

CL-AB.14

From: "Antony Cooper" <ACooper@csir.co.za>  
To: "Jeremy Michaels" <jmichaels@parliament.gov.za>  
Date: 2009/10/23 07:35 PM  
Subject: Comments on the Criminal Law (Forensic Procedures) Amendment Bill [B2-2009]

Dear Mr Michaels

I have two comments on the Criminal Law (Forensic Procedures) Amendment Bill [B2-2009]:

(1) I do not think that the definitions of "intimate sample" and "non-intimate sample" are adequate. For example, a sample of semen or of urine is not covered by either definition as neither is a sample of blood (and hence is not an "intimate sample") and neither is hair, taken from or under a nail, taken from a mouth or from a blood finger prick (and hence is not a "non-intimate sample").

I would suggest that a better approach would be to define a "non-intimate sample" adequately and then define an "intimate sample" as all other samples. This would have the advantage that the default for a sample would be that it was intimate, unless it had been defined as being non-intimate (which would cater for other tissue samples that might be used for forensic purposes in the future). It would also minimise the need for language that could be considered by some to be prurient.

I would like to propose the following definitions:

'non-intimate sample' means --

- (i) a sample of hair other than pubic hair;
- (ii) a sample taken from a nail or from under a nail;
- (iii) a swab taken from the mouth (buccal swab);
- (iv) a sample of blood taken by a finger prick; or
- (v) a combination of these;

'intimate sample' means any other sample taken from a person;

I would also suggest that the following be added to the definition of 'authorised person':

- (iii) intimate samples, any registered medical practitioner or a registered nurse;

(2) Earlier this year, the Committee on Identifying the Needs of the Forensic Sciences Community of the National Research Council (NRC) in the United States of America, published the report "Strengthening Forensic Science in the United States: A Path Forward" (ISBN: 0-309-13131-6, 352 pages, 2009, available at: <http://www.nap.edu/catalog/12589.html>). The report was commissioned by the US Congress.

While the report was about the forensic sciences in the USA, it did include international input. Unfortunately, the report is rather scathing about the forensic sciences in general, and issues such as their scientific basis, the disparities between the forensic sciences, the interpretation of forensic evidence, and the lack of mandatory standardization, certification and accreditation. It is expected that many people convicted on the basis of forensic evidence will now appeal their convictions.

A fundamental problem has been the very limited funding made available for the forensic sciences to conduct the required research, such as to establish the limits and measures of the performance of the various forensic sciences. One can only imagine how much less funding has been available for research in the forensic sciences in South Africa, when compared to an economy of the size of the USA.

However, I would suggest that it is now essential that the South African

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Government allocate significant funding for research in the forensic sciences (as outlined in the above-mentioned NRC report), for the following reasons:

(a) The environmental conditions in South Africa differ from those in the USA, so while we can exploit the research conducted in the USA and in other countries, the research needs to be calibrated for local conditions. An example of this is analysis of the insects splattered on the front of a vehicle, to determine where the vehicle has been.

(b) The forensic sciences applied in South Africa are not necessarily exactly the same as those in the USA. Research is needed to establish what the differences are and how the forensic sciences in South Africa can be improved. It must be emphasised that in some fields, South African forensic scientists might well be better than their counterparts in other countries.

(c) We need to establish our own reference samples, standards, procedures, accreditation, certification, etc.

(d) Legislation and case law differ between countries, so the admission of forensic science evidence in litigation in South Africa is not necessarily the same as it is in the USA, where it is driven mainly by the rulings in the case *Daubert v Merrell Dow Pharmaceuticals, Inc* (though as you will see from the NRC report, there is concern that *Daubert* is not being applied correctly).

(e) The NRC report is particularly concerned about the analysis of body prints and hair samples, for example, and both are mentioned in the Bill.

(f) The Bill mentions several processes that will require research in the forensic sciences, such as Clause 15C. (1) on the collection, storage, maintenance and administration of forensic evidence, Clause 15C. (2) on developing training courses, Clause 15C. (3)(b) on systems and processes, Clause 15N. (1) on standards for quality assurance, etc.

In conclusion, I believe that clauses should be added to the Bill to provide for the funding of research in the forensic sciences in South Africa.

I trust that these comments will be of interest to the Portfolio Committee on Police. Please do not hesitate to contact me should you have any queries.

Thank you  
Antony Cooper

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