The Quiet Devolution: How the Model Criminal Code Officers' Committee Botched New South Wales's DNA Law

The Noisy Revolution

In his article 'The Quiet Revolution', Meagher (2000) traces the history of forensic procedures legislation in Victoria. That history commenced in 1993 with the Victorian Parliament's faithful response to the narrow recommendations of a detailed expert report. The following years saw regular amending acts that incrementally expanded police powers without a corresponding basis in expert opinion. By contrast, forensic procedures law in New South Wales recently underwent a revolution that was neither quiet nor incremental.

NSW police — in common with all their Australian counterparts except the Victorian police — have long held powers to perform some forensic procedures without consent, by virtue of a short provision in the *Crimes Act* 1900 (NSW) authorising 'examinations' of the 'person' of charged suspects in custody. However, in June 2000, the NSW Parliament passed an entirely new Act containing 123 provisions exclusively devoted to forensic procedures in criminal investigations.

The commencement of the balance of the *Crimes (Forensic Procedures) 2000 Act* (NSW) ('Act') — literally as the world partied on 1 January 2001 — expanded police powers in NSW well beyond the extent achieved in Victoria after a decade of increments. The Act gives NSW police and courts powers to order forensic procedures on certain suspects and offenders. It also provides for consensual procedures on everyone and regulates the retention of samples and the use of information derived from them. Although applicable to a broad range of forensic procedures, the Act's *raison d'être* is the facilitation of the use of DNA identification in criminal investigations in NSW. Specific provisions regulate the production, storage, matching, cross-jurisdictional transfer and retention of DNA profiles on databases.

NSW's noisy revolution resembles the latter stages of Victoria's quiet one in the absence of considered policy debate in the legislature and community. The Crimes (Forensic Procedures) Bill 2000 ('Bill') was introduced in the NSW Parliament without prior exposure or detailed policy announcements. The responsible Minister, Attorney-General Shaw, resigned part way through the parliamentary debate. The main political case for the Bill was made by the NSW police, who unsubtly arranged a mass DNA screening in the country town of Wee Waa a month before the Bill's introduction (see Kennedy 2000). The Bill's progress through Parliament was smoothed by the Carr government's portrayal of calls for caution as outright objections to the use of DNA identification to fight crime in NSW. For example, an Opposition proposal for a two-year sunset clause, identical to that contained in the 1993 Victorian legislation, prompted the following response from Police Minister Whelan:

> The members of the Liberal and National parties oppose this legislation. I wonder how Rita Knight — the lady from Wee Waa who was brutally raped — feels? ... The Coalition will wear forever criticism for its opposition to DNA laws and for attempting to hamstring the New South Wales Police service ... The Opposition deserves the wrath of the community for what it has done (*Hansard*, NSW Legislative Assembly, 29 June 2000).

Such tactics ensured the Bill's passage through the NSW Upper House without substantive amendments in under a month. In place of detailed parliamentary scrutiny of the Bill, the Act provided for post-passage reviews by the Attorney-General's Department, the Ombudsman and — as a result of the sole significant amendment to the Bill in its passage through Parliament — the Upper House's Standing Committee on Law and Justice ('Committee'). The latter amendment (inserting s123 into the Act) prompted the following comment from the Opposition leader in the Legislative Council:

> We move forward in the debate knowing that the law and justice committee will conduct a thorough review of the implementation of the legislation in the ensuing weeks or, indeed, months. We look forward to the committee's report, and we hope it gets a clean bill of health (*Hansard*, NSW Legislative Council, 21 June 2000).

In February 2002, the Standing Committee on Law and Justice (2002) tabled its *Review of the Crimes (Forensic Procedures) Act 2000* ('Review').

The Review's terms of reference covered not only the Act, but also the social and legal implications of the use of DNA identification and the effectiveness and reliability of that technology. The Review's findings on these latter topics were broadly positive, although the Committee acknowledged (at 21) that it lacked the expertise to address many of the technical and criminological issues. However, the Committee's findings on the Act itself and its operation in NSW fell far short of 'a clean bill of health'. The Review noted that:

> [t]here is general agreement among contributors to the Review that the drafting of the *Crimes (Forensic Procedures) Act 2000* is excessively complex, undermining clarity and preventing easy understanding of the provisions (Standing Committee on Law and Justice 2002:xiv).

Indeed, 'the claimed extent of the errors prevents the Committee from listing them' in the Review (160). Instead, the Committee simply recommended (161) that the Attorney-General give full consideration to literally hundreds of drafting problems identified in submissions to the Committee. Nonetheless, the Committee itself made specific criticisms of many key provisions of the Act, including the following:

- **Compulsory orders on suspects and offenders:** 'unreasonably low' thresholds (76), public policy left to subordinate legislation (78–79), inadequate legislative guidance (81, 89), legislative formulae that 'do not appear to have any meaning' (88), 'extraordinary and, in the Committee's opinion, unnecessary complexity' (161), 'needlessly complicated' with entirely 'redundant' sub-sections (162), 'complicated and convoluted' (163).
- **Procedures on volunteers:** inappropriate application to victims (88), absence of any thresholds (92–93), inadequate information to volunteers (94), 'unsatisfactory' and 'anomalous' provisions concerning children (129), a 'legislative oversight' that 'inadvertently' bars forensic procedures on victims who are under 10 years old (132) and 'failure to regulate' body cavity searches and identification procedures (165).
- **Informed consent:** the information provided to subjects is 'convoluted and confusing, and there is a great deal of doubt whether it is understood by the majority of test subjects' (102), failure to effectively provide for legal advice (111) (especially for indigenous people (124)), failure to clarify the role of the common law (112), absence of certain legislative safeguards for suspects (112), 'anomalous and unsatisfactory' provisions for volunteers (107) and provisions that 'offer no real protection' to offenders (107).
- **Analysis and retention of samples:** 'anomalous' provisions on destruction (153), permits retention of some samples for 'no reason' (151) or in 'inappropriate' circumstances (152–153) and 'uncertainty' about whether samples from victims' bodies can be analysed (165).

- **DNA databases:** 'problematic' disincentives for victims and relatives of missing persons to cooperate with the police (142–143), 'inadvertent' limits on which databases are regulated (147), 'inappropriate use of delegated legislation that could result in an expansion of DNA profiling without a satisfactory level of public debate or consultation' (149) and 'would benefit from a more comprehensive approach' (148).

This list of criticisms ought not to be mistaken as mere legal hair-splitting. The Act primarily regulates interactions between investigators and lay people and, thus, must be intelligible to government officials at the coalface of criminal justice and to ordinary members of the public who undergo forensic procedures. In this vein, the Committee noted that the clumsiness of the Act makes its 'implementation ... by police officers more difficult, prevents the easy understanding of the provisions by suspects, and potentially could cause legal uncertainty' (163). The Committee expressed concern that some of the Act's regulatory loopholes 'could lead to abuses' (165). In reference to the Act's provisions on consensual procedures, the Committee noted that all consents given under the Act to date — including 94% of the DNA sampling of offenders — are potentially subject to future legal challenge (102, 107).

The critical remarks of the cross-party Committee are, understandably, measured. Liberal MP John Ryan made a more candid appraisal of the implications of the Review in Parliament by noting that the government chairman of the Committee:

> should be commended for his courage. To be honest, if I were a Government member assigned the task of conducting this inquiry, no doubt by the time the inquiry concluded I would have had the difficult task of telling the Government, "You will not like this report. Our review of this legislation is not a pretty picture" .... If, as has been rumoured, anyone in the Government is not inclined to read this report carefully and implement its findings, the result will not be that civil liberties will be compromised — although there is no doubt that is happening; the very legitimate purpose to which DNA profiling can be put to will be lost and police will lose cases. Without revealing any evidence that I should not, I will say that it was made very clear to the committee in evidence given by a very senior police officer that police are extremely concerned about the current status of the Act if it is not reviewed (*Hansard*, NSW Legislative Council, 12 March 2001).

Perhaps the most telling irony about the Act to emerge from the Review concerns mass screenings. The NSW police's showcasing of DNA identification in Wee Waa prior to the parliamentary debate relied on the common law of consent. The non-proclamation of the Act's volunteer provisions — almost certainly because of their numerous flaws — meant that such screenings probably ceased to be lawfully available to NSW police after the commencement of the bulk of the Act (at 91).[1] Accordingly, to use the language of the ex-Minister of Police, the Carr government 'deserves the wrath of the community' for hamstringing the police and failing to protect rape victims. Arguably, the Opposition's proposed sunset clause would, had it been enacted, have been a blessed relief to police, victims and, perhaps, the government's own Criminal Law Review Division, which has the hapless task of cleaning up the mess.

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1 The volunteer provisions were eventually proclaimed in June 2002, 18 months after the rest of the Act, following the passage of the *Crimes (Forensic Procedures) Amendment Act* 2002, which excluded victims and people who provide prints for elimination purposes from the definition of volunteer.

It is premature, at this stage, to assess the extent and cost of the Act's flaws. Two further NSW reviews are pending,[2] the potentially legally fraught prosecutions based on evidence gathered under the Act's provisions are still years away and extensive rewriting of the legislation may yet save the day. Rather, this comment is concerned with the process that led to the passage of such sickly legislation on a vital topic. That process began many years before the Bill's hurried passage through the NSW Parliament. Indeed, the true origins of the Act's failures are not in the 'bear pit', or even in the state of NSW, but in a joint Commonwealth-State committee with a significant role in developing criminal justice legislation in Australia. The implications of the stalling of NSW's forensic procedures revolution, therefore, extend to other Australian jurisdictions, and to broader topics than DNA identification.

A Model Revolution?

Despite all appearances, the NSW Act was not composed on the back of an envelope. Rather, it is a modified version of the *Final Draft* of the Model Forensic Procedures Bill ('Model Bill'), published in February 2000 by the Model Criminal Code Officers Committee ('MCCOC') of the Standing Committee of Attorneys-General ('SCAG'). The six-year review process preceding that publication was a key plank in the NSW Government's case for its Bill. The second reading speech notes that MCCOC:

> circulated drafts of a Model Forensic Procedures Bill for comment in 1994. Sixty-eight submissions were received in response to the bill. In July 1995, the majority of the Standing Committee of Attorneys-General endorsed the 1995 Model Forensic Procedures Bill and forwarded a proposal to establish a national DNA database to the Australasian Police Ministers Council. A discussion paper titled "Model Forensic Procedures Bill and the Proposed National DNA Database" was released in May 1999 following consultation with the Office of the Commonwealth Privacy Commissioner and the Police Commissioners Working Group. Extensive background research and consultation has been undertaken to bring this bill before the House and the Government is pleased that the bill reflects the valuable work of numerous officers and experts (*Hansard*, NSW Legislative Assembly, 31 May 2000).

This description of considered, consultative, independent, expert development of model legislation is difficult to reconcile with the Review's findings about the NSW Act. The most obvious explanation would be to blame the modifications made to the Model Bill before it was enacted in NSW. However, while it is true that some of the Committee's harshest remarks were made about NSW provisions that do not match the Model Bill, the balance of the Review's negative findings concern provisions that were copied quite faithfully from MCCOC's *Final Draft*, notably the volunteer, informed consent and DNA database provisions. This suggests a fault or faults in the process that produced the Model Bill.

The question of what went wrong within the process of drafting the Model Bill is a difficult one to answer. MCCOC's deliberations (and its interactions with governments and other organisations) are not on the public record. Apart from the various exposure drafts, the only readily available documents about the six-year process that produced the Model Bill are MCCOC's May 1999 *Discussion Paper on Forensic Procedures and the Proposed National DNA Database* ('1999 Discussion Paper'), and notes attached to the February

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2 The further reviews required by the Act are by the Ombudsman (s121) and the Attorney-General (s122). In addition, two reviews are currently underway into Part 1D of the *Crimes Act* 1914 (Cth), which is also based on the Model Forensic Procedures Bill. See ALRC (2002a) and Forensic Procedures Review Committee Secretariat (2002).

2000 *Final Draft* of the Model Bill. The author has not interviewed the individual participants in the process about what might have gone wrong or who could be to blame. Therefore, the discussion here is speculative and at best only a partial account of the process. Nonetheless, consideration of the nature of MCCOC's task and the available documents indicates three apparent failings in process that led to the final Model Bill and, ultimately, the NSW Act.

An Expert Revolution?

The first is the decision of SCAG to assign the task of developing legislation regulating criminal investigations to MCCOC. MCCOC was created in 1990 with the task of developing a model Australian criminal code, that is, a set of principles applicable to all crimes, as well as model definitions for key crimes. While this task requires, as a background, some practical attention to issues of criminal investigation, it does not include the development of legislation on police powers nor other non-substantive parts of the criminal justice system, such as pre-trial and trial process and sentencing. Although there is much to be said for the reform of non-substantive criminal legislation in tandem with the *Model Criminal Code* project, it is obvious that two tasks involve quite distinct challenges of legal policy and drafting.

Nonetheless, according to the 1999 Discussion Paper:

> In addition to its main task of developing the Model Criminal Code (which will later this year be completed ...), the Committee has been asked by SCAG on several occasions to develop model criminal procedural provisions. One of those tasks was to develop a Model Forensic Procedures Bill (MCCOC 1999:i).

Despite the reference to 'several occasions', the Model Bill is the *only* draft legislation on criminal process ever produced by MCCOC. Two other major joint Commonwealth-State criminal justice projects in 1999, the *Model Domestic Violence Laws Report* and the *Working Group on Criminal Trial Procedure Report*, were developed by purpose-created working groups of Commonwealth, State and Territory officials, each with different membership to MCCOC (Partnerships Against Domestic Violence 1999; Standing Committee of Attorneys-General 1999). While there is nothing in the credentials of the members of MCCOC that raises any doubt about their expertise in the field of drafting legislation about criminal investigation, the distraction of their primary task of drafting substantive criminal legislation does provide a plausible explanation for the flawed outcome of their sole procedural project. In this regard, it is worth noting two features of the process from 1999 to 2000, which amended the 1995 draft to include provisions on offenders, volunteers, admissibility, destruction, DNA databases and inter-jurisdictional transfer.

First, MCCOC (1999) initiated public debate on the controversial new topics to be dealt with in the Model Bill by publishing the 1999 Discussion Paper in the format of an exposure draft with section-by-section commentary. This differs from the traditional approach of publishing an issues paper, raising broad questions of policy, prior to any attempt to draft actual legislation, an approach taken in Victoria and Western Australia in relation to their forensic procedure legislation. Alternatively, as occurred with the Australian Law Reform Commission's ('ALRC') (1985) reference on uniform evidence legislation, a multi-volume paper can deal, sequentially, with broad questions of policy, followed by a commentary on how those issues were implemented in a draft bill. MCCOC explained that it chose to proceed directly to an exposure draft format because of its experience in seeking public inquiry while developing the *Criminal Code*. This explanation disregards a crucial difference between the Code and the topics covered in the 1999 Discussion Paper:

substantive criminal law was already the subject of four criminal codes in Australia (not to mention numerous examples worldwide and partial codifications in the remaining jurisdictions); on the other hand, forensic procedures on volunteers and offenders and, especially, the DNA database, were not, at the time, the subject of comprehensive legislative or judicial attention anywhere in Australia or, indeed, most of the world.

Although the weaknesses of the final Model Bill cannot be directly linked to the premature release of an exposure draft, it is likely that MCCOC's approach hampered the public consultation process. Because the discussion paper was built around the exposure draft, the public was left with the task of separating questions of policy and implementation. MCCOC's explanatory role was restricted by the format of attaching commentary on a section-by-section basis on the facing pages of the exposure draft, an approach that resulted in piecemeal and, often, rambling and inadequate analysis and explanation. According to MCCOC (1999:iii), only the Commonwealth Privacy Commissioner and a working group of Police Commissioners were consulted prior to the drafting of exposure legislation. All other public consultation, therefore, was dependent on the accessibility of the convoluted provisions of the exposure draft and the section-by-section commentary. Despite extensive publication, the 1999 Discussion Paper generated only one-third the number of submissions that had been received by MCCOC following its much shorter and less controversial 1994 draft bill. This apparent failure in the public consultation process was not acknowledged either by MCCOC itself in its *Final Draft* or in the NSW second-reading speech's description of the Act's background.

Second, arguably the most significant part of the Model Bill, its novel provisions on DNA databases, while aimed at being 'descriptive of the various elements of the database and how they may be used for criminal investigative purposes' (MCCOC 1999:91), consists almost entirely of a series of new *criminal offences* (along with supporting definitional provisions). This approach, which obviously drew on MCCOC's considerable experience in drafting substantive criminal legislation, suggests considerable inexperience in the regulation of criminal investigations. Nearly all informed commentators on policing agree that, because of the low likelihood of prosecution of investigators, criminal offences have little or no role to play in the regulation of criminal procedure. Rather, the best hope for appropriately constrained investigations is the drafting of clear, intelligible rules, that can be effectively scrutinised through administrative process and, as a fall-back, trigger the judicial discretion to exclude illegally or improperly obtained evidence. Offence provisions, which require narrow drafting, often with double negatives designed to accommodate the burden of proof and definitions of *mens rea* and defences, are an exceedingly poor method of enunciating clear rules. A telling example is the Bill's sole provision regulating what profiles can be placed on the database, which takes the form of two criminal offences:

(1) A person:

(a) whose conduct causes the supply of forensic material taken from any person under this Part (or under a corresponding law of a participating jurisdiction) to any person for prohibited analysis, and

(b) who intends or is reckless as to the supply of material of that kind,

is guilty of an offence.

(2) A person:

(a) whose conduct causes the supply of forensic material (other than excluded forensic material) to any person for analysis for the purpose of deriving a DNA profile for inclusion on an index of the DNA database system, and

(b) who intends or is reckless as to the supply of material of that kind,

is guilty of an offence (MCCOC 2000:52–53).

To understand what profiles can go on the DNA database, a police officer (or anyone else who cares) must derive the answer by first decoding these two sections and then reading the supporting definitions. It is doubtful that a lay person could discern, from these sections, that the profiles permitted on the database are those contained in the lengthy definition of 'excluded forensic material' *except* for those profiles derived from the material whose analysis would fall within the definition of 'prohibited analysis.' Nor is it likely that a lay reader would correctly apply either of those complex definitions, each of which involves cross-references with other provisions of the Act. Indeed, the definition of 'excluded forensic material' in the Model Bill's *Final Draft* contained significant errors that had to be hastily fixed when the Bill was enacted in NSW and the Commonwealth. Accordingly, it is not surprising that the NSW Committee found that many of the Act's provisions on DNA databases were not only unintelligible to the lay people who were subject to them, but were also of unclear legal meaning and, in many cases, left serious regulatory loopholes.

An Independent Revolution?

A second flaw in the process that led to the *Final Draft* of the Model Bill is the likely absence of independence in MCCOC's decision making. The ALRC, which was given the analogous task of developing Australia's model evidence legislation, is an autonomous statutory body with legislative protection for its commissioners' independence. According to the ALRC (2002b) itself, this means that it is 'not under the control of government, giving it the intellectual independence and ability to make research findings and recommendations without fear or favour'. By contrast, MCCOC is not an independent body in two respects. First, although chaired by a judge and retaining outside consultants and advisers, its membership comprises public servants, each responsible to the Attorney-General of their respective jurisdiction. Second, MCCOC is not an autonomous body, but rather a working group of SCAG, a committee of politicians. Accordingly, in contrast to the draft evidence bill developed by the ALRC, the Model Bill's provisions may reflect, not just 'the valuable work of numerous officers and experts', but also the political instructions of various Australian Attorneys-General, both individually and collectively.

Like most legislative reform bodies, MCCOC's decisions about the Model Bill were made in private. Unlike many such bodies, the publications of MCCOC provide very little insight into the questions that arose for decision. In a noteworthy contrast to the lengthy *Final Report on Evidence* by the ALRC (1987), the publication of the *Final Draft* of the Model Bill was not accompanied by a detailed commentary on the final version. Rather, MCCOC (2000) published only a brief set of 'explanatory notes' that, apart from an introduction, conclusion and extracts from some submissions, amounted to just two pages of text. Despite this, the *Final Draft* contains a number of significant policy and drafting changes from the version that was exposed for public consultation in the 1999 Discussion Paper, many of which were not even mentioned in the explanatory notes. Even in this non-transparent context, political interference in MCCOC decision making is both explicit and implicit in the nine months between May 1999 and February 2000, when the Model Bill was finalised. The *Final Draft*'s explanatory notes (MCCOC 2000:1) state that the Model Bill was '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 ... at its 23 July 1999 and 12 November 1999 meetings'. The notes (at 2, 3) attribute the decision to retain the classification of buccal swabs as an intimate procedure and to change the definition of 'convicted serious offenders' to the July meeting of SCAG. However, the impact of any other decisions from SCAG, including the content of decisions at the November meeting, just three months before the publication of the *Final Draft*, are not discussed.

Doubts about MCCOC's ownership of decisions about the Model Bill is most apparent in the new provision on the matching of DNA profiles in the *Final Draft*. The explanatory notes describe the background to the new provision as follows:

> 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 Crim Trac 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) (MCCOC 2000:3).

This discussion is highly misleading, because the new clause 82 is far more than a simplification or refinement of the earlier Model Bill's drafting. The only regulation of the matching of profiles in the 1999 draft of the Model Bill was a provision criminalising attempts to determine whether a profile on the 'limited purposes index' of the database was also on the 'crime scene index' of the database. By contrast, the table in clause 82 of the *Final Draft* is as follows:

Profile to be matched	**Is matching permitted?**						
Column 1	*Column 2 Crime scene*	*Column 3 Suspects*	*Column 4 Volunteers (limited purposes)*	*Column 5 Volunteers (unlimited purposes)*	*Column 6 Serious offenders*	*Column 7 Missing persons*	*Column 8 Unknown deceased persons*
1. crime scere	yes	yes	no	yes	yes	yes	yes
2. suspects	yes	no	no	no	yes	no	yes
3. volunteers (limited purposes)	only if within purpose	no	no	no	only if within purpose	only if within purpose	only if within purpose
4. volunteers (unlimited purposes)	yes	no	no	no	yes	yes	yes
5. serious offenders	yes	yes	no	no	yes	yes	yes
6. missing persons	yes	yes	yes	yes	yes	yes	yes
7. unknown deceased persons	yes	yes	yes	yes	yes	yes	yes

(MCCOC 2000:55)

As can be seen, this table regulates, not merely matches between profiles on the 'limited purposes index' and the 'crime scene index', but rather matches between *every* pair of profiles on the database. Not only is the reasoning behind the 49 distinct policy decisions contained in the table completely unexplained in any MCCOC publication, but MCCOC's own description of the background to the table fails to clarify whether MCCOC itself — rather than, say, CrimTrac, the Federal or NSW Privacy Commissioners, SCAG or even the

'drafter' — was the one who made any of the decisions. The lack of transparency in the policy decisions underlying the matching table is egregious, not merely because of the number of decisions involved, but also because of their significance to the DNA identification debate. The matching rules are the chief restriction on the potential for DNA identification to intrude on the behavioural privacy of every person whose profile ends up on the database. As the table is regarded as a fundamental element of the proposed national DNA database, it has been adopted in six of Australia's nine criminal law jurisdictions (and has been proposed for adoption in a seventh).[3]

An extreme instance of the doubtful decision-making process underlying the matching provisions is the major policy reversal between May 1999 and February 2000 on the question of whether profiles taken from unconvicted suspects can be compared on mass to crime scene profiles to generate 'cold hits', that is, otherwise unsuspected links between suspects and unsolved crimes. This question is, arguably, the most important policy issue in the contemporary politics of DNA databases. At present, most world jurisdictions restrict 'cold hit' comparisons to profiles taken from convicted offenders; however, many are considering the UK model, which is now building its mass comparison database with profiles from unconvicted arrestees. In its 1999 Discussion Paper, MCCOC decided firmly in favour of the narrower approach to databasing. The 1999 draft Model Bill held that suspect profiles must be placed on the 'limited purposes index'. MCCOC argued that to do otherwise:

> [w]ould go far beyond the purpose of which the forensic material was obtained in the first place and may expose suspects to random searching by police anywhere in the country who are quite separate from the particular investigation and who are just fishing for matches on the crime scene index (MCCOC 1999:93).

Yet, this position was completely reversed in the *Final Draft* merely through the appearance of a single word, 'yes', in the second box of column 2 of clause 82's matching table. MCCOC has never given any reason for this policy reversal. The reversal was not called for by any of the submissions quoted in the 2000 publication. Most importantly, the fact of the policy reversal was not mentioned *at all* in the explanatory notes or any other MCCOC document. The non-transparency of MCCOC's processes means that the involvement or awareness of any of the individual members of MCCOC — including its judicial chairman — in this policy reversal is anyone's guess. The explanatory notes to the *Final Draft* bear only MCCOC's collective endorsement.

Ultimately, the absence of explicit reference to the decision by MCCOC makes it extremely difficult to believe that such a significant policy change was the product of MCCOC at all. This leaves two unsavoury possibilities. Either this major change in policy direction was somehow inadvertent or it was the product of one of MCCOC's political superiors — perhaps SCAG at its November meeting — whose interference was left disguised as the 'valuable work of numerous officers and experts' in MCCOC.

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3 *Crimes (Forensic Procedures) Act* 2000 (NSW) s93; *Crimes Act* 1914 (Cth) s23YDAF; *Crimes (Forensic Procedures) Act* 2000 (ACT) s97; *Crimes Act* 1958 (Vic) s464ZGI; *Forensic Procedures Act* 2000 (Tas) s54; *Criminal Investigation (Identifying People) Act* 2002 (WA) s78; Criminal Law (Forensic Procedures) (Miscellaneous) Amendment Bill 2002 (SA) clause 37.

A Uniform Revolution?

The third apparent flaw in the Model Bill process goes beyond both MCCOC's capacities and its governance to a more fundamental problem: the inadequate justification for the development of a single Australian 'model' for forensic procedures legislation. The ALRC (1985, 1987), in dealing with its reference on evidence law, did not resolve the question of whether a uniform Australian statute was desirable until its final report, after a consideration (and call for submissions) on the arguments for and against. Even then, it based its primary case for a model bill, not merely on inconsistencies amongst Australia's jurisdictions, but in deficiencies in all evidence law as it developed through piecemeal judicial and statutory reforms. By contrast, while MCCOC's 1999 Discussion Paper discussed the need for comprehensive legislation on forensic procedures, it did not explain why a single legislative model ought to be enacted across Australia. Rather, MCCOC's (1999:91) brief comment on this topic simply noted that Canada has a single act governing its national database and that, because powers over criminal investigation are dispersed in Australia's version of federalism, '[w]e therefore need a model if there is to be a simple and comparable system throughout the country'. This begs the question of why Canada's version of federalism is preferable to Australia's in this instance. Federal systems, by definition, contemplate local differences in legislation in matters left to component territories, including most aspects of criminal investigation in Australia.

MCCOC (1999:101) pursued its assumed goal of Australia-wide uniformity in relation to all forensic procedure laws by framing the provisions of the Model Bill so as to 'facilitate a cooperative scheme of similar legislation'. The chief mechanism for encouraging such uniformity is the definition of 'corresponding law', which includes 'a law relating to the carrying out of forensic procedures that substantially corresponds to' the Model Bill. Jurisdictions with a corresponding law qualify as participating jurisdictions, permitting them to enter Ministerial arrangements for cross-jurisdictional transfers (subject only to the mutual recognition rule on retention). In practice, the main incentive for jurisdictions to bring themselves within the definition of 'corresponding law' is to allow exchanges with the Commonwealth's national DNA database, which is governed by legislation that closely follows the Model Bill. It should be noted that MCCOC's conception of uniformity covers, not merely dealings with profiles, but rather the gathering of all forensic material, including DNA samples. Accordingly, the Model Bill seeks to encourage, not just shared rules on matching or disclosure, but also commonality on such topics as the sex of officers who can be present at a blood sampling, whether consents should be taped on audio or video and the punishment for the offences of improper supply of material.

MCCOC's failure to discuss the rationale for uniformity carries the obvious risk that MCCOC also neglected to consider the arguments against this approach. The most obvious danger of uniformity is that it will impose on all jurisdictions, not merely the strengths of a particular model, but also its weaknesses. This danger was extensively raised in the debates over the uniform evidence legislation, leading to the inclusion of provisions aimed at preserving the innovation and flexibility of the previous common law. Perhaps MCCOC could be forgiven for regarding its model drafting as superior to likely alternatives throughout Australia. However, even if this assumption were accurate, it does not allow for MCCOC's apparent lack of ownership in policy decisions behind the Model Bill.

Of greater importance is the danger that, once it entered the political process, the Model Bill would come to represent, not a minimum standard, but rather a maximum one. This is precisely what occurred in NSW, in at least three contexts:

First, in the NSW Cabinet meeting that addressed the issue of forensic procedure legislation, the issue was framed as a debate between the Model Bill approach (favoured by the Attorney-General's Department) and the UK's less restrictive PACE (favoured by the Police Commissioner). Unsurprisingly, Cabinet struck a balance between these approaches, retaining the Model Bill's drafting (alas!) but watering down some of its provisions.

Second, in the NSW Parliament, the substantive debate focused upon the divergence between the NSW Act and the Model Bill, with minor parties, advised by interest groups such as the NSW Law Society, unsuccessfully expending considerable political energy moving amendments to restore the Model Bill's provisions. A key example was the threshold for the sampling of suspects in the NSW Act:

> **s12 Matters to be considered by police officer before requesting consent to forensic procedure**
>
> The police officer must be satisfied that: ...
>
> (c) ... there are reasonable grounds to believe that the forensic procedure *might* produce evidence tending to confirm or disprove that the suspect committed:
>
> (i) a prescribed offence, or
>
> (ii) another prescribed offence arising out of the same circumstances as that offence, or
>
> (iii) another prescribed offence in respect of which evidence likely to be obtained as a result of carrying out the procedure on the suspect is likely to have probative value ...

The furious debate in the NSW Parliament over the word 'might', which replaced the stricter Model Bill formulation 'is likely to', completely neglected the more serious flaws in this provision. As the Review later found, the entire provision fails the test of plain English and sub-paras (ii) and (iii) of the test are totally redundant.

Third, and perhaps most dramatically, the NSW government has since taken advantage of its regulatory power under the Act to abandon MCCOC's commitment to encouraging similar legislation through the definition of 'corresponding law'. Relying on the pretext of supposed administrative difficulties in transferring a profile from a NSW detainee who was a suspect in the Northern Territory backpacker kidnapping case, the NSW government issued regulations deeming the forensic procedures law of every jurisdiction in Australia to be a 'corresponding law' (see *Crimes (Forensic Procedures) Amendment (Corresponding Laws) Regulation* 2002 (NSW)).

The latter development is precisely the danger that was feared by some commentators on the proposed national database. They argue that, unless those jurisdictions impose legal barriers on the cross-jurisdictional transfer of DNA profiles, the limits in one jurisdiction could be undermined if those profiles were sent to another jurisdiction whose laws lacked those limits. As Justice Action submitted to the NSW Review:

> Example: Tasmania has no provision for the destruction of samples and data under any circumstances. If data from NSW is shared with Tasmania which must later be destroyed (or de-identified) in NSW there is no way of enforcing the destruction provisions on the Tasmanian copies of the data. It is possible, even likely, that the Tasmanian data would later be 'shared back' to NSW and the 'destroyed' NSW data would be resurrected. It can be seen that the effective privacy of those on the NSW database would be equivalent to the lowest common denominator of privacy provisions in 'participating jurisdictions' (Standing Committee on Law and Justice 2002:144).

Clearly, the 'lowest common denominator' effect is a by-product of Australia's federal system, which allows for local differences in the rules governing dealings with DNA profiles. However, the fact that lack of uniformity is the problem does not mean that uniformity is the only, or even the preferable, solution.

An alternative to uniformity is for each jurisdiction to recognise and enforce the matching, retention and disclosure rules of other jurisdictions in relation to profiles obtained from those jurisdictions. In the example, Tasmania could pass legislation obliging local investigators who obtain NSW profiles to destroy them according to the timetable for destruction set out in NSW law. Similar laws could be passed in relation to other jurisdictions' rules on use and disclosure. However, Tasmania could retain its own rules for its own profiles (which NSW investigators would follow if a Tasmanian profile is sent to NSW). Administrators of a cross-jurisdictional database, including the national DNA database, would apply the jurisdictional rules on retention and disclosure applicable to each profile and could only compare profiles from two different jurisdictions if permitted to do so by the laws of both jurisdictions. This 'mutual recognition' approach, by removing any benefit to local investigators of sending profiles to more permissive jurisdictions, avoids the 'lowest common denominator' effect without affecting how states and territories deal with profiles obtained locally. The 'mutual recognition' option was clearly know to MCCOC, which placed the following condition on the cross-jurisdictional transfer of profiles in the Model Bill:

> Information that is transmitted under this section must not be recorded or maintained in any database of information that may be used to discover the identity of a person or to obtain information about an identifiable person at any time after this Part or a corresponding law of a participating jurisdiction requires the forensic material to which it relates to be destroyed (MCCOC 2000:59).

However, this provision is limited to the mutual recognition of rules on *retention*, leaving other local rules on dealings with DNA profiles with no legislative protection from the lowest common denominator effect.

In the absence of adequate discussion by MCCOC, the reason for MCCOC's preference for uniform rules on all aspects of forensic procedures over the less expansive approach of encouraging mutual recognition of rules on retention, use and admissibility for transferred profiles can only be speculated upon. One possibility is that MCCOC, in its 1999 Discussion Paper, needlessly framed the issue as a choice between two extremes. MCCOC (1999:86–89) presented two alternative provisions on issues on cross-jurisdictional transfer of samples and information derived from them. One allowed *carte blanche* dealings with samples that were lawfully obtained and retained under the law of another jurisdiction, ignoring 'mutual recognition'. The other barred dealings unless a comparable dealing with a profile obtained lawfully would either be permissible under local law or a trivial breach of that law, an approach that goes well beyond 'mutual recognition'. MCCOC noted that each provision had a flaw. The first promoted the lowest common denominator effect unless there were uniform laws throughout Australia. The second 'would involve excluding evidence obtained lawfully', a 'most unfortunate outcome'. Unsurprisingly, MCCOC (2000:9–10) ultimately opted for the first option, noting CrimTrac's view that the exclusion of lawfully obtained information 'will represent a significant intrusion on the exchange of information procedures that Australia's police services currently employ'. A contrary view from the NSW Privacy Commissioner received the enigmatic response that MCCOC 'agrees that it is desirable that there should be consistency'.

The heavy involvement of CrimTrac and the Commonwealth Privacy Commissioner in the behind-the-scenes drafting of the Bill offers a further clue about the origins of the imperative for uniformity. CrimTrac, which administers the national DNA database, would be most burdened by the mutual recognition approach, as it would need to keep track of the 'home jurisdiction' of each profile on the database and programme its computer to ensure that the relevant rules are followed. Clearly, its officers would envy their Canadian counterparts who have just one set of rules to follow. Recently, the Federal Privacy Commissioner (2002) has argued that privacy interests cannot be protected by multiple laws, because these will leave unresolved issues of 'legislative inconsistency and vagueness'. Instead, the appropriate balance between privacy and investigation can only be struck with 'national consistency', based on the 'adequate, minimum standard' in the Model Bill. Given the serious flaws in the Model Bill, this latter assessment of MCCOC's achievement is bewildering.

The Quiet Devolution

Inquiries into legislative history almost invariably mention the saying (attributed to Bismarck) that '[i]f you like laws and sausages, you should never watch either one being made'. While the queasy process that produced the *Crimes (Forensic Procedures) Act* 2000 (NSW) certainly confirms the truth behind Bismarck's words, the findings of the NSW Committee's *Review* also highlight why true lovers of sausages and legislation are nonetheless better advised to ignore his advice. Hiding the making of legislation from public scrutiny, just like barring health inspectors from sausage factories, can prove poisonous, especially when the wrong people are in charge of manufacturing.

Victoria's 'quiet revolution' in forensic procedures, as described by Meagher (2000), involved a gradual shift from committee-based expertise to base parliamentary politics. The story in New South Wales is curiously reversed: behind the noise of the forensic procedures revolution in that state in mid-2000, was a subtle handover of power to an expert committee. This 'quiet devolution' might have been an occasion for the development of high quality criminal procedural legislation away from the din of criminal justice 'law and order' politics. Sadly, instead, the NSW parliament (along with several other Australian legislatures) has devolved its power to a body that devised the wrong mission, had the wrong background and was subject to raw political interference untempered by even the rough and tumble of parliamentary democracy. The result is not merely inadequate criminal justice policy, but legislation so poorly drafted that it furthers no policy at all.

When a small goods manufacturer makes a bad sausage, it soon goes out of business. There is, of course, no prospect of the NSW Parliament suffering politically for passing bad legislation on forensic procedures. In criminal justice, there is no shortage of other institutions — the courts, civil libertarians, bureaucrats — for politicians to blame. On the other hand, the Model Criminal Code Officers' Committee may not escape so lightly. MCCOC's members presently continue the hard task of selling the *Model Criminal Code* to Australia's states and territories, so far without success. Ironically, the Model Forensic Procedures Bill remains the only one of MCCOC's products to be adopted at the state level. MCCOC's success in offloading its most dubious work onto eager Australian parliaments may be the undoing of its major project. Jurisdictions like NSW that have sampled the appetiser — and are now suffering a bad case of indigestion — will surely refuse the main meal. It is well past time for a product recall.

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