in the earlier cases.