Contemporary Comment

*Medical Examination of Defendants: Yesterday, Today, Tomorrow**

> An examination is necessary in many instances, particularly in cases of sexual offenses. That is the main purpose of the clause ... There have been cases where it is known that an examination of the person would have resulted in a conviction, but where without such examination a conviction was impossible.[1]

Introduction

The concern expressed above in 1928 remains a contentious legal issue today. In March 1995 the New South Wales Court of Appeal ruled that it was unlawful to take blood samples from two men accused of rape and murder. The accused men argued that there was no statutory authorisation for such an assault against their person.[2] In April 1995 a Canadian court made a similar ruling. The court did, however, allow hair samples to be taken without consent.[3] In both cases decisions prohibiting the taking of blood samples centred on fundamental legal concerns. These were the demands not to interfere with the rights of, or bodily integrity of, an accused, and not to jeopardise a person's right against self-incrimination.[4] Both cases involved violent crimes against women.

This commentary reviews major developments in the arguments used to oppose or support the taking of blood samples. The article begins with a brief historical overview of legislative and common law decisions on the right to take bodily samples in a criminal investigation. The discussion then outlines how key legislation and common law cases were used to support the recent High Court ruling in the *Fernando* case. The contentious decision in *Fernando* and the issues raised by the case lead to a discussion about legal responses to crime and victims. Competing interests are contrasted between the views advanced by civil libertarians, victims' rights advocates and women's groups. A glimpse into changes in Canadian law provides a source of contrast for the dominant social and legal concerns now being debated in Australia.

Yesterday: 1897–1989

In October 1897 Sir Samual Griffith presented a draft Code of Criminal Law for Queensland.[5] The Code required that there be reasonable grounds to believe that an examination

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* Thanks to Dr Ania Wilczynski for comments on an earlier draft.

1 *Official Reports of the Parliament Debates* (SA) vol 2 session 1928 at 1163–4. For debates on NSW Legislation s353A of the *Crimes Act* 1924 see vol XCV1 of the *NSW Parliamentary Debates, Second Series.*

2 *Fernando & Anor v Commissioner of Police & Anor* (1995) CA 40761/94 CL 13147/94.

3 *R v Hutchinson* (unreported, 13 April 1995) Ontario Court (General Division) Barrie.

4 The decision in *Fernando* not to invade a person's body for a blood test was primarily based on the interpretation given to s353A of the *Crimes Act* 1924.

5 Presented to parliament (CA 89–1897), above n2 at 13.

of an accused person would afford evidence as to the commission of an offence. The purpose of the Code was "to ascertain the facts which may afford such evidence, and to use such force as is reasonably necessary for that purpose". The draft is said to have provided the model from which other states enacted legislation. [6]

Between 1901 and 1928 every state except Victoria passed legislation concerning medical examinations. A review of parliamentary debates indicates some of the dominant concerns argued when enacting the legislation. Those opposing the statute were concerned about the possible abuse of police power[7] and the false weight that a medical examination may give to erroneous claims of sexual offences. This latter concern reflects the belief that allegations of sexual assault "are often the easiest made and the hardest to be disproved", and that a medical examination might wrongly reinforce such claims.[8]

Those supporting the statute argued that there was a need for corroborative evidence, particularly in sex crimes. One example was the ability to detect whether a prisoner was suffering from venereal disease.[9] The collection of evidence in an examination was also thought to provide a safeguard for suspects, for example, by improving the chance to gather exculpatory information. Moreover, it was thought to be "a very wise protection, if the man arrested can insist upon a medical examination".[10] The debates did not discuss blood samples; nor did any State detail the specific forms of evidence to be covered by the statutes.

Since 1976 legislation in all states except New South Wales has either been amended, or interpreted in its original form to include blood samples. In Tasmania, soon after the admissibility of a blood sample was challenged,[11] the *Criminal Process Act* (1976) was passed to allow samples of blood, saliva, hair and nail clippings to be taken from accused persons. The Full Court in the South Australian case of *Franklin* interpreted a provision, similar to that of the New South Wales statute, to permit the taking of blood samples without consent.[12] In 1983 the Northern Territory Parliament adopted a criminal code authorising examinations by a medical practitioner to take blood, saliva or hair. Similar changes authorising the taking of blood samples were made in 1989 in Queensland and Victoria.[13]

Other legislation has indirectly affected developments in the taking of blood tests. First was a change to the *Acts Interpretation Act* 1901 (Cth) in 1984. The Act expanded the material courts can consider, such as Royal Commission Reports and parliamentary debates, when examining issues of disputed statutory construction. Second, in 1987 the *Motor Traffic Act* 1909 was changed to authorise taking blood samples without consent.[14]

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6 Id at 12–3.

7 *New South Wales Parliamentary Debates* XCV1, Second Series at 1074.

8 *Official Reports of the Parliamentary Debates* (SA), above n1 at 805 and 1096. Letter from the Council of the Law Society.

9 Parliamentary Reports (SA), id at 1164.

10 *New South Wales Parliamentary Debates*, above n1 at 1076.

11 *R v Harrison* (1975) Tas SR 140.

12 *R v Franklin* (1979) 22 SARS 101.

13 *Queensland Code* 1989 s259 and the *Crimes (Blood Sample) Act* 1989 (Vic).

14 Act no 44 s5AA *Motor Traffic Act* 1909.

The legacy of yesterday: *Fernando*

Fernando was the first case of its kind to interpret the rights given in the New South Wales legislation to take blood samples. The court ruled for the defendants. To make this judgment the court argued it was necessary to depart from the rule of comity; a rule "which usually follows the decisions of courts of like position in other Australian jurisdictions on similar points."[15] If the court had followed the comity rule, the *Fernando* judgment would have reflected the *Franklin* decision, which interpreted legislation to permit the taking of blood samples.

A topic to be discussed below is the accepted practice that to break the comity rule the court needs to be "convinced that the law and justice of the case require a different decision".[16] This condition placed an obligation on the *Fernando* court to show that their decision departed from previous decisions, because "justice seems to require the earlier decision to be overturned".[17]

The New South Wales court's decision not to follow the comity rule was supported by a "very long line of authorities".[18] Some of the key issues addressed by the court are briefly discussed here. First is the court's interpretation of the conditions necessary to make statutory change. The central concern in the cases cited by the court was not to "overthrow fundamental principles, infringe rights or depart from the general system of law" unless such an intention is expressed "with irresistible clearness" in the legislation.[19] This position is interrelated with the second topic: the court's interpretation of legislation, parliamentary debates and case law on medical examinations. Of "particular significance" to the decision, the court found:

> a complete absence in the debate of any remark by anyone at any time indicating that [an] examination ... could extend to anything beyond examination by sight and touch. Indeed, there is very little in any of the materials ... indicating that anything more than an examination by sight and touch was being spoken of ... .[20]

The *Fernando* decision was also influenced by the interpretation the court gave to the word "examination". The court held the view that what an examination meant was what was "understood in ordinary language" in 1924.[21]

Today: 1990–1995

A cursory review of *Fernando* indicates decisions made today rest on the power of language and attitudes that existed 70 years ago. The voice of women, the rights of victims and the need to balance concerns about public safety with the rights of the accused, are not debated at any time in the decision. In and of itself, this is not unusual. But a concern is raised here that the *Fernando* decision goes beyond reinforcing a system of law that

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15 Above n2 at 27.

16 Id at 12.

17 *R v Hookham* (1993) 31 NSWLR 381. For other discussion on the need to follow or break the uniformity of legislation see, eg, *Camden Park Estate Pty Limited v O'Toole* (1969) 72 SR 188, *Australian Securities Commission v Marlborough Gold Mines Ltd* (1993) 177 CLR 485 at 492 and above n2.

18 Above n2 at 8.

19 *Potter v Minahan* (1908) 7 CLR 277 at 304.

20 Above n2 at 16.

21 Id at 7.

most represented the views of, and the protection of, one sector of society. *Fernando* overrules a decision that meant (intentionally or not) the protection of those previously underrepresented in legal debates: the voice of women and victims of crimes. In short, the concern expressed in 1928 is still to be resolved: some "convictions [are] impossible"[22] especially in sexual offences, unless evidence is permitted from a medical examination.

It is worthwhile to note that Australia is not alone in its struggle to resolve this complex debate. The Canadian experience closely resembles the issues now discussed in Australia. For example, constraints are imposed by laws that at no time address "the issue of bodily fluids or other such samples".[23] The major force for change stems from Bill C-109.[24] The Bill led to changes in the *Canadian Criminal Code* 487.01, concerning conditions for search warrants.[25] Since the Code was amended police have tried to persuade the courts to interpret it liberally, to allow samples to be taken for DNA testing.

The key argument against the Code appears to be section 24(2) of the Canadian Charter of Rights and Freedoms. The Charter specifies that if a court concludes "that evidence was obtained in a manner that infringed or denied any rights of freedoms guaranteed" the evidence is to be "excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute".[26] This argument led an Ontario court to find an unreasonable search occurred, for example, when police did not advise an accused of the negative consequences that could result from a saliva test (a rape conviction), or of his right not to consent to the test.[27]

Another area of change in the Canadian courts is the admissibility of samples taken from materials that are abandoned by suspects during an investigation. In one case, although there was no search warrant, the court admitted into evidence test results taken from a tissue that a suspect had used to wipe blood from his face.[28] In a second case the expectation for police to warn against self-incrimination was addressed. The court admitted test results from cigarette butts taken after an interview.[29] It was decided in both cases that admitting such evidence did not violate the privacy expectations of the accused.

In Australia, most importantly in New South Wales, the Crime Legislation Bill (1990) attempted to permit the taking of blood samples without consent. The bill, which only passed in the legislative assembly, was introduced as a direct result of the Blackburn Royal Commission (1990).[30] The Blackburn Report highlights some of the conflicting interpretations of section 353A of the *Crimes Act*.

Like any major work, however, the Blackburn Report itself has been the subject, on the face of it, of conflicting interpretations.

The report has been used to both support and oppose the taking of blood samples. In the *Fernando* case, for example, the New South Wales court cited the report to support

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22 *Parliamentary debates* (1928), above n1.

23 Letter from Bruce Brown, Director of Legal Services, London Police Ontario Can, 16 June 1995.

24 The Bill that forms the basis for the Code was introduced in the *Commons Debates* by the Honourable Perrin Beatty, on behalf of the Minister for Justice and Attorney-General of Canada (25 February 1993) at 16491–5.

25 *Canadian Criminal Code* part XV — Special Procedure and Powers s487.01

26 Canadian Charter of Rights and Freedoms 51.

27 *R v Castanheira*, Ont Gen Div, Howden J, 13 Jan 1995 Full Text Order No 1446–024.

28 *R v Legere*, New Brunswick Court of Appeal, 95 CCC (3d) part 2 at 139.

29 *R v Arp, BCSC*, Parrett J, 8 Feb 1995 Full Text Order no. 1446–008.

30 *The Blackburn Royal Commission* (1990) at 363.

their decision that the defendants did not have to give blood.[31] In complete contrast, the mother of the woman murdered in the *Fernando* case asked why parliament had not fixed the anomaly (that permitted the accused to refuse blood tests), as it was suggested in the Blackburn Royal Commission.[32]

Both interpretations of the report are correct. The key difference appears to be that, on the one hand, the New South Wales court rightly used information that interpreted the past to support their views against taking blood samples. On the other hand, the mother of the victim rightly used information that suggested how to correct anomalies in the law. The report describes the view, for example, that if the Crimes Legislation Bill (1990) did not pass:

> no-doubt the legislature would give consideration to alternative means of dealing with the problem, namely the passing of legislation empowering police to demand samples and, if the demand is refused, to give the refusal in evidence for consideration by the jury on the question of the accused guilt.[33]

The Blackburn Report discusses, among many things, past and present issues that are central to the current debate on the taking of blood samples. Issues raised by the report include: concerns about abuses of police power, the need to protect the rights of the accused from unwarranted state intrusion, the demand for stringent conditions on the admissibility of evidence and considerations when responding to victims.

Discussion in the report on this last issue raised concerns that improvements were needed in the criminal justice system to adequately respond to the needs of victims.[34] The response to reports from victims about feeling "unnecessary humiliation" is but one indication of recent changes in attitudes to victims. The need to attend to the dignity and rights of the accused and the victim has strong support. The extent of this recognition is seen in the Department of Public Prosecutions new initiatives to consider the experience and rights of victims.[35]

The public agenda

Like Australia, changes to Canadian laws are being influenced by public pressure; similar law and order perspectives dominate public concerns.[36] At issue here, in both countries defendants can use the law to protect themselves from legal action by refusing to have a blood test.[37] It is not only the nature, but also the effect of these laws, protecting criminals, and risking the safety of citizens, that are fuel for the fire in debates about inadequacies in the justice system.

In a climate of public fear about crime, the fundamental rights of an accused are being challenged, by compelling demands from social and legal forces, to resist allocating and judging rights in a vacuum.[38] This article will briefly discuss below how our response to

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31 Above n2 at 24–6.

32 *Sun-Herald*, 4 June 1995.

33 Above n30 at 363.

34 Id at 259: 261 (appendix part 1 section J) Police Instruction 67.

35 See Office of the Director of Public Prosecutions New South Wales *Annual Report 1993–94* at 10 and 30–8.

36 Personal communication, Superintendent Balmain (30 March 1995) and Bruce Brown, Legal Director, London City Police, Ontario Canada (14 June 1995).

37 While challenges to the use of test results from bodily samples in Canada are now being bypassed in a variety of ways, above n28 at 28, arguments still uphold restraints on blood testing; eg, above n3, where new law CCC 487.01 was rejected. In Australia (NSW) see *Fernando*, above n1.

38 Minow, M, *Making All The Difference: Inclusion, Exclusion, and American Law* (1990) at 173 and Fineman, M and Thomadsen, N (eds), *At The Boundaries of Law: Feminism and Legal Theory* (1991).

crime needs to go beyond balancing rights.[39] For now, however, the discussion focusses on key concerns from victims' and women's groups and civil libertarians about the justice system. Their views underline the competing values that often collide in discourses on rights.

Special interest groups

The New South Wales Council For Civil Liberties strongly opposes any legal changes to allow the taking of blood tests without consent.[40] The Council reports that attempts to permit such tests represent a "familiar trend whereby the rights of, and protection of, the individual is eroded in the name of law and order".[41] The Council is also concerned that attempts to change the law further indicate that "the criminal onus and presumption of innocence [is] being broken down by the introduction of coercive and onerous evidence gathering procedures".[42] Supporting these concerns, the Council writes that recommendations for change[43] "provide no protection of the individual's dignity ... and are an affront to the civil and human rights of the individual".[44]

The views of women's groups and crime victims can provide a complete contrast to the concerns that the Council For Civil Liberties seeks to protect. One strong contrast, especially in recent media reports, is the price paid by victims of crime versus the apparent leniency or blunders of the criminal justice system in their response to offenders.[45] The experience of one victim makes the contrast glaringly clear: "Ever since the rape I feel as though I am the one serving the sentence — and it could be for life."[46] As the law stands, the havoc caused to this woman's life, and possibly to the lives of others, is not considered, and the goal to uphold the dignity and rights of the accused is given primacy.

The need to improve equality for women in the law and for fundamental changes to the structure of the legal system is strongly supported in a recent Law Reform Commission Report.[47] The report, *Equality Before the Law: Justice for Women,* states that "until recently" violence by men against women "... was sanctioned by the law's indifference". A goal of the National Committee on Violence Against Women, one group among many, is to make violence against women a more prominent concern in traditional law.[48] It seems a central force for such change may come from the recommendation to actively seek women's perspectives in the development of a uniform criminal code.[49]

Progress in the representation of victim's (and women's) rights is not without its critics. In a recent article by Tim Anderson, "Victims' Rights or Human Rights?",[50] concern

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39 For a discussion about what is wrong with all social problems and advocacy being presented as a clash of rights see, eg, Glendon, M, *Rights Talk: The impoverishment of political discourse* (1991).

40 Letter from NSW Council For Civil Liberties to Chairperson, Model Criminal Code Officers Committee Model Forensic Procedures Bill, 18 January 1995.

41 Ibid.

42 Ibid.

43 As discussed in the Model Criminal Code Officers Committee Model Forensic Procedures Bill (20 December 1994) PCC–102L.

44 Above n40.

45 For example, see *Sixty Minutes*, March 1995, program on Raymond Denning release and rape victim interview and "Blunder Frees Sex Attacker", *The Sydney Morning Herald* 1 April 1995 at 3.

46 Dowdeswell, J, *Women on Rape* (1986) at 145–64.

47 *The Law Reform Commission Equality Before the Law: Justice for Women* (April 1994) ALRC 69 part 1.

48 Described in the Law Reform Commission Report, id at 159.

49 Id, Recommendation number 12.1 at xxxiv.

50 Anderson, T, "Victims' Rights or Human Rights?" (1995) 6(3) *Curr Iss Crim Jus* at 335.

is raised that victims' rights are being harnessed for repressive law and order perspectives, such that "contradict traditional human rights"[51].

The interlocking paradigms of "police power" and "defendant's rights" are powerful (and traditional) reasons to leave the law as it stands. It is, however, only one side of the debate. The difficulty is, how to balance the demand not to give the State a license to assault citizens,[52] with the imperative not to give cold-blooded attackers, aroused by the infliction of violence and humiliation on others, do not have a license to walk free and attack again.

Tomorrow

The Australian[53] and Canadian[54] Attorneys-General each announced last month a plan to present a Bill, that, under certain conditions, allows the taking of blood tests without consent. In addition, the New South Wales Attorney-General has just proposed a Criminal Legislation Bill which contains amendments to section 353A.[55] The Bill "will reverse the effect of the decision of the Court of Appeal" in *Fernando*.[56]

The document that may serve as a model for uniformity in legislation is the Model Criminal Code Officers Committee Model Forensic Procedures Bill (MCCOC),[57] which outlines, on the advice of many authorities,[58] what is needed in comprehensive legislation for forensic procedures.

As well as detailing stringent court order conditions for forensic procedures, the Model Code proposes several safeguards for suspects. These include medical standards, reasonable privacy for the suspect, and the right to refuse to have the procedure videotaped.[59] Suspects also have a right to have independent persons present at the time of the examination and to obtain samples of what is being tested.[60] Conditions on liability for those performing a forensic procedure apply, and it is an offence if such persons disclose information revealed by the procedure, outside the conditions in the Code.[61]

In a letter addressing concerns expressed by civil libertarians about the invasions of individuals' privacy and dignity that will be created by the Code, the Minister for Justice writes:[62]

> The Government is very aware of the criticism which has been, and will be, levied by those who are concerned about privacy, but it is imperative that police have proper inves-

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51 Ibid.
52 For a discussion on the harms caused to people by the state see, for example, above n50 at 335.
53 For example, the *The Sydney Morning Herald,* 1 June 1995 at 5.
54 Letter from Director of Legal Services, London Police Ont CA, 16 June 1995.
55 *Criminal Legislation Bill* Hansard Proof, 1 June 1995 at 31.
56 Ibid
57 Model Provisions Part** Forensic Procedures PCC–102L, 20 Dec 1994.
58 For example, see Australian Law Reform Commission report *Criminal Investigation* (1975); the 1989 Victorian Consultative Committee on Police Powers of Investigation report "Body samples and examinations" (The Coldrey Report); the 1991 Gibbs Committee Report (5th) and a 1994 Queensland Justice Commission Report; as cited in the MCCOC explanatory comment.
59 MCCOC PCC–102L, December 1994 at 10.
60 Id at 11.
61 Id at 13–4.
62 Letter from the Honourable Duncan Kerr MP in response to concerns about the Bill from The Council for Civil Liberties, March 1995.

> tigative tools at their disposal and that the rights of the victim are balanced against those of suspects.[63]

Discussion about the rights of suspects and victims by the Minister for Justice, and recognition in the New South Wales Bill of the need to address public safety issues[64] are, if balanced carefully, encouraging signs.

Australia's commitment to international human rights obligations support these developments. Specific to the topic in this comment is The Declaration on the Elimination of Violence Against Women, which calls on the need for protections to be developed to prevent the revictimisation of women that stems from "gender-insensitive" practices.[65]

If the direction of change outlined in this section of the comment continues, legal protections, such that prevent medical examinations and the collection of necessary evidence for criminal investigations will, as it was hoped in 1928, once and for all be resolved. This means that criminals will no longer be given what in effect is a legal gift: their rights will not hand them a privilege that allows them to escape prosecution.

A more subtle, but nonetheless equally powerful change to defendants' rights is the impact of the proposed legislation on what is currently called justice. In Canada, tst results that proved a man's guilt in a violent crime were prevented from being used in court because admission of the results would "bring the administration of justice into disrepute".[66] In Australia, blood tests were prevented from being used for evidence in a violent crime because "the justice" of a case demanded the tests were not taken.[67]

Tomorrow, legislation will ensure that what we call justice includes the entitlements and protections available to society at large.

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63 Ibid.
64 Above n55.
65 Above n47 at 279.
66 Above n27.
67 As in *Fernando*.