

MODEL FORENSIC PROCEDURES BILL - DNA DATABASE PROVISIONS - EXPLANATORY NOTES

INTRODUCTION

The Model Forensic Procedures Bill has been revised as a result of consultation on the draft circulated in the discussion paper in May 1999, and decisions made by the Standing Committee of Attorneys-General (the Standing Committee) at its 23 July 1999 and 12 November 1999 meetings. The Model Criminal Code Officers Committee (MCCOC) has now redrafted the Bill, taking into account all comments raised in consultation, and the decisions of the Standing Committee. During the preparation of the Bill, MCCOC had detailed discussions with officers from the CrimTrac Project Team, law enforcement agencies and the Federal and NSW Privacy Commissioners offices to simplify and improve the data-matching rules which are contained in the Model Bill.

The following notes provide a summary of the results of consultation and a guide as to how key issues have been addressed in the Bill. The consultation was also very valuable in providing detailed improvements to the draft Bill. A list of the people and organisations who were consulted is provided in the Appendix to this document.

The Bill is not short. MCCOC has found that the desire by police for specificity about their powers, and concerns about ensuring there are adequate safeguards against abuse of the legislation have added to its length. Both these aspirations have meant that the Bill is much longer than some of the State legislation it will be replacing. The brevity of the legislation in those States has resulted in uncertainty and unsatisfactory litigation (for example, the decision of the NSW Court of Appeal in *Fernando* (1995) 78 A Crim R 64). The Model Bill is also longer because the legislation in all jurisdictions needs to cater for the national DNA database system (which is being developed as part of the CrimTrac project) by providing for the suitable matching rules.

The Bill satisfies the contemporary desire for specificity, evident in everything from environmental standards to welfare and taxation legislation. It should come as no surprise that procedures which could lead to the stigma and inconvenience of being investigated for criminal activity and possibly being detained for that purpose should be detailed and precise. It is also essential that there be certainty about the rules in light of the significant scrutiny of police investigative practices in modern times.

MCCOC has worked hard to achieve a balance between procedures that are practical and providing adequate safeguards.

INTIMATE AND NON-INTIMATE PROCEDURES

At the Standing Committee meeting in July 1999, a majority of jurisdictions supported categorising the taking of mouth swabs as an intimate procedure. This is consistent with the original 1995 Model Forensic Procedures Bill and Commonwealth, Victorian, Queensland and South Australian legislation which is aligned with the 1995 Bill.

However, while the May 1999 discussion paper draft treated the procedure in relation to intimate samples in the same way throughout the Bill, the NSW Police Service noted that the same was not true of the way the Bill dealt with non-intimate samples. While a non-intimate sample, for example hair from a non-intimate part of the body, could be taken from a non-consenting suspect by order of a senior police officer, when it came to getting the same sample from a convicted serious offender the Bill required court approval if the person did not consent. The police pointed out that if this inconsistency was remedied, then it would give them a non-intimate option which did not require court approval if the serious offender refused to consent to providing a mouth swab or blood sample. In many cases taking a hair sample will be sufficient as a second choice to obtain the necessary DNA and will be easier to take when someone is resisting than a mouth swab or blood sample.

MCCOC considers this to be reasonable, but it can be expected that some, such as the Criminal Bar Association, will consider that court supervision is necessary whenever the convicted serious offender does not consent regardless of the nature of the procedure. They will no doubt argue that convicted serious offenders are vulnerable to police harassment and invasion of their privacy and need the option of court supervision to temper excesses.

Another difficulty is that forensic scientists have advised MCCOC that hair samples are not adequate for DNA analysis unless they include the roots. Based on forensic advice at the time, when hair was first classified as a non-intimate sample the Model Bill provided that the hair must not include the roots. While MCCOC has carefully redrafted s. 37 to provide that the procedure must be completed in the least painful way possible, some may argue that if the person does not consent there should be court approval in relation to the taking of hair. However, MCCOC notes that while the procedure of taking samples of hair with roots may be marginally more inconvenient and uncomfortable, it is not more intimate.

COLLECTING SAMPLES FROM SERIOUS OFFENDERS

In the May 1999 discussion paper MCCOC experimented by suggesting that there be a special objection procedure in relation to convicted serious offenders in gaol as opposed to those out of gaol. The procedure was developed in an attempt to make the legislation more workable in the prison environment. However, consultation with both law enforcement and other sources concluded that the different approach could not be justified. Police in Victoria, who have experience with the court approval process, considered that the procedure would not make the process any easier. MCCOC also considered it could not justify discriminating between different categories of serious offenders in this way.

Some, such as the Commonwealth DPP and some police, considered that serious offenders should have no right to the safeguard of court approval where they do not consent. Most submissions, including some from law enforcement agencies,

recognised that the view of the Commonwealth DPP on this point is unacceptable. Serious offenders, particularly those in prison, are very vulnerable to harassment and should be afforded the same safeguards as suspects. Indeed, in some cases the person may be someone who is being investigated. If the person does not consent to an intimate procedure, then they should have the right to have the issue considered by a court (it may be, for example, that it is the fifth time in a month that a sample is sought, or there might be an argument that the person is not in fact a serious offender for the purposes of the legislation, or that the offence is so remote from the sort of offence which is likely to be relevant to forensic matching or that the person is in fact a suspect and argues he or she should be dealt with under the provisions that relate to suspects).

The redrafted Model Bill addresses concerns that the use of court resources should be minimised. MCCOC proposes that cross-examination be restricted to the applicant unless the suspect can give substantial reasons why anyone else should be cross-examined (see clause 23). This is based on section 48E(2)(b) of the *Justices Act 1902* (NSW).

The Model Bill now categorises ‘convicted serious offenders’ in accordance with the decision of Standing Committee in July 1999 (ie anyone convicted of an offence with a maximum penalty of 5 or more years imprisonment, common assault or breach of a domestic violence order). The Bill also reflects the decision to cover those convicted of serious offences prior to the commencement of the legislation.

COLLECTING SAMPLES FROM VOLUNTEERS

As a result of suggestions from the Federal and NSW Privacy Commissioner’s office and others, MCCOC has improved the safeguards in relation to the collection of samples from volunteers. For example, under the latest draft police will be required to raise the issue of how long the samples will be kept. It is important that members of the community are kept fully informed so that if asked to cooperate with police, consent is real and confidence in using DNA to solve crime is not undermined.

DNA DATABASE SYSTEM - PERMISSIBLE MATCHING

Consultation demonstrated that almost all groups found the matching rules contained in the discussion paper difficult to understand and in need of refinement. At the suggestion of the CrimTrac Project Office, and in consultation with the Federal and NSW Privacy Commissioner’s offices, MCCOC instructed the drafter to present the matching rules in the form of a table (see clause 82). The table is underpinned with offences to ensure that DNA information is only matched in accordance with the purposes that are permitted by the legislation.

For example the table makes it clear that there is to be no open access to the volunteers limited purpose index. It must only be used for the purposes for which the sample was given.

CONCLUSION

MCCOC has made many minor changes to the Model Forensic Procedures Bill which address practical concerns raised by law enforcement. These do not undermine the accountability mechanisms, but by making the legislation easier to use, they should encourage a culture of compliance.

There was considerable criticism of the Model Bill by various bodies from various viewpoints, as well as support for the proposed approach (see the Appendix). This simple summary should not be interpreted to suggest there is complete consensus on the content of the Bill or that the issues do not remain controversial. However there has been considerable progress towards consensus between informed law enforcement and privacy commentators.

Model Criminal Code Officers Committee

February, 2000

APPENDIX

COMMENTS ON THE DISCUSSION PAPER DRAFT

General

Former Chief Justice of the High Court - Sir Harry Gibbs

“The Bill seems to me to be carefully drawn and on the whole to make a satisfactory balance between the needs of those conducting investigations into crime on the one hand and the rights and interests of the persons affected on the other.”

John Tonge Centre For Forensic Science (Queensland)

“Generally the proposed changes to the Model Bill are supported. They overcome many of the limitations of the 1995 Bill, while providing reasonable and balanced safeguards.”

NSW Police

“The Service supports the overall thrust of the proposed legislation and movement towards a national legislative framework in this area.”

Privacy Commissioner (NSW)

“Regulation of the taking, retention and use of forensic samples should not simply mandate clear technical procedures. The regime should also be sufficiently transparent to prevent law enforcement officers taking advantage of people’s ignorance or misunderstanding of the evidentiary process to exert undue pressure on suspects.

For these reasons I support the proposition that restrictions on the way a database is to be established and used should be incorporated into forensic testing legislation by all Australian jurisdictions as recommended in the Discussion Paper and the Model Bill.”

The Criminal Bar Association (Victoria)

“We are in general agreement with the proposed procedures and safeguards proposed. For example, in our opinion, it is essential that the courts regulate the taking of samples from suspects or persons convicted of relevant offences.”

On mouth swabs as an intimate procedure

Tasmania Police

“It is argued that it will seriously hamper the expediency of police investigations if there is a requirement to obtain a medical practitioner, dentist, nurse or other qualified person when a buccal swab is required from a suspect or charged/incarcerated person. It is also argued that it should not be necessary to obtain a Magistrates approval for such a process where the person refuses to support it. It is our contention that the procedure should be dealt with in the same way as the taking of fingerprints and hair, ie non-intimate forensic procedure.”

Western Australia Police

“If WA legislation reflects the Model Forensic Procedures Bill view that buccal swabs are classed as an intimate procedure, the WA legislation should include authority for a trained police officer to take this type of sample.”

Similar views were expressed by the National Institute of Forensic Science (NIFS), the John Tonge Centre (Qld), ‘the AFP, Queensland Police, Australian Forensic Science Forum’ (Commissioners of Police, Directors of Forensic Science Services and Australian Association of Crown Prosecutors), and the CrimTrac Project Office.

While supporting the treatment of mouth swabs as a non-intimate sample, Victorian Police put forward an alternative option:

“Although there is little doubt that the taking of a mouth swab, by force or without agreement, would be intrusive, the taking of the sample with the consent of the subject, or the taking of the swab by the subject themselves would be far less intrusive than other methods of collection At the very least the Bill should allow the taking of a mouth swab as a non-intimate sample in the instance of consent.”

NSW Police and ‘Australian Forensic Science Forum’ favour defining the taking of mouth swabs as non-intimate, but propose another alternative:

“..concerns raised by the committee about suspect non-consent and possible need for ‘reasonable force’ could be averted. These concerns could be easily addressed by including alternative provisions in the Bill for the taking of a sample of head hairs (including roots) as an alternative source of DNA material.”

Privacy Commissioner (NSW):

“I support including mouth swabs in the definition of intimate samples. Having regard to the legal consequences of this definition (requiring judicial authorisation for taking a sample without consent) the crucial consideration should be the violation of personal autonomy in providing a bodily sample which is capable of revealing detailed information about a person and not a subjective assessment of the kind of procedures which are capable of arousing prurient interest.”

Retrospective taking of samples from serious offenders

Sir Harry Gibbs:

“There is however one provision that seems to me to be doubtful in point of principle. That is s.51 [now ss 50(4)].which provides that a forensic procedure may be carried out on a person found guilty of a serious offence before the section came into operation, if that person is serving a term of imprisonment. This seems to me to offend the principle that no person should suffer any adverse consequence from committing an offence unless that consequence was provided for by the law at the time the offence was committed.

The justification suggested for this retrospective provision is that a serious offender belongs to a class of persons likely to offend again. That seems to me to be too broad a generalisation. I do not accept that a person convicted of, say, company fraud is likely to commit robbery or burglary. The Committee recognises that providing a sample is an imposition on a person’s liberty, but suggests that the proposed procedure is less significant than the restrictions imposed on prisoners generally. Those restrictions however, are, as the Committee has said, imposed for the safe and convenient running of the prison, and are thus deemed a necessary incident of the imprisonment, whereas the forensic procedures have quite a different purpose.”

Destruction requirement

The Privacy Commissioner (NSW) has some difficulties with the approach taken in the Model Bill:

“As long as a retained sample exists there is the possibility of reidentifying the person it comes from through comparison with another sample from the same person. The Model Bill recognises this to the extent that it makes it an offence to analyse samples that have been approved for destruction. Sections 65 and 66 [Now ss.70 and 71] which prevent the admission of destroyed samples into evidence. These safeguards would not necessarily prevent the reuse or threatened reuse of a sample to pressure a person into making an admission. The Bill should explicitly rule out the reuse of samples which have been anonymised in accordance with the requirements for destruction.”

Volunteers

The Privacy Commissioner (NSW) is very concerned that there be strict accountability:

“Procedures for taking forensic samples from volunteers together with the creation of an index containing volunteer profiles on the proposed National database raise serious privacy concerns. There would have to be extremely comprehensive and credible safeguards to prevent samples acquired from volunteers being permanently retained or used for purposes other than to eliminate members of a class from a specific inquiry. Unless these safeguards can be guaranteed, we believe that the legislation should remove the nexus between the general process of collecting and analysing samples from volunteers and the inclusion of such samples on the National database.

I also support the Discussion Paper's recommendations on informed consent and on the need for comprehensive consultation with privacy bodies on the wording of any notification to prospective volunteers. My office is aware of a number of instances where the form of notification proposed by police where personal information is collected for law enforcement purposes is either grudging or uninformative."

The Australian Privacy Charter Council was also very concerned about material obtained from volunteers:

"...While we have not been able to digest and analyse much of the paper, there is one key issue which we would like to highlight. This is the proposal for law enforcement agencies to be able to solicit DNA samples from volunteers, not only in the context of particular investigations but more generally, and to keep them in a database for as long as the individuals consent.

This has the potential over time to generate a DNA database of a large proportion of the community, based on generalised appeals to the 'public spirit'. Given the risk, recognised in the discussion paper, of other uses of DNA information, with major implications for people's life chances and circumstances, it is inappropriate to rely on individual consent as the only safeguard. Whatever the justification for the use of DNA samples for targeted law enforcement investigations, it should not be permitted to build up a permanent database of DNA information about people who are in no way suspected of any wrongdoing. If it is considered desirable to allow people to volunteer samples to help eliminate suspects (and we do not necessarily accept this case), then these samples must be destroyed soon after completion of the particular investigation.

In this and other matters, the Committee responsible for the Discussion Paper appears to place too much faith in safeguards against inappropriate use, rather than focussing on the threshold questions of whether some collections and uses should not be allowed in the first place."

Court approval

The Commonwealth DPP and Queensland Police suggest that the requirements for court approval where a serious offender does not consent to providing a sample are unnecessary. It is claimed there would be no circumstances where the application could be legitimately refused and then serious offenders may be 'bloody minded' and object all the time.

The Privacy Commissioner (NSW) supports court supervision but believes the grounds for granting an order should be tighter:

" I support this approach as it reduces the risk of samples being taken for intimidatory or other inappropriate reasons and reinforces the concept of a register which is used solely for evidentiary purposes rather than as an identification database. However I have some concerns that criteria to be considered by the court in clause 56(3) [now ss 62(6)] are both narrow and overly discretionary. They would allow for different interpretations which could lead to an uneven approach to the taking of samples. I would prefer to see criteria which more clearly indicate that samples should only be taken where the

nature of the offence and the likelihood of re-offending mean that the sample is likely to have evidentiary value.”

Right to have others present

Victoria Police suggest MCCOC gives the suspect or serious offender the option of having too many different types of witnesses. They suggest video taping should be sufficient. Queensland Police object to the right to have any independent person or medical practitioner present. However the NIFS submission suggested that video taping would be impractical in remote areas.

Children

NSW Police and NIFS submit that children should be able to consent without the agreement of a parent or guardian from the age of 16 years. Victoria Police express similar views. Also the ‘Australian Forensic Science Forum’ states that 16 year olds can consent to serious medical procedures - so why not these procedures?

Queensland Police seem to suggest that any children should be able to consent.

MCCOC’s response is that young people are vulnerable up until the internationally recognised age of 18 years. The procedures proposed could lead to a life changing result - imprisonment. It can therefore have more risks and consequences than a medical procedure.

Hair roots

The John Tonge Centre (Qld), NIFS, the AFP, NSW Police, CrimTrac Project Office advise that it is necessary to have hair roots for proper forensic analysis.

Spare sample

Queensland Police suggest it is unnecessary to require the police to give the person from whom it is collected a spare sample as they can test their DNA at any time.

MCCOC’s response is that the requirement is general to all samples. The provision of a spare sample at the same time should improve confidence in the procedure and will allow the person from whom it is taken to have tests done not only on the DNA but other indicators that may be relevant.

Use of DNA evidence in other jurisdictions

CrimTrac Project Office is strongly in favour of proposed section 82 [now s.97] which allows the information to be used in other jurisdictions if it is lawful in the collecting jurisdiction and opposes the alternative provision which is described as ‘unworkable.’ They say:

“We do not believe that there are justifiable grounds to prevent police accessing and using material and information obtained lawfully. Any prohibition on the use of this material and information for investigative purposes will represent a significant intrusion on the exchange of information procedures that Australia’s

police services currently employ. Much of this information is police intelligence, which is used not only to help solve crimes, but may also, in some circumstances, help eliminate suspects from an investigation.”

The Privacy Commissioner (NSW) has the opposite view:

“I strongly support the strategy of insisting on uniform adoption before choosing the first alternative.

However, I have some concerns over how an appropriate level of uniformity is to be assessed so as to determine which of the two alternatives is adopted. In particular I am concerned that variations between jurisdictions could lead to piecemeal expansion of the scope and functions of a national database. There needs to be a more explicit benchmark provision to avoid jurisdictional variations translating into expanded functions of the DNA database.”

The MCCOC response is that it agrees it is desirable there should be consistency.

Model Criminal Code Officers Committee
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