REPORT OF PROCEEDINGS BEFORE

STANDING COMMITTEE ON LAW AND JUSTICE

INQUIRY INTO THE CRIMES (FORENSIC PROCEDURES) ACT 2000

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At Sydney on Tuesday 14 August 2001

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The Committee met at 10.00 a.m.

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PRESENT

The Hon. Ron Dyer (Chair)

The Hon. Peter Breen
The Hon. John Hatzistergos
The Hon. John Ryan

GILLIAN ELIZABETH CALVERT, Commissioner, New South Wales Commission for Children and Young People, Level 2, 407 Elizabeth Street, Surry Hills, affirmed and examined:

ROBERT HENRY LUDBROOK, Senior Project Officer, Commission for Children and Young People, 1/52 Gould Street, North Bondi, sworn and examined:

CHAIR: Ms Calvert, in what capacity do you appear before the Committee?

Ms CALVERT: As the Commissioner for Children and Young People.

CHAIR: Mr Ludbrook, in what capacity do you appear before the Committee?

Mr LUDBROOK: As an assistant to the Commissioner.

CHAIR: Did you each receive a summons issued under my hand in accordance with the provisions of the Parliamentary Evidence Act 1901?

Ms CALVERT: Yes, I did.

Mr LUDBROOK: Yes.

CHAIR: Are you each conversant with the terms of reference of this inquiry?

Ms CALVERT: Yes, I am.

Mr LUDBROOK: I am.

CHAIR: The commission has made a written submission. Would you like that to be included as part of your sworn evidence?

Ms CALVERT: Yes, please.

Mr LUDBROOK: Yes.

CHAIR: If either of you should consider at any stage during your evidence that in the public interest certain evidence or documents you may wish to present should be heard or seen only by the Committee, the Committee would be willing to accede to your request. Ms Calvert, I invite you to give a brief opening oral submission.

Ms CALVERT: Thank you for the opportunity to appear before the Committee. One of my statutory functions as the New South Wales Commissioner for Children and Young People is to promote the participation of children and young people in the making of decisions that affect them. Another of my statutory functions is to make recommendations to government on legislation, policy and practices affecting children. The Crimes (Forensic Procedures) Act 2000 creates a set of statutory rules for regulating the taking of forensic samples and photographs from serious offenders, suspects and volunteers.

Under that Act there is no power to take a forensic sample from a child under the age of 10 years. My submission is limited to the provisions of the Act affecting children between the ages of 10 and 17 years and for simplicity I will refer to that age bracket as "children". There are situations in which a child may benefit from the taking of a forensic sample either through being excluded from a police inquiry or through providing evidence which may result in the apprehension of an offender. Also there are situations in which their interests may be harmed by connecting them to a crime or providing evidence that could be used against them in criminal proceedings.

The Act provides separate provisions, or separate rules, for serious offenders, suspects and volunteers. A sample can be taken from a child who is a serious offender or suspect only under the authority of a magistrate's order. In that regard, the child is provided with special safeguards—and I support those safeguards. However, I believe that before making an order in relation to a child, the

magistrate should be required to take into account the age of the child, the welfare of the child, the wishes of the child and the child's cultural background. These matters are required to be considered by the court under equivalent Commonwealth forensic procedures legislation and the proposed new section to be inserted by the Crimes Amendment (Forensic Procedures) Bill 2001.

The taking of a forensic sample is an intrusive procedure and it is appropriate that in the case of a child the court should take into account the child's welfare and wishes; that is consistent with the United Nations Convention on the Rights of the Child. I believe also that children should be represented by a lawyer at the hearing before a magistrate, or at least should have the support of an interview friend. Under current legislation only indigenous people are entitled to an interview friend.

My greatest concern about the Act refers to the volunteer provisions in part 8. Obviously there are situations in which people may wish to volunteer to give a forensic sample. For example, people may wish to prove their lack of connection to a particular crime, or may be a victim wanting to assist the police to apprehend the perpetrator. However, part 8 of the Act allows only parents and guardians to volunteer a forensic sample on behalf of their child. Before giving consent the parent has to be fully briefed on the nature and possible implications of undergoing a procedure.

The child, who may in fact be approaching his or her eighteenth birthday, is treated under this legislation as incapable of giving consent and is not entitled to information about the nature and implications of the procedure. The child is excluded from the decision-making processes and is given no information on which he or she can make a decision whether or not to consent. The only way in which the child has any influence over the voluntary procedure is to object or resist.

In my view it is unacceptable that a parent has total decision-making power over an issue that primarily affects his or her child and that the child is denied access to relevant information and is put in a position in which he or she has to show dissent by objecting or resisting. It flies in the face of the child's participation and right to information articles of the United Nations convention. Also it is contrary to recent legislation passed by this Parliament affecting children's participation in decision making.

I respectfully recommend that part 8 of the Act be amended to provide that a voluntary consent is not effective unless both the child and the parent or guardian give an informed consent. In the case of the child there should be a requirement that the information be provided in a manner and language that the child can understand. That is consistent with Commonwealth and New Zealand legislation. In my view it is much more consistent with New South Wales legislation relating to children's participation in decision making that affects them.

CHAIR: Any question that I or my colleagues might ask may be responded to by either or both of you as you choose. Would you agree with me that an important principle in your submission is that set out in paragraph 6.01 which states:

> The Act treats children as being legally incompetent … Children should be consulted and should be able to say "no".

Would I be correct in identifying that as an important principle underlying your submission?

Ms CALVERT: Yes.

CHAIR: Paragraph 6.02 of your submission states:

> There are dangers in giving parents power to consent on their children's behalf.

Would you like to say something about that?

Ms CALVERT: It is important to remember that the consent occurs only in the context of voluntary sample taking. It strains the meaning of "volunteer" to have a parent give consent for his or her child to be volunteered for a procedure when the child has no say in whether he or she volunteers for the procedure. A parent can have conflicting interests in relation to a child; something we do not necessarily feel comfortable about, but the reality is that that occurs. For example, a parent may want to exculpate themselves from an alleged crime by implicating the child.

The other thing is that you can create an unnecessary risk in other situations between a child and a parent where a parent consented to the child having a voluntary sample taken and the child does not consent. That can in a sense set up a potential conflict between the parent and the child. It is also important to note that adults are not required to submit to voluntary procedures. If adults say they do not want a voluntary sample taken, then they do not have to have that sample taken. The provision where someone can be forced to participate in a voluntary process only applies to children.

CHAIR: You make the point in paragraph 6.05 that the treatment of children as being legally incompetent runs contrary to the developments in the common law and statute law of New South Wales. Would you give the Committee some examples of what you mean by that?

Ms CALVERT: For example, the Children and Young Persons Care and Protection Act 1998 requires that under-18s be given detailed information about proposed actions or decisions and have the opportunity to express their views freely. They have to be given information in a language and manner that is appropriate to their age and stage of development. My own Act, the Commission for Children and Young People Act 1988, requires me to promote the participation of children in making decisions that affect them and to encourage agencies to do likewise. I am also required to take into account the views of children before I make serious and significant decisions.

In relation to the Permanency Planning No. 2 Bill 2001, which is an amendment to the Children and Young Persons Care and Protection Act, a sole parental responsibility order cannot be made in respect of a child aged 12 or older unless the child gives informed consent. Similarly, an adoption order cannot be made in respect of a child aged 12 or older without the child's informed consent. There are some recent pieces of legislation either before the New South Wales Parliament or passed by the New South Wales Parliament that enshrine the notion that children should be able to participate in decisions that affect them and to have information available to them about their decision in a manner that is appropriate to their age and stage of development.

The Hon. JOHN HATZISTERGOS: What is the impact of section 76 (3)? If the child objects or resists, does that not obviate the need for the child to be required to specifically give consent? It seems to me that is the consultation process.

Ms CALVERT: It is a very unusual consultation process to ask a child to resist as a way of determining—

The Hon. JOHN HATZISTERGOS: It is not just resist, it is also object.

Ms CALVERT: To object or resist. It is an unusual way to get consent. I am not aware of that being applied to any other matters where we are seeking informed consent for adults, for example. In fact, if someone objects to having some things done to them they can have charges laid against them.

The Hon. JOHN HATZISTERGOS: Part of your submission, as I understand it, is that both the child and the adult have to consent.

Ms CALVERT: Yes.

The Hon. JOHN HATZISTERGOS: In effect, is that not what the section provides for? If the child objects, then he is not consenting.

Ms CALVERT: Not necessarily. The child does not have the information on which to base that decision about whether or not to object. Children may object for a whole range of other reasons. For example, children may not like someone approaching them and they may experience it as an intrusion of their bodily integrity. If it were explained to them, they may give a consent. I do not believe it is informed consent to rely only on a child's objection. The other issue is that children are socialised not to object when adults approach them and ask them to do something. That often acts as a barrier to their being able to express their opinion. We are asking them to step outside their socialisation processes. Again, I would not see that is being informed and proper consent.

Also there are cultural differences in that the way children express objection may be different across the cultures. Police officers may not be able to step outside their own culture to recognise when a child is objecting. They may have adult notions of objecting or they may have their own cultural notions of what an objection is. When we look at that section, it does not fulfil the requirements of informed consent. We ask children to do things that are outside what we ask children to do in almost every other circumstance, that is, to obey parents and adults and people in authority and to follow the instructions.

The Hon. JOHN HATZISTERGOS: If the provisions required the consent of the child, would you not have the same circumstances arising?

Ms CALVERT: Where the child objected?

The Hon. JOHN HATZISTERGOS: The child may feel if the parent decided he or she wanted to consent on behalf of the child then the child has to give consent as well. Could you not have a similar circumstance where the child feels in some way pressured to consent because the parent has so decided? I am trying to work out what the difference is.

Ms CALVERT: The difference is that the child is given information on which to base his or her decision. The child is given the information in a manner where he or she is not faced with someone saying, "Can I take a piece of your hair?" The discussion and the issue about whether or not the child is going to consent occurs outside the situation where the child is going to be subjected to the procedure. It also means that the child has a capacity to ask other people, to find out from them and—you are quite right—to have a conversation with his or her parents about the consequences of participating or not participating in a voluntary process. Certainly children are subject to influence, just as adults are subject to influence. We need to have some clear guidelines and provisions about informed consent so that children have the opportunity to step back from that influence and think about the implications for them and what they want to do.

The Hon. JOHN HATZISTERGOS: Assuming the parent decides to consent, the child is given all the information necessary to make a decision and the child is then asked to consent. Do you not feel that the child would be in a similar position? The parent has already consented. Do you not feel that the child in similar ways would be pressured?

Ms CALVERT: Not necessarily. There are circumstances were children often override or disagree with the views of their parents. They are capable of doing that. We think that they are more likely to be able to express their views when procedures are in place that set up a situation where they are allowed to make informed consent, as opposed to a circumstance where they are placed in a position of having to give a forensic sample.

The Hon. JOHN HATZISTERGOS: Could they not be given the opportunity to make an informed objection? Would that be any different?

Ms CALVERT: Informed consent allows for both an informed objection and an informed agreement to participate.

The Hon. JOHN HATZISTERGOS: If they make an informed objection in terms of the way the Act is phrased, would that meet your requirements?

Ms CALVERT: No, it would not.

CHAIR: Is there not another issue regarding the particular age of the child? Do not different considerations arise regarding a 16- or 17-year-old as opposed to a 13- or 14-year-old?

Ms CALVERT: Yes, developmental issues arise in that 17-year-olds are in a different position to 11-year-olds.

CHAIR: They may be more independent of their parents than the younger child?

Ms CALVERT: Yes. In fact, they may not even be living at home. Again, as to the needs of the 11-year-old and the needs of the 17-year-old, there are arguments in both of those circumstances as to why it is critical and important that they be allowed to give informed consent rather than relying on a notion of just objecting. In no other legislation do we equate objection with informed consent. I do not know why we would continue it as an anomalous situation in this legislation.

CHAIR: In the ordinary case, what is government practice regarding consulting your office about legislation that would ordinarily be thought to affect the interests of children? I add the more specific question: Was your office consulted about the form of this legislation?

Ms CALVERT: I would have to take the second part on notice and check my records. The Government consults me in a number of ways—through asking me to comment on Cabinet ministers, through contacting me and having discussions in the preparation of Cabinet minutes, and through the development of policies to which we make both informal and formal submissions. There are a range of ways in which the Government consults.

CHAIR: In your submission you make references to provisions of the United Nations Convention on the Rights of the Child. How do you see those as impacting on the legislation or being relevant to it?

Ms CALVERT: The Australian Government ratified the United Nations Convention on the Rights of the Child in January 1991 and through that process has then agreed to implement the articles of the convention. The preamble states that under-18s should be provided with special safeguards, including legal protections, because of their physical and mental immaturity. Then there are four articles that are relevant to this legislation. Article 3 states that the best interests of the child shall be the primary consideration in all actions concerning children. That is relevant in relation to the taking of forensic procedures. Article 12 gives children the right to express their views freely in all matters that affect them and requires that their views be taken into account according to their age and maturity. Article 13 gives children the right to receive information of all kinds. Article 40 requires that children alleged to have infringed the penal law be treated in a manner consistent with the promotion of their sense of dignity and worth and which reinforces their respect for human rights. They are the four articles that are relevant to this legislation.

CHAIR: Towards the end of your submission in part 10 on page 8 you deal with the origins of this legislation, by which I mean arising out of the model bill which, in effect, is now the Federal legislation. You say in paragraph 10.03:

> No explanation is given in the Report

I take it you mean the report from the Standing Committee of Attorneys General—

> why the *Model Criminal Code* provisions (which require a separate written consent from both competent child and parent) have metamorphosed in the draft *Forensic Procedures Bill* into provisions by which a parent can consent on behalf of any child under 18, and even a competent child has no power to give or refuse consent.

Why do you think that happened?

Ms CALVERT: I am not clear, and we do not know, why that happened. In a way that is the point we are trying to make, that it is unclear why that shift occurred; that the model criminal code did, in fact, require separate consent but that was not reflected in the bill that was developed. We are not clear why that happened.

CHAIR: You also make a comparison with relevant or equivalent Victorian and New Zealand legislation. What did those provisions enact?

Ms CALVERT: Under equivalent Victorian legislation no-one under the age of 17 years can volunteer to give forensic samples so children under the 18 years are excluded from giving forensic samples voluntarily.

Mr LUDBROOK: It is actually under 17 years in Victoria.

Ms CALVERT: Yes, the difference is the powers would be under 18 years so there is a slight difference in age there. In New Zealand the Criminal Investigation (Blood Samples) Act 1995 requires a consent from both the parent and the child before a voluntary blood sample can be taken and requires that both parents and child be fully informed of the nature and possible consequences of the procedure. In the Commonwealth forensic procedures legislation a forensic procedure can only be taken from someone in the 10-17 age range by court order, and a forensic procedure on a child suspect may be carried out by order of a magistrate. There is a bill currently before the Federal Parliament which would introduce volunteer provisions almost identical to those in the current New South Wales Act.

CHAIR: Is that legislation seeking to amend the present model code adopted by the Federal Government?

Mr LUDBROOK: This is a specific forensic procedures code which has been developed more recently by the Standing Committee of Attorneys General but it actually runs against the earlier model code. For instance, the Commonwealth legislation needs the consent both of the child and the parent for anybody under 18 years to take part in an identification parade. There seems to have been a shift. I am unaware why that shift has taken place. That shift is reflected in the New South Wales legislation and in the bill that is currently before the Commonwealth Parliament.

CHAIR: I must say I have had a concern that the New South Wales legislation in various aspects not particularly relevant to children is tougher and gives more sweeping powers. Do you say that the Federal legislation is under review and there might be a move back the other way towards the New South Wales position in some respects?

Ms CALVERT: I cannot comment on the overall legislation but I do know they are looking at introducing similar provisions in relation to the voluntary screening which would mean that only parents can give consent so, yes, it is a swing away from what the model code originally proposed.

CHAIR: I refer to what your Commissioner would prefer to happen. You put it in the alternative at the conclusion of your submission and say:

> … that either the volunteer provisions be amended so that they do not apply to under-18s or alternatively, if they are to be retained, that the informed consent of both child and parent be required …

If you have a preference which of those alternatives do you prefer?

Ms CALVERT: I probably do not have a preference. I think either would be acceptable but we would find either acceptable.

The Hon. JOHN HATZISTERGOS: What would happen where you had the law requiring both the consent of the child and the parent or guardian, the parent or guardian cannot be located and therefore you have to apply to the court? Do you say that the court's consent must coexist alongside the young child's consent? Do you say that if an order is obtained from the court, in place of the parent or guardian granting consent but still, notwithstanding that court order, the child should also consent?

Ms CALVERT: Yes.

The Hon. JOHN HATZISTERGOS: Would that be an anomalous situation?

Ms CALVERT: Yes, I think those cases would be quite rare and it would be unlikely that the child was unable to locate the parent or guardian. For example, for children who are in care I would assume that the Children's Guardian would consent on behalf of them: that would be the equivalent for the child who is in care.

The Hon. JOHN HATZISTERGOS: Leaving aside the question of how unlikely or likely it might be, it would be an anomalous situation to have the court placed in a position of granting consent and then having the child not consenting? We do not normally place courts in that position.

Ms CALVERT: Maybe you would not approach the court if the child was not going to consent. If the child said that they would not consent then there would be no point approaching the

court. It would only be if the child consented and then you would approach the courts to get that order. The other recommendations we would make is in relation to the serious offenders and suspects section where we would want the magistrate being required to take into account the child's age, welfare of the child, child's wishes and cultural background. That would be the second group of amendments we would like to see as well.

CHAIR: In regard to the alternative I put to you a short time ago, that is, either the volunteer provisions be amended so that they do not apply to under 18's or, in the alternative, that the informed consent of both parent and child be required that, there is a possible further refinement, namely, that in either case the provisions relate in a different way, depending on the age of the child? In other words we sever younger children, 13- and 14 -year-olds, say, from those who are older?

Ms CALVERT: Yes. In a sense, a schedule could be put in place so that those under 14 years of age are in fact excluded from giving samples, then for those between 14 and 16 years of age you require both the child's and parent's consent, and then for those 16 years and above you only require the child's consent. You could actually put in a structure like that. That would be fairly consistent with some of the other approaches, for example, the Minors (Properties and Contracts) Act certainly has a severing at aged 14 years in terms of consent and then it is preferable to get consent from both parent and child between 14 and 16 years, and from 16 years on the child, and that is a third alternative that the committee could consider.

CHAIR: You mentioned that the magistrate should take into account factors, including the cultural background of the child. What impact should cultural background have on the decision?

Ms CALVERT: I think some cultures view legal processes in a particular way and also view bodily integrity in different ways as well and I think that it is worthwhile considering that in making an order. It would be unlikely that it would be the thing that the matter would turn on but it is one of the things that we think should be taken into account when looking at having a forensic procedure or a forensic sample taken.

CHAIR: Do you have the interests of the Aboriginal community in particular in mind?

Ms CALVERT: That would be one of the cultural groups that I would be concerned about. Similarly, Muslim girls who are in full veil would be an issue that it should take into account in making your decision. We would ask that the magistrate be required to take that into account.

The Hon. JOHN RYAN: Your submission largely addresses itself to the taking of samples, particularly with regard to whether they are young people who are suspects or otherwise. Have you examined the legislation in terms of what happens in terms of the destruction of samples and removal of information from the DNA index as to whether there is adequate protection being made in those regards? Previous witnesses to the Committee have indicated that there may be circumstances in which, for example, DNA samples taken from a child as a victim may wind up being used by the State for statistical purposes or on the index. There appears to be stronger capacity for people to take things off the index if it comes as a result of a court order, not as a result of being given voluntarily. Have you examined the legislation in regard to that? Do you have any concerns or recommendations to make?

Ms CALVERT: No, I have not but I might take that on notice if that is acceptable to the Committee. I would say in passing that what we have done when looking at this legislation is to look at inconsistencies between adults' rights and children's rights and to look at anomalies in relation to their age and development, or provisions that may disadvantage them because of their age and development. The issue about samples being taken from somebody as a victim and then ending up on a DNA data base that is then used to identify suspects applies to both adults and children. If we had concerns, they would exist equally for both adults and children. I think where it does impact differentially on children is the different provisions that apply for children in relation to voluntary samples than apply for adults, and that is where I have my concerns.

The Hon. JOHN RYAN: Are there any special considerations the legislation should have in regard to young offenders who are found to have committed serious offences and are therefore subject to the taking of samples whilst they are in custody and so on? Does the Children's Commissioner have

any concerns about those procedures, particularly as it is to be forthcoming in the near future, as I understand it, that the police might be seeking to gain samples from young people above the age of 18 years in custody?

Ms CALVERT: I would be concerned about the ones who are under 18 years. Currently we welcome the safeguards that exist in the forensic procedures Act which require it to the put before a magistrate and for the magistrate to make the determination. We would recommend that there always be required to be legally represented or to have an interview friend present, and to make those other changes in relation to what the magistrate is required to take into account.

The Hon. JOHN RYAN: You have suggested that children above the age of 16 years might in fact be able to give informed consent on their own. Is it not possible that notwithstanding the fact that a person aged 16 to 18 years might feel that they are giving informed consent because they do not have wide experience of legal ramifications of the decision that they, and might be making—and that is understandable due to their inexperience—that it is not an appropriate safeguard for such a decision to be made to be able to be vetoed by a parent?

Ms CALVERT: I think 16-year-olds are capable of making informed consent. The issue that you raise is addressed in how you give them the information, and what information you give them. If you are comprehensive in the information you give them, and it is given in a fair and unbiased way by somebody who is not in an authoritative position over them, then I think 16 -year-olds are capable of making informed consent.

The Hon. JOHN RYAN: Do you think there would have to be some special procedure**s** for ensuring that the information given to 16- and 18 -year-olds is different from that given to adults?

Ms CALVERT: Regardless of age—whether it be 16, 17 or 19—I believe a person needs to be given information in a clear manner and in a way that fulfils the requirements for informed consent. Considerable work has been done on what is the basic criteria for informed consent. So long as they are followed I would feel confident that a 16-year-old or 17-year-old could make a decision as easily as an 18-year-old or 19-year-old.

The Hon. JOHN RYAN: What recommendation would you make to address the concern raised in paragraph 7.01 of your submission, where you pointed out that:

> While children can avoid a forensic procedure if they 'object or resist' this places the onus on them to show dissent. This reverses the situation that applies to adult volunteers who are given a free choice to agree or refuse. Children are not offered this choice but must take positive action to express their opposition or refusal. This treats children less favourably than adults and is discriminatory.

Are there any models of legislation that might exist to enable such a recommendation to be acted upon?

Ms CALVERT: Yes. For example, the care and protection legislation in New South Wales, while it does not set out procedures for seeking informed consent, does show a way forward in looking at how one might seek the views of children and young people in matters affecting them.

The Hon. JOHN RYAN: You quite reasonably pointed out that it is strange to use the term "voluntary" to provide that a parent or guardian can consent on behalf of a child when the child may be 16 or 17 and living independently of his or her parents, and in full-time employment. If there were to be a review of part 8 of the Crimes (Forensic Procedures) Act in line with your recommendation, would that fully address your concerns?

Ms CALVERT: Yes.

(Short adjournment)

MARGARET ANN ALLISON, Chief Executive Officer, Legal Aid Commission of New South Wales, 323 Castlereagh Street, Sydney, and

DOUGLAS JOHN HUMPHREYS , Director, Criminal Law Branch, Legal Aid Commission of New South Wales, 323 Castlereagh Street, Sydney, sworn and examined.

CHAIR: Thank you for the Legal Aid Commission's submission and for agreeing to appear before the Committee this morning to give evidence. Did you each receive a summons issued under my hand in accordance with the provisions of the Parliamentary Evidence Act 1901?

Ms ALLISON: I did.

Mr HUMPHREYS: Yes.

CHAIR: Are you both conversant with the terms of reference for this inquiry?

Ms ALLISON: I am.

Mr HUMPHREYS: I am.

CHAIR: As you are aware, the commission has made a written submission to this inquiry. Is it your wish that that submission be included as part of your sworn evidence?

Ms ALLISON: It is.

Mr HUMPHREYS: Yes.

CHAIR: If you should consider at any stage during your evidence that in the public interest certain evidence or documents that you may wish to present should be heard or seen only by Committee members, the Committee will accede to your request. In that regard, I understand that at the conclusion of the public hearing you would like to make some matters known to us in confidential session. Is that correct?

Ms ALLISON: Yes. It is likely that we may want to refer to matters that are currently before the court in order to illustrate our answers to certain questions. Perhaps we could leave those matters until the end of the public hearing.

CHAIR: Yes. We will proceed in that way and hold an in-confidence session at the end of the public hearing. I understand that neither of you wish to add to the written submission at this stage and that you are happy to proceed directly to questions.

Ms ALLISON: That is correct.

CHAIR: Any question from my colleagues or me may be responded to as you choose by either or both of you. I refer to the first matter mentioned in the commission's written submission: the difference between the Federal legislation—or the model bill, as it is commonly known—and the New South Wales Act regarding the criteria for requesting consent to or authorising a forensic procedure. You point out correctly that the New South Wales Act requires that there should be reasonable grounds to believe the procedure might produce evidence tending to confirm or disprove that the suspect committed the relevant offence. On the other hand, the model bill—the Federal legislation—provides that there must be reasonable grounds to believe the procedure is likely to produce such evidence. That is a clear distinction. Which model do you prefer, and why?

Mr HUMPHREYS: The Commonwealth model code was obviously a very considered model involving representatives from the various States. It balanced the public interest of obtaining forensic material with the very intrusive nature on a private basis. The test that is currently with the New South Wales is a very wide test—that is, there are grounds to believe the procedure might produce evidence. From our point of view, that is a very low threshold. The Commonwealth model code indicates that there should be reasonable grounds to believe it is likely. It seems to me that before

investigating authorities should be able to obtain such material—bearing in mind that it may involve intimate examination of a person—there should be a much higher test. Under the New South Wales legislation, basically anyone could be the subject of intimate forensic examination, and we believe there is a countervailing private interest that needs to be taken into account.

CHAIR: Before we continue with questioning, I indicate the presence in the room of a group of visitors from the Eastern Cape Province parliament in South Africa. They are very welcome.

I turn to the issue of access to legal advice and representation. As you will be well aware, suspects are to be given a reasonable opportunity to communicate or attempt to communicate with a legal practitioner. However, in the nature of things, many of these procedures are likely to occur late at night or in the early hours of the morning. What remedy does the commission suggest that the Committee might at least consider in that regard?

Ms ALLISON: One of the possible options is the availability of a statewide after-hours legal advice service able to be accessed by telephone from persons detained in police stations or in some other form of police custody. The commission makes no particular submission about the form of that service except to say that there is probably a substantively comparable model in the United Kingdom that may warrant some consideration.

CHAIR: The Law Society witnesses recently raised this issue with us. They referred us to the United Kingdom model and the availability in Britain of a legal aid or advice service in these circumstances. They also admitted to us quite frankly that there is a substantial price tag attached to the provision of that service. What do you believe the Committee should do? Should we recommend to the Government that it should at least consider such a scheme or do you think it is so expensive as to be impractical?

Ms ALLISON: I think there are competing tensions in this area. On the one hand there is the statutory entitlement of a person who may be asked to produce forensic examples to legal representation. On the other hand we have the realistic and practical situation whereby people are often unable to access such advice, particularly after hours. I think the other factor that distinguishes New South Wales from the United Kingdom is the distances involved. There are clearly questions about substantial remoteness in parts of the State, which provides a practical impediment irrespective of funding levels. However, there may be a combination of approaches involving some access to telephone service by people who for reasons of distance or other practical considerations cannot access advice in person and a rotational duty solicitor model, which seems to operate in the United Kingdom. Under that model local practitioners take it in turns to be on call and make a decision in the circumstances about whether it is desirable to attend in person or to speak on the telephone to the person in custody.

CHAIR: I suppose the problems associated with the provision of such a service would be more difficult to solve in country and remote areas of the State than in metropolitan areas.

Ms ALLISON: That is our experience with all forms of legal service delivery. The difficulties we experience in country areas providing legal services to persons accused of criminal offences would certainly be exacerbated considerably after hours.

CHAIR: I refer you to a passage that appears on page 3 of your submission, which states:

> It seems to Legal Aid that in balancing the interests of the accused against that of the community, given the particularly invasive nature on a person's civil liberties of these procedures, it is not unreasonable to suggest that where a court finds that relevant procedures have not been followed, and in exercising its discretion, the court concludes that such evidence should be excluded, that this be an absolute bar to the obtaining of further samples of a similar nature from the defendant.

It is clearly a matter for the discretion of the court to include or exclude evidence. What are you driving at with regard to the absolute bar on rerunning the procedure that you refer to in that passage?

Mr HUMPHREYS: You can have a situation whereby, for example, there may be a forensic material, there is a voir dire prior to the trial commencing and there is then a decision by the trial judge in those circumstances to exclude that evidence. At the moment it is open to the Director of

Public Prosecutions on the basis of that evidence being excluded to then no bill proceedings. Unfortunately, there is nothing that would then stop those proceedings being recommenced and the correct procedures being undertaken, which would then allow that evidence, arguably, to become admissible. There would always be a question as to whether that process would itself be an abuse of the process of the court given the previous proceedings. I am not talking about a bar forever in terms of forensic procedure; I am saying simply that forensic material cannot be admitted in relation to those particular criminal acts that were then the subject of court proceedings.

CHAIR: Has the situation to which you are adverting existed in practice to date?

Mr HUMPHREYS: Not yet.

CHAIR: Do you foresee that such a situation might arise?

Mr HUMPHREYS: I think it is possible. It would depend particularly on the extent to which the case developed around the forensic material and its probative value and the strength of the case otherwise. One could well imagine a case that would fall over but for forensic material. If it were in the exercise of the court excluded, I can foresee a possibility that that situation could occur. There would certainly be arguments both ways as to whether an attempt to obtain subsequent material would be an abuse of the process.

CHAIR: Would you like to say anything to the Committee about a decision of Mr Justice Wood in the case of *Regina v Phung and Huynh*, referred to in the commission's submission, concerning the admissibility of records of interview, or articulate the commission's views regarding that decision?

Mr HUMPHREYS: From the commission's point of view, although the case is dated in terms of the events that took place as compared to the actual decision, it raises concerns as to whether or not there is compliance with the provisions and the safeguards that are enacted within the legislation by police in relation to vulnerable people. The case itself outlines not just one breach of the requirements; it outlines a series of breaches which are alluded to by His Honour Mr Justice Wood which cumulatively gave rise to his decision to exclude records of interview.

The concerns that the commission has in our experience—and although I cannot point you to other reported decisions like this—is there is a lack of training perhaps, a lack of awareness and lack of rigour in the police force to the strict adherence to those provisions. That can mean that people are subjected to procedures that should not take place. It seems to me that there are issues regarding training, the provision of material to support persons and the selection of support persons. In particular we talked in the second case about the selection of a Salvation Army person to attend and that person taking no particular part in the proceedings. There is a question, from our point of view, as to whether or not there should be trained people to act as support persons where others are not available who understand the role and the rights of accused people and their obligations as support persons.

I go back to some of the suggested amendments by the police department in the light of the incapacity, as evidence in this case, of the force to currently adhere to the guidelines and there are some fairly serious breaches there, in my submission. One would have to question whether or not it is appropriate to consider extending and widening the provisions of the current Act in the light of that case.

CHAIR: You say, in particular, that the current system of training of custody officers needs to be reviewed. Are there designated officers in police stations in this State now who are designated as custody officers or is that a generic description; you are referring to any police having custody of a particular suspect?

Mr HUMPHREYS: No, there are custody officers who have particular responsibilities under part 10A to keep records, to make decisions, provide medical assistance, ensure people are given access to telephones and make inquiries. There is a large list of requirements that are there. In the light of that case, although I make the caveat that this was in 1998 and two years has passed since then, there needs to be more training and more rigour in the role of custody officers.

CHAIR: Near the end of your submission you make reference to what is described in general parlance as the innocence panel, that is, a group of people of a representative character to decide on applications by those seeking to prove their innocence by accessing the DNA database. What is the commission's view, first of all, regarding the composition of such a panel when established and, secondly, whether it ought to be set up administratively or possibly subject to specific legislation or amendments to this legislation?

Ms ALLISON: It would probably be desirable to have some statutory framework for the establishment of such a scheme, in our view. For example, there are issues of clear guidelines for such a scheme, the process of making submissions and perhaps even in broad terms the array of interest represented on such a committee and, in our view, there certainly should be three broad sets of interest, including obviously the prosecution, the defence perspective and some technical expertise because there clearly needs to be some appropriate rigour and scientific assessment of the arguments produced and any exculpatory evidence that may be tendered.

There is also the issue of what is the impact of a finding by that committee, whether it triggers an appeal by the convicted person or a section 474 inquiry and whether organisations like ourselves would be required to provide legal aid for a person in those circumstances. Obviously, that last matter is not a matter for legislation, but certainly in our view there would be some value in establishing the basis for such a mechanism in legislation and at least in broad terms some of the procedural steps.

CHAIR: Is the Prisoners Legal Service a division of the Legal Aid Commission and has it received any complaints from prisoners arising out of the practical operation of this legislation?

Mr HUMPHREYS: The Prisoners Legal Service is a part of the Legal Aid Commission. It consists of seven legal officers and a clerical officer. They provide information, advice and representation to prisoners within New South Wales. The main areas of representation they currently provide relate to visiting justice hearings, the Parole Board and sentencing redeterminations in relation to old life sentence matters. They are a dwindling number at the moment but they have certainly been a fair amount of our work recently. As part of their role they visit or arrange for someone to visit most of the correctional centres across New South Wales. We try and see on a regular basis anyone who wants to see us.

Prior to this legislation being put in place we arranged for a briefing with the Department of Corrective Services, which was attended not just by the Prisoners Legal Service but by a large number of our staff. We made a number of representations to Corrective Services regarding the way it was proposing to implement the Act and indeed agreement was reached in respect of a person who was non-consenting but was compliant. At that point of time if a person was non-consenting they were regarded as non-compliant and they were being regarded as subject of restraints and other procedures to enable forensic procedures to be taken from them. We consulted with the Department of Corrective Services and talked through the issue and it was agreed that there was a separate category of person who might, as a matter of principle, object to a forensic sample being taken but would not use violence to prevent it. As a result of that, there was a change in the procedures and that has been a positive thing. We think it has protected prisoners' rights in that they can say, "I am not prepared to consent to an order from the police. Go and get a court order. If you get a court order I will then comply. I will not resist but I still maintain my objection to it."

We receive on average up to 10 phone calls a week from prisoners. Some problems occurred in relation to whether or not people have been correctly identified as falling within the legislation and there are various categories of people, some of whom are subject to compulsory testing, some of whom are not. We have generally found as a result of representations we have been able to make that those matters have been resolved or that prisoners have been able to satisfy themselves by obtaining independent advice from us that they are liable to it and that the consequences of resisting could be such that they either could be restrained or they would be in fact guilty of an offence if they then resisted. To a large extent we have been able to satisfy prisoners' needs in that regard.

We also contributed to the document that the Department of Corrective Services handed out to prisoners outlining the scheme and what it involves. We made some small changes to that prior to it being released. I have also seen the video that the Department of Corrective Services uses. We think

we have contributed in a very positive way to the implementation of the scheme through the service that we provide. I should add that this is another burden that has been thrust upon us in terms of additional services we have been required to provide yet we have scarce legal aid funds.

CHAIR: Is it possible for the commission to subsequently furnish the Committee with statistics the commission maintains as to the number and the nature of complaints that might be made?

Mr HUMPHREYS: We have not kept specific statistics on DNA inquiries. We keep general statistics by way of telephone advice but not on DNA matters, so it would only be possible to provide anecdotal evidence. I could not provide statistics by absolute numbers of inquiries we have received that only relate to DNA.

CHAIR: Do you have any evidence regarding complaints you might have received from prisoners of inmates being punished through reclassification as an example for refusing to consent to a procedure?

Mr HUMPHREYS: We are aware of perhaps one instance where that may have occurred. That was a matter of representation on our part where it appeared that there had been a threat of reclassification. It relates to whether a person is consenting or non-consenting but compliant or non-consenting and non-compliant and there are issues there regarding whether or not that is a breach of prison discipline; if they are non-consenting and non-compliant and whether or not that justifies a reclassification. It is a very difficult area. In terms of the commission's discretion, they have very wide powers to take into account many matters in terms of what is the appropriate classification for a person.

CHAIR: The Police Service will be sending witnesses to appear before this inquiry tomorrow. You will be aware no doubt from written questions we have submitted to you that the Police Service is suggesting that we ought to consider various amendments with a view to the Committee possibly recommending them to the Government. Would you like to make any brief comments today, bearing in mind that we are more than willing to take on notice any of these matters and furnish written reasons why you might oppose various suggestions the Police Service is making?

Ms ALLISON: I will ask Mr Humphreys to make a brief response today. I appreciate the opportunity to take this on notice and I thank the Committee for furnishing us with a copy of the Police Service's submission. It may well be that we would like to provide some further more detailed written remarks but in general terms we would like to make a few comments today about the ambit of the Police Service proposals.

Mr HUMPHREYS: By way of opening remarks, it would appear that at least some of the suggestions made by the Police Service would be to considerably open and widen the number of categories of people who would be subject to DNA sampling. It would seem to me that the rationale behind this—and it is hard to know what the rationale behind this is—that the experience from the United Kingdom might indicate that they are hoping to expand the database and on that basis they might increase the number of cold hits by increasing the number of people on the database for whatever reason they come into contact with police and that might allow them to pick up people where they have forensic material. The more people they have on the database the more chance they have of picking up people.

That would appear to me to be the basis whereby, certainly in relation to the first suggestion they make that they are looking at trying to increase the taking of the buccal swab from a much larger number of people, whereas they are suggesting that it should be an indictable offence rather than a serious indictable offence. There is public policy on what basis we are going to allow DNA sampling and its retention on the database. It is a matter of balance between what is the appropriate basis for doing it. At the moment the fact of the matter is that a person who is the subject of an offence that carries a period of imprisonment of more than five years as a maximum can be the subject of DNA sampling. The fact is, a simple larceny could carry a penalty of more than five years. It might be dealt with summarily, where maximum penalty might be restricted to two years, but on the basis of the fact that a larceny carries a statutory period of more than that it would seem to me that it is a very wide category of people now who can be the subject of DNA sampling.

Ms ALLISON: It would potentially pick up offences like shoplifting, and my submission would be that that would take it beyond the original intent of the legislation, that people charged with offences like that could be subject to these procedures.

Mr HUMPHREYS: On that basis it would appear that the only people would be strictly those who have committed summary offences. The fact is that not as many people in gaol are the subject of sentences of imprisonment for strictly summary offences. Potentially, everybody in gaol is now the subject of forensic sampling. It is a matter of public policy as to what line we draw before we make a decision that we are going to include people on the database.

CHAIR: Do you think the Legislature has made a correct policy decision in restricting the sampling to serious indictable offence?

Ms ALLISON: Yes, that would be our submission.

CHAIR: Do you wish to make any brief comment regarding any of the other amendments that the Police Service is seeking?

Mr HUMPHREYS: I am very concerned at the suggestion in part 8 of the submission that police be given the power to exclude an interview friend where police reasonably expect that the interview friend will interfere with or obstruct the carrying out of the forensic procedure. At the moment it is excluded where the person unreasonably interferes or obstructs. The potential, if one adopted that legislative basis, would be that, first of all, it is completely unappealable. It is not even reasonable likelihood. One goes then to reasonable belief. It is at the very minimum that one could frame it in terms of legal jargon. A reasonable suspicion is at the very lowest end, and I question why that is necessary. It would seem to me that the current legislation, which allows them to exclude people where there is an obstruction or interference, is reasonably based. Otherwise one could well imagine circumstances where, for no stated reason and, as I said, in the completely unappealable way, the person could be excluded. It would seem to me that there are very sound public policy bases why the legislation included the use of interview friends and access to legal advice. This, in fact, completely undermines that. It is a completely retrograde suggestion.

CHAIR: You are really saying that it would be within the entire discretion of the police officer whether an interview friend were to be permitted or not if this amendment were to be approved?

Mr HUMPHREYS: It would be very difficult to turn around and challenge the actions of the police officers where they have such a very wide discretion. In terms of the other matters, there are a number of procedural matters outlined in parts 9, 10, 11, 12 and 13 that we have no objection to. They would appear to be, as I said, procedural matters that have no great import and are sensible. I do not want it to be suggested that we are fundamentally philosophically opposed to every suggestion the Police Service has put forward. Certainly, those two matters are of great concern to us.

CHAIR: I would invite you to make any subsequent detailed comment you may wish regarding the amendments sought by the Police Service.

Mr HUMPHREYS: I might make a comment in relation to suggestion No. 5 by the Police Service, and that is that the Act be amended to simplify the information, or that the Act place the onus on the suspect's or serious indictable offender's legal advisers, rather than the Police Service to explain the intricacies of the legislation. The latter suggestion, in my submission, is such as to completely relieve the police from any obligation to provide information, because there are no legal advices present in the current circumstances. There are some extreme difficulties with that.

The Hon. JOHN RYAN: So far today we have focused on your submission on the collection of evidence. Have you examined the provisions of the legislation with regard to the destruction or legal destruction of evidence, which is slightly different? Are you satisfied with the provisions that relate to the removal of a person's identifying features from any indexes and so on?

Mr HUMPHREYS: One matter that has given me some concern is that it appears in the New South Wales legislation that when a decision is made to destroy the material, the profile can

remain on the database. That appears to diverge from the Commonwealth model code, where as the result of an acquittal or there is no decision to proceed, that whilst the material may be destroyed, as I understand it, under section 89 of the Act destruction of forensic material where related evidence is inadmissible under section 89 (1) it says that the forensic material is to be destroyed where it is rendered inadmissible. Interestingly, it then says that this section does not require destruction of a DNA profile derived from the forensic material. I do not quite understand that.

It would seem to me that whilst the forensic material itself has to be destroyed, if there has been a profile obtained of the person, notwithstanding the fact that the evidence itself has been ruled inadmissible by the court, the fruits of that, that being the profile, can remain on the database. That would appear to be at odds with the Commonwealth legislation, and I question the reason for that in all of the circumstances. Again, there are arguments both ways. It is a matter of public policy as to whether it is appropriate that the fruits of procedures that have been ruled inadmissible at court should then be able to be retained on the database, albeit that that material might not be able to be used in the actual court proceedings themselves. What it would allow is later identification of a person if the person had not previously been placed on the database.

Ms ALLISON: There is one other related issue, if I could, and that is the taking of samples in events where charges are not subsequently laid. In our view the model Commonwealth legislation provides a framework and a time frame for the destruction of that. It basically says that if charges are not laid within 12 months, and I understand that the other material is to be destroyed. That provides the kind of safeguards that we would like to stay.

The Hon. PETER BREEN: I want to ask about the prisoners who are being asked to give buccal swabs and have the DNA profile placed on a database. You suggested that there was a response to the effect from some prisoners, "Get me a court order and I will comply." Do you have any record of the number of prisoners who have taken that approach?

Mr HUMPHREYS: No, we do not.

The Hon. PETER BREEN: We have heard evidence from the Police Service that the number of prisoners who have resisted is only five, whereas other evidence we have heard suggests that some prisoners might resist initially but then when they are told about the complexity of orders and so forth and may have been given other information they have complied. To my mind that is a very important distinction to draw. I would be interested to know if you could, at some stage, from the information you have from the Prisoners Legal Service, verify the figures that we have been given.

Mr HUMPHREYS: I am not in a position to verify the number of prisoners who have actively resisted the taking of DNA samples. As I said to you previously, where we are contacted by a prisoner we can advise the prisoner of the fact that there are a series of procedures that can be gone through and the consequences of non-compliance. Generally, in our experience, prisoners having had that explained to them they may say, "Go and get a court order and then I will consent, but I am not going to just turn around and do it now. I am going to put them to the process." I can understand that from the point of view that if they have an opportunity to at least delay it, they will do that. The vast majority of prisoners, it appears, are not requiring that, from what I understand. But that is what we do. We do not keep any records of that. The Corrective Services Department or the Police Service would be able to tell you how many times it has been necessary for a court order to be obtained, or a senior office's order.

The Hon. PETER BREEN: Are you able to say what advice has been given to prisoners by the legal service?

Mr HUMPHREYS: We go through the legislation. First of all we verify why they are in prison, whether they fall within the category of people who are subject to a forensic sample. We then explain what procedures are and that there is a cooling-off period. We explain that they can request that an order be obtained and that if an order is obtained and the prisoner resists that the prisoner can be the subject of a further offence. We go through just the general material taken up to that point of time. We explain what the material can be used for and what will happen with it. It is general advice covering all of those areas.

The Hon. PETER BREEN: Is any advice given about consent generally, about philosophical objections that you might have, for example, to consent? We heard evidence the week before last from Dr Gans to the effect that the whole procedure may well be invalid and that the five prisoners who forcibly resisted were the only ones, ironically, whose DNA profiles were legitimate. I am curious to know in that context whether you were taking a particular position in relation to advising prisoners.

Mr HUMPHREYS: We have advised prisoners that they have the right to object and they have the right to make the authorities obtain appropriate orders. But at that point of time it appears to us that the legislation is valid and that in fact they risk being charged with a criminal offence if they actively resist the taking of a sample. We explain those consequences to them. We certainly have advised prisoners of the right to object, and we have explained that to them. They are not required to consent. Our job is to provide the advice to them, not to provide the philosophical advice. We provide legal advice.

CHAIR: I want to ask you a question relating to section 9 subsection (2) of legislation, which sets out the circumstances in which the suspect is deemed to give informed consent to forensic procedure. Paragraph (d) refers to giving the suspect a reasonable opportunity to communicate or attempt to communicate with a legal practitioner of the suspect's choice. In your view are the requirements of that provision fulfilled if a suspect attempts, unsuccessfully, to communicate with a practitioner, such as being given access to a telephone, ringing and simply not succeeding in getting a response? Perhaps a telephone is not answered.

Ms ALLISON: In our view, yes, that is the case. We believe that the provisions would be satisfied by allowing the suspect access to a telephone. It may well be that at a police station in the country the suspect is given access to a telephone and the number of the local legal aid office. However, it is three o'clock at the morning at that time. It is clearly most unlikely and unreasonable that the office would be staffed at that time. But it could be well be open to interpretation that on the ringing of that phone the police officer has discharged his or her obligation to the person.

CHAIR: The importance of the matter we raised initially of some advice being available is highlighted by that sort of circumstance?

Ms ALLISON: Clearly highlighted in our view, yes.

CHAIR: Do you wish to say anything more before the Committee moves to the in camera session?

Ms ALLISON: No, thank you.

Mr HUMPHREYS: No.

(Evidence continued in camera)