

REPORT OF PROCEEDINGS BEFORE

STANDING COMMITTEE ON LAW AND JUSTICE

INQUIRY INTO THE OPERATION OF THE
CRIMES (FORENSIC PROCEDURES) ACT 2000

¾¾¾

At Sydney on Wednesday 8 August 2001

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The Committee met at 10.00 a.m.

¾¾¾

PRESENT

The Hon. Ron Dyer (Chair)

The Hon. Peter Breen

The Hon. John Hatzistergos

The Hon. John Ryan

The Hon. Janelle Saffin

CHRISTOPHER JOHN GUELPH PUPLOCK, Privacy Commissioner of New South Wales, 201 Elizabeth Street, Sydney, sworn and examined:

CHAIR: Mr Puplick, in what capacity are you appearing before the Committee?

Mr PUPLOCK: As Privacy Commissioner.

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

Mr PUPLOCK: I did.

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

Mr PUPLOCK: Yes, Mr Chairman.

CHAIR: As you are well aware, you have made a written submission to the Committee. Is it your wish that that submission be included as part of your sworn evidence?

Mr PUPLOCK: Yes, please.

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 the Committee, the Committee would be willing to accede to your request. I now invite you to make a brief opening statement in support of the written submission that you have made.

Mr PUPLOCK: Thank you very much for the opportunity to appear before the Committee. I appreciate the significant job that the Committee is undertaking in relation to an important issue within our community. I have only a few brief comments to make in general support of the matters which are dealt with in the submission, although I would like to table a number of other documents for the information of the Committee. The issue which is being addressed at the moment is part of a continuing debate within New South Wales—seeking to balance the need for community protection for the detection and solution of criminal activities and for New South Wales law enforcement authorities to have access to technologies and information which are up to date, relevant, and which will assist them in the discharge of their responsibilities against the need for there to be some limitation on the powers of police and law enforcement authorities.

At the end of the day one can have a crime-free society at high cost to the nature of society and to the liberties and rights of individuals and citizens. Achieving this balance is extremely difficult and, I think, a great challenge for parliaments, particularly given that Parliament, with due respect, often lacks some of the expertise in relation to emerging frontier issues such as the impact and significance of the genetic revolution. It is my opinion that the legislation which is currently being examined has gone too far against the supposition or the presupposition of the rights of individuals in our community to be treated as citizens with private rights and responsibilities; that it is too technologically driven rather than genuinely focusing on the question of whether this technology is the most effective and appropriate to achieve the aims of law enforcement; and, above all, that there has been no constructive, public debate about the use of some of these new technologies.

I want to make two points before I respond to any of the Committee's questions. The first point is that there still remains, in my view, an insufficient level of trust between the community of New South Wales and the Police Service of New South Wales for people to feel entirely confident that they will be dealt with in a fair, decent and honest fashion by everybody who is part of the law enforcement mechanism. The second point is that DNA is qualitatively different from most of the other forms of identification, whether it happens to be photographic identification, voice recognition or fingerprints. DNA potentially tells you a great deal not simply about the person from whom the DNA is taken but also about all of his or her relatives. It tells you a great deal about other people. The DNA information taken from me will tell you a great deal about my parents, my children, my siblings, my cousins and various other people. I give you one example by way of suspicion of the potential misuse of this information.

During the course of the year 2000 I had the opportunity to visit the United Kingdom, to talk to the chief constable who is in charge of the British DNA program, and to visit the laboratories of Forensic Science Services, which actually provides the laboratory facilities for the British police. The chief constable told me that, in order to build up a database which would allow information to be excluded from crime scenes, the police ask all of their own officers to be DNA tested so that that could be on record and so that any DNA-based material found at a crime scene could be run through the computers to eliminate the prospect that it had been contaminated by a police officer; that it was the blood of a police officer who was at the scene; that it was a hair follicle from a police officer who was at the scene; or whatever it happened to be. The police refused to put themselves on the DNA database.

When surveyed and asked why, the overwhelming response that was given was that the DNA database would be misused by being given to the child welfare authorities to establish questions about paternity. When you bear in mind that, in our community, somewhere between 10 and 12 per cent of children are fathered by males other than the person whose name appears on their birth certificate, there are some significant issues about building up the DNA databases and their potential use. The fact that the British police themselves are not prepared to be uniformly screened and put on the DNA database tells you a great deal about the attitudes of law enforcement authorities. It would be an interesting exercise to see what would happen if New South Wales police officers were all told that, as a matter of course, they were going to be entered into the DNA database in order to exclude from the crime scenes that were being investigated any potential contamination of their own DNA.

I table for the information of the Committee a number of documents which I hope might be of assistance. I table the report of the Senate Legal and Constitutional Legislation Committee inquiring into the provisions of the Crimes Amendment (Forensic Procedures) Bill, which has significant reference to questions about the retrospectivity of a system, particularly when it applies to people who are already incarcerated and who are being tested under a regime which was not in place at the time that they were convicted and incarcerated, and which has a useful discussion about what I have called the lowest common denominator approach in relation to the national database.

I table an article by Andrew Haesler, Public Defender, from the *Law Society Journal* entitled "Criminal Law. Is DNA Testing a Panacea for Solving all Crime for a Modern Spanish Inquisition?" I table an article by Jeremy Gans, who I understand has already made a submission entitled, "Something to Hide. DNA Databases Surveillance and Self-incrimination." I table a paper from the Third Annual Canadian Symposium on Forensic DNA Evidence entitled "The British Mistake", which deals with the case of a man who was the one in 37 million who was subjected to a match which was an incorrect match.

I table the testimony of Barry Steinhart, Associate Director, American Civil Liberties Union, before the United States House of Representatives Judiciary Committee Subcommittee on Crime. I table an article from the *New Scientist* of 16 June 2001 entitled, "An Identity Crisis", which deals with the increasing extent to which fingerprints are being called into question as a means of identification. I table a judgment in the Supreme Court of Queensland in *Regina v Fitzherbert*—to which I may refer in the course of my remarks—where DNA evidence was quite critical.

There is also an editorial and a number of articles in the *New Scientist* of 5 May 2001 which deal extensively with the operation of the DNA database run by the police in the United Kingdom and from which I have drawn some figures and statistics that I might mention during the course of responding to the Committee's questions. The other matter I mention is one that I do not have a copy of, which I regret, but I am sure that the secretariat has access to it. I draw your attention to a report dated 30 November 1999 on DNA anomalies which was prepared by the Hon. Tony Ryall, the former Minister for Justice in New Zealand, the Rt Hon. Sir Thomas Eichelbaum and Professor Sir John Scott.

CHAIR: Thank you, Commissioner. You are tabling all of those documents?

Mr PUPLICK: I do not have a copy of the New Zealand report, but that should be readily available.

CHAIR: I understand that we have a copy of that report already.

Mr PUPLICK: Thank you, Mr Chairman.

CHAIR: Mr Puplick, thank you very much indeed for those opening remarks and also for your submissions to the Committee. I will start with a matter to which you referred just a moment ago, and that is the retrospective effect that the legislation has on prisoners currently in custody in New South Wales. Would you like to say anything more to the Committee about that aspect and why you think that retrospectivity might be inappropriate?

Mr PUPLICK: The comments that Sir Harry Gibbs makes, which are reported in the Senate committee's report, go to the question of principle. I appreciate that there is generally a view in the community that once a person is incarcerated, he or she loses a whole variety of his or her civil and political rights and that itself is not in dispute: I think that is correct. The extent to which DNA information, taken in a compulsory fashion by legislative fiat—namely, all of those persons who are in custody shall be subject to this—raises the question of forcible self-incrimination in a quite significant sense. It also indicates that the rights which an individual would have, were he or she not in custody—namely not to have the Parliament determining that he or she has to be DNA tested—would not be acceptable outside the prison environment but it has been decided to be acceptable within the prison environment.

My own view is that while I appreciate that there is a powerful argument that says that there may be statistically a greater chance that people who are already in custody or who have a record of numerous convictions may in fact have committed crimes which are still unsolved and there is a public interest in dealing with those, I think that the principle itself—namely that the Parliament has retrospectively changed the rights of a group of people by definition simply because they are in custody and has subjected them to a procedure which they would not have been subjected to, had they not been in custody—is in fact a very retrograde step as a matter of principle.

CHAIR: Could I ask you whether, conceding the truth of what you are saying in terms of legal principle, the Government might have taken a policy decision in the public interest on the basis that prisoners are convicted offenders; that there is a propensity for a substantial number of prisoners, or a proportion of them, to reoffend; and that, given the propensity to recidivism, they should be tested as an aid to the solution of crimes which might have occurred in the past or which might occur in the future. What would you say about balancing the factors that you have just advanced against that policy purpose?

Mr PUPLICK: Chairman, I understand that and I understand, as I said, and appreciate the fact that there is a high degree of repeat offences and recidivism generally and, indeed, multiple offences. I appreciate also that it is a balancing matter and that there is a very strong argument—a very sound argument—about testing people in custody. I guess the trouble is that there is always a good excuse somewhere to set aside a fundamental principle, and that balance is one which I believe in this instance has been exceeded. I will be demonstrated to be wrong if in fact over the course of the next couple of years the police are able to demonstrate that there has been a higher rate of matching and solving of previously unsolved crimes on the basis of DNA evidence taken from prisoners currently in custody.

CHAIR: In your submission, you draw attention to the fact that the New South Wales legislation allows consent to be sought from a suspect or an order to be made requiring a suspect to submit to the taking of a sample where the procedure might—I emphasise the word "might"—prove evidence tending to confirm or disprove that the suspect committed the offence. You also draw attention to the fact that the model bill—and the Federal legislation follows the model bill, as you will be aware—sets a higher standard of "likely to prove" rather than "might prove". The Law Society appeared before the Committee last week and argued in favour of the Federal standard rather than the State standard. Would you like to express any view regarding that matter?

Mr PUPLICK: My view is very strongly that the Federal standard is the correct standard and that the New South Wales standard is in fact far too open-ended. The idea that something might prove something else—with the greatest of respect, I might be the next President of the Legislative Council. That is not beyond the realms of possibility.

The Hon. JANELLE SAFFIN: It certainly is not.

The Hon. JOHN RYAN: I wish it were true.

CHAIR: You have not told us that before this morning.

Mr PUPPICK: But I do not think that I am likely to be. I think that the Federal standard was drawn specifically to put some onus on the investigating authorities to really demonstrate that there was a serious possibility that the evidence would be useful other than as a mere fishing expedition. The New South Wales legislation is an invitation to a fishing expedition.

CHAIR: You also state the following passage in your submission:

The comprehensive and non-discretionary collection of samples from correctional inmates, irrespective of whether the sample has immediate probative value, can only be intended to create as large as possible a database of potential suspects for other offences. This raises concerns over an even wider collection of data: all people arrested or charged, or all individuals in the State?

I take it that you are raising the concern that if there is a foot in the door, the door might be widened somewhat more in the future. Would you like to say anything to the Committee about that?

Mr PUPPICK: Yes, Mr Chairman. As you know, there has already been a call by one member of the Federal Parliament for the establishment of a national DNA database on the basis of testing everybody or recording everybody in Australia. Perhaps I can answer this in two areas. The first is that overseas experience in a very like jurisdiction, the United Kingdom, concerns me. There is evidence that the British police have on file approximately 80,000 DNA samples which have been taken unlawfully or not in accordance with the provisions of UK legislation and with no attempt by the authorities to clean that up. In fact, the British Government has indicated that wants the police to treble the number of DNA samples that it takes over the next couple of years. They have actually set a target of 3.5 million samples over the next three years which would result in a British register of DNA samples of one in 15 of the population.

I think that the pressures for the continued expansion of this—in other words, the expansion to suspects, then to groups of volunteers, then to people in particular occupations and then to newly arrived migrants or newborn babies, whatever it happens to be—is something that law enforcement authorities and other people have an interest in, that is, the expansion of this database. I think that it is really up to the Parliament to establish ongoing limits—of course, the Parliament would keep that under review—to ensure that we do not get what is referred to in the literature as function creep in relation to these matters. I will give you an example of the way in which DNA could be migrated into the criminal investigation system.

Almost every child who has been born in a public hospital in New South Wales over the past 40-odd years has had what is called a Guthrie test. When they are born, their heels are pricked and two little blood spots are taken which are put onto a card and then they are tested for phenylketonuria [PKU] and for a number of other genetic indications which can be readily cured with appropriate early childhood intervention. Those cards are all kept, and if you go out to the New Children's Hospital, you can find a vault which has hundreds of thousands of these cards. They are all there, all available and they are all filed. They are also all named. What, if anything, stops the police or Parliament—

The Hon. JOHN HATZISTERGOS: The New Children's Hospital is not a maternity hospital.

Mr PUPPICK: No, but that is simply where the storage happens to be. What is there to stop the police or the Parliament from deciding that what they want to do is give the police access to that DNA material to integrate into a database or to go through on any occasion?

CHAIR: I think there might be uproar if that were proposed.

Mr PUPPICK: There would be an uproar, but what happened in Western Australia was that the police sought a court order to give them access to the Guthrie cards in Western Australia and

before the matter could be resolved one way or the other in the court, the Western Australian Health Department had a bonfire and set fire to the Guthrie cards and destroyed them all because of their belief that in certain circumstances a court order may very well have given police access to that information and they were not prepared to keep it around any longer.

The Hon. JOHN HATZISTERGOS: Is that not to ensure some legislative protection? That is a problem with this debate. The real issue is that at the same time this regime is put in place there must be safeguards to properly protect the privacy issues you have raised. That seems to be the answer as opposed to the alternative, which is limiting DNA sampling.

Mr PUPLOCK: The answer to that is yes, if the Parliament can be relied upon, but I invite you to consider, for example, the history of the Medicare number and the tax file number, which you will recall was introduced with all the assurance in the world that it would never be used for anything other than for the taxation system and look at the way in which that has expanded. I invite you to look at the way in which the Medicare number has become used for a whole series of purposes other than that for which it was originally introduced. As Mr Ryan said by way of interjection, I do not doubt the capacity of the Parliament in full hue and cry on the question of the law and order, particularly as elections approach, to determine that Alan Jones and John Laws are right and that civil liberties are just for wankers.

CHAIR: In your submission you also say the system established by the Act does not remove the possibility of planting DNA evidence to manufacture a match. Could I put it to you that various aspects of technology can be abused. I suppose it has always been possible for a corrupt police officer to plant evidence of any sort at a crime scene. Do you think that it is really a matter of having a clean Police Service rather than excluding a new form of technology on the basis that it might be abused?

Mr PUPLOCK: I think that is correct. In reality, just as you cannot legislate for ethics generally, you cannot legislate for an incorruptible or uncorrupted police force. So to that extent the question of can you legislatively effectively provide for a system in which there is no possibility of evidence being manufactured or evidence being planted, I think the answer is clearly no. It is a question of what oversight, what audit, what capacity you have to keep the system under review. It is just that with DNA evidence it is so much easier. With a fingerprint it is very difficult, although it is not impossible by any means but it is quite difficult to lift a fingerprint from one place and establish it at another place. It can be done and it is not technically beyond the realms of most people's capacity to do it, but it is not easy, whereas the picking up of a cigarette butt that has saliva on it, the gathering of a hair follicle from somebody's shoulder or coat and transferring that to a crime scene is quite easy. The popular conception if it is DNA evidence it must be significant is why I table that case of *Regina v Fitzherbert*, a Queensland Court of Appeal case.

Although in this instance the DNA evidence is pretty incontrovertible, the bench said that in case, "Here is somebody who is appealing a murder conviction. There is evidence that his story about whether he knew the victim or whether he had animosity towards the victim has no credibility." But he then said "But the DNA profiling evidence showed that his blood was found at the place where the deceased was killed and was unexplained enough to support the conviction." That sort of attitude which I think is reflected in the view that unless you can prove that you were not there, because your DNA sample is there, ergo you must have been there, and the way in which the public and probity debates about DNA are going seem to me very much to encourage the belief that if there is DNA evidence it is an open and shut case.

CHAIR: You say at the top of page 5 of your submission that you attach great importance to ensuring that control of any national or New South Wales DNA database should be physically separated from the control of the police themselves. Would you like to say something to the Committee about that?

Mr PUPLOCK: Yes. I think one of the great strengths of the British system, such as it is, is that the Forensic Science Services, which actually runs the database, is that it is separated physically, politically and administratively from the Police Service. Although it is part of the same department, namely the Home Office, the independence, the physical separation of the laboratories is enormously important because it means that what happens is that the Police Service does not have access to the actual sample once it has been collected and sent to the laboratory. The laboratory then only informs

the police with a yes or no answer. They get a sample and are given a yes or no answer as to whether there is a match. If there is a match the answer is yes. If there is not a match, the answer is no. What it means is that there can be no circumstances in which the police can interrogate the database other than with a specific question related to a specific event or a specific sample.

It means that broad-scale profiling and inappropriate access by police authorities are controlled. It is enormously important, both in terms of establishment and the long-term maintenance that the separation of the laboratory in terms of the physical sample so that they are not in the control of the Police Service and the separation of the authority to undertake matching tests and the authority to release results does not lie with the Police Service itself but with the independent laboratory. The independent laboratory is accountable differently from the way in which the Police Service is accountable.

The Hon. PETER BREEN: In the situation in Britain, would it not be possible for the police to retain part of a sample, a match having been established with forensics with the database, that because of the separation of the two protocols this could be used in a way that was totally counter-productive to the system and could be even more dangerous than the situation we have at the moment where it is a bit loose, I agree, but at least there are no protocols in place that cannot be checked. With the situation in Britain one could not check that the police had in fact kept part of the sample.

Mr PUPPICK: I think that is correct and in that sense that goes to the question of the improper use of the sample on a subsequent occasion and it goes to the question the Chairman was asking about the integrity of the Police Service and police officers involved. It goes to the question of the improper planting or misuse of samples. The separation of the laboratories, the results which could be put before the courts to determine whether there is or is not a match and the results which come from the independent laboratory and only those tests which are authorised can be done by the laboratory because if you do not have that separation, there is a real danger that tests, which are in fact not authorised by law, will be done. We know from evidence about police access to their own database, the COP system, in an improper fashion, that that will happen from time to time.

CHAIR: Towards the end of your submission you draw the Committee's attention to the provisions of section 92 (2) (j) of the legislation, which allows information on the DNA database to be used for other purposes defined by regulation. I must say I find that an extraordinary and startling provision. Would you like to say something to the Committee about that?

Mr PUPPICK: That is a very significant matter to the extent that a very powerful tool such as a DNA database, which has been established for a particular purpose, namely the detection of crime or the matching of crime samples and which has an elaborate structure around it as to what can be done, what can be matched and all the rest of it which presumably has been well and coherently thought out by Parliamentary Counsel or by the Parliament, although I think if you read Mr Gan's submission he might take argument with that, that could be somehow altered by regulation; in other words, a regulation could be made which expanded either that the sort of matches that could be made, the circumstances in which matches could be made, the circumstances in which samples could be taken, the question about how samples could be treated, where information should go, whether information should be given to third parties, all those sorts of things, should be subject to the regulation-making power rather than the legislative power of the Parliament is a matter of considerable concern.

We are talking about a new era in terms not only of crime detection with all of the DNA debate a new era in terms of the relationship between individuals and the State. If we are going to change any part of that balance, then it should be the Parliament in full public debate with informed discussion that takes the responsibility for that. It should not be a matter of regulation and although I appreciate that regulation is a disallowable instrument, the whole principle that delegated or subordinate legislation should allow the expansion of the scheme which has otherwise presented itself as being limited is in fact quite inappropriate.

CHAIR: You have tabled a paper entitled "The British Mistake". I cannot pretend that I have absorbed it at this stage but can you explain the circumstances of the matter referred to, particularly why, on my advice, it was falsely claimed that an accused had a one in 37 million chance of a DNA match and can you tell us what the relevance of the case might be to New South Wales?

Mr PUPLICK: The matter of the Easton case is interesting in that whereas the New Zealand case, which received a fair amount of publicity, appears to have turned at the end of the day on sloppy laboratory procedures and possible contamination of the sample in the laboratory, the case of Mr Easton is one where simply his match to the crime sample was on the basis of the evidence found to be exactly correct; that it was in fact a true and proper match but that there was no possibility that he in fact could have committed the offence in question.

All it goes to demonstrate in that sense is that it appears around the place that the chance of getting a false DNA match in the United Kingdom is slightly greater than the chance of winning the national lottery. It simply demonstrates in that sense that even at very high levels of statistical probability from time to time there can be false positives. It goes simply to demonstrate that the DNA itself always needs to be accompanied by other persuasive evidence, and should never be relied upon as the only way in which possible guilt or innocence can be established.

The Hon. JANELLE SAFFIN: That is two problems you have raised: the fact that it can be used of itself and the fact that it is found at a crime scene of itself. There seem to be two particular issues around it.

Mr PUPLICK: Yes.

The Hon. JANELLE SAFFIN: As all conclusive evidence.

Mr PUPLICK: In many respects it is like a lot of other things, like CCTV and other investigative tools. One of the things that concerns me is an increasing reliance on the technology in all of these things to the exclusion of adequate attention paid to all of the other traditional investigative ways of gathering evidence. If one increasingly relied on DNA as the principal way in which one would adduce evidence in court or, more to the point, one got a community view built up and relied upon it is essentially the way to try to make people confess to offences then there would be greater and greater pressure for the DNA database to be expanded. The more and more you say it is valuable, the more and more names you want to get on it and the more and more people you want to bring into the system. The possibility of the misuse of the system expands with the number of people who are on it.

The Hon. JANELLE SAFFIN: It has been said that it is a lazy way to approach investigations.

Mr PUPLICK: I think it has its values, but I think it should not detract from the traditional tools of investigation. In exactly the same way, CCTV is often a lazy way of dealing with matters to improve street amenities or street lighting, or having foot patrols or doing things other than relying on cameras.

The Hon. JOHN HATZISTERGOS: Have not the limitations of DNA evidence been properly addressed by trial judges in summing up to juries? It seems to me that that is really where juries ought to be told about where it starts and where it finishes. I note what you quoted from the Queensland case. It seems to me that you are reading too much into that one glib statement when you should focus on adequacy of directions that are being given. I do not know whether you have surveys to see whether they are proper, whether the Judicial Commission has given adequate training to judges on the sort of material or not.

Mr PUPLICK: I have not surveyed what the Judicial Commission has done, what is in the bench books, or anything like that. I have read quite a number of constructions in individual cases, or summaries in judgments. But I must say, I think for many average citizens serving on a jury even with the best will in the world to have some distinguished lawyer who is not a statistician or a scientist walk the jury through the questions of the meaning of statistical probabilities and to explain to the jury the difference between the various statistical terms such as probability and all the rest of it is, sometimes, very hard to follow particularly when you have been denied juries access to the transcripts so that they can sit down themselves in the jury room and read through the transcript slowly and try to absorb it slowly. They do not have access to those in New South Wales.

The Hon. JOHN HATZISTERGOS: I am not so much referring to that. I am perhaps more referring to things such as the timing of finding a piece of DNA at a crime scene, which is a critical factor in terms of any conviction. That is one thing that the DNA sample you take does not tell you. It does not tell you when it was put there. It could have been put there at the time of the crime, or it could have been put there at some other time. Those are the kinds of limitations that juries ought to be informed about. They are quite critical. Are they being informed about them?

Mr PUPLOCK: I am not in a position to answer that.

CHAIR: You might be aware that some considerable time ago the Minister for Police made an announcement about a general intention to establish what is termed an innocence panel. Could you tell the Committee what your view is of the composition of such a panel, and whether it should be set up administratively or subject to legislative provisions?

Mr PUPLOCK: I was intrigued when I got a call from a newspaper reporter telling me that the Minister had announced in the Parliament that I was to be appointed to a so-called innocence panel, and that the panel would get under way shortly and would do something in relation to applications by people in custody for a review of the conviction based on DNA evidence. Although on a number of occasions the police Minister has indicated that the Privacy Commissioner will be represented on the panel, I have heard nothing about the panel other than what I have read in newspapers. I am now informed by reading newspapers that the panel will not come into existence as of 1 July, as we were originally informed because somebody has, apparently, declined to serve on the panel. A replacement is being sought.

I think in principle this is an extremely worthwhile initiative. There is a huge amount of evidence from the United States, in particular, that demonstrates that there has been a very high rate of false convictions of people, and I am sure the Committee is aware of many of the United State cases. I think that such a panel, if it is to be set up, should have some legislative authority because, at the end of the day, one would want to know what was the right of the panel to seek evidence, to deal with matters that were before it, what are the legislative restrictions in relation to confidentiality of its proceedings and capacity for its proceedings not to be subject to subpoena or examination in other jurisdictions, and there should be some clarity as to the status of any recommendations that the panel might make.

What recommendations is it entitled to make, or does it just make findings of fact on the basis of material that is put before it? I think it is appropriate that it should have a senior judicial figure. I think it is more than appropriate that the Privacy Commissioner or his office should be represented, that the law enforcement authorities should be represented and that this should be some community person or representative, a person of distinguished integrity in the community who would serve much in the way that I think people are selected for bodies such as the Serious Offenders Review Tribunal.

The Hon. JOHN RYAN: Are you aware of any concerns about the conditions in the Act relating to the obtaining and use of DNA taken from the bodies of victims? A couple of days ago we received a submission outlining the circumstances, which you might recall, of a child who was in a motor vehicle that was stolen from Cabramatta. Unfortunately, the child died. Apparently DNA samples were taken from the child for some purpose, which I have now forgotten. Concern was expressed that the DNA samples are available to be included on the statistical index. They remain identified, as I understand, forever, whereas if they had been taken from a suspect I understand that under certain circumstances you are able to de-identify your sample. Are you aware of any significant concerns relating to circumstances such as that? Are there adequate provisions in the Act to ensure that someone who has a DNA sample taken for some purpose, other than being looked at as a suspect in a crime, is able to have the sample removed from the index and not used for any other purpose?

Mr PUPLOCK: I do not think there are adequate provisions. Another example of that has been drawn to my attention, and I am not in a position to say whether this is correct but it has been raised seriously, is that DNA samples taken from people who are the relatives of or who are seeking missing persons, given samples to be matched, so that if the body turns up that body can be examined and a possible identification made that it is the missing person relating to the applicant to find the missing person. This, of course, will become a further issue when the part 8 provisions regarding

volunteers are brought into operation. In the case of the Wee Waa samples we saw an extraordinary delay in the destruction of those samples and ongoing controversy about other information that had been gathered, namely the photographs and the interviews, were also part of that process of destruction.

While there is talk about eventually de-identifying material that is on the data base, it is my view that almost any material can, at some stage, be re-identified in terms of a new sample that is taken that is matched against something that was allegedly de-identified, but is clearly now re-identified. I do not think that within the legislative framework there is adequate separation of those DNA samples that are taken for purposes other than attempting to link a person to a crime when we are talking about the suspect who has committed a crime rather than anybody else who is involved in the crime but who is not a suspected offender.

The Hon. JOHN RYAN: Submissions have been made to the Committee of concerns about whether DNA material, that is the material taken to obtain the profile, is destroyed. Do you have any concerns or recommendations to make to the Committee as to under what circumstances the DNA material should be either preserved or destroyed?

Mr PUPPICK: I think there has to be a presumption for destruction. The legislation at the moment establishes that there is a certain period of time after which information is supposed to be destroyed, although if you read the legislation there is in fact a rolling over application, so that the enforcement authorities can roll over on a six or 12-month basis a request that the material not be destroyed. My view is that material ought to be destroyed after a reasonable period of time unless the law enforcement authorities can demonstrate on the basis of a high probability threshold—which ought to be written into the legislation and which ought to require judicial function—that material should be removed from the database.

The Hon. JOHN RYAN: Another issue with regard to the destruction of material is the distinction that is apparently made between the physical destruction of DNA material and simply de-identifying it. Do you have a strong view as to whether destruction of the material is sufficient to remove its identification properties or do you think the material should be physically incinerated or destroyed in some way?

Mr PUPPICK: I would prefer the latter. I think there is a number of difficulties even with keeping de-identified information. One of the points that is often discussed, for example, is whether de-identified information would be used for medical or other forms of research. It seems to me that that would be contrary to National Health and Medical Research Council guidelines. I do not believe, unless a case can be made, that there is a genuine reason for any of the material to be maintained, either identified or de-identified, and that we should be progressively building up a database of hundreds of thousands, eventually millions—to talk about this matter in a national context—of Australians.

I do not want to draw an excessively long bow about this, but when I was involved in hearings about the proposal to introduce the Australia card Justice Kirby made the point in evidence to us that during the Second World War about 40 per cent of French Jews were rounded up and taken away and 80 per cent of Dutch Jews were taken away simply because the Dutch kept better records. I have a view about databases generally—particularly databases under the control of government and law enforcement authorities—being potentially quite dangerous creations. The presumption should always be that there should be as little as possible on them.

The Hon. JOHN RYAN: You state in your submission that sections 19 and 70(2) authorise a more extreme form of collection—hair samples rather than a buccal swab—when an individual refuses to consent, thereby placing undue pressure on individuals to consent. I imagine that a hair sampling procedure is undertaken when consent is not given because, logistically, it is probably easier for a police officer or someone else to obtain hair than to force an individual's mouth open and obtain a buccal swab—to say nothing of the potential health difficulties that might arise if a person has not consented. How would you accommodate those sorts of logistical concerns? I am inclined to agree with you that people are probably more likely to consent to a buccal swab than to hair removal. How do you ensure that there is no duress and accommodate the obvious logistical problems?

Mr PUPLOCK: There will always be a form of duress in the sense of saying, "Here you are, sunshine, your alternatives are do this swab or we will rip out your hair" or, in an extreme case, to take a forcible blood sample. The legislation is somewhat disingenuous in relation to consent. It says that you can either consent or we will take a sample—we will get a sample one way or another. Although, as I understand it, this cannot be brought into evidence—

The Hon. JOHN HATZISTERGOS: That is not quite right: there is consent or in certain circumstances you can be forced. It does not follow that there are clear alternatives.

Mr PUPLOCK: It does not follow in the legislation but what follows in the police station I think will be somewhat different. First, to what extent will a police officer—particularly in stressed circumstances—always ensure that a person knows in the first instance whether he or she is subject to the law? Most people who are suspects but who may not be under arrest or who are detained in particular circumstances will not know whether the legislation applies to them. When a police officer says, "Please give us a swab and if you do not give us a swab we will take a hair sample", in many circumstances people will not know whether they are being asked to consent to a procedure that is lawful or unlawful. Secondly, if people do not consent and are told that a sample will be taken forcibly, it is unlikely that there will be full details of how a senior police officer's order or a judicial order will be obtained. People will simply be told, "We will take a sample one way or another" and people will be coerced in that way into giving consent.

The Hon. JOHN HATZISTERGOS: That is consent under duress. It is questionable whether it is consent.

Mr PUPLOCK: Yes, but any statistics around the place will record whether a person consented, and the answer will be yes. There will be neat annual reporting statistics to show that only 5 per cent of people refused to consent—of course, the quality and nature of that consent will not be apparent in any sense from those statistics. As I understand it, you cannot adduce in court evidence whether a person consented or did not consent to the test. I do not think you can adduce in court that a person resisted or that a sample was taken compulsorily. Nevertheless I am sure that that information will be out and about.

The Hon. JOHN HATZISTERGOS: Does the Act not refer to whether the evidence was obtained legally or improperly?

Mr PUPLOCK: I am told that section 84 is relevant.

The Hon. JOHN HATZISTERGOS: The exception is in relation to an allegation that a police officer or other person acted contrary to the law. You then go to section 82, which places the court, if it is satisfied, in a position to balance the information and work out whether it should be admissible. That is the risk the prosecuting authorities run: if they do not follow the law, they may not get evidence.

Mr PUPLOCK: Indeed. My difficulty is that, although under section 84 evidence is not supposed to be adduced in that fashion, there are difficulties associated with the way in which cross-examinations would run—for example, "Mr Puplick, you were taken into custody at such and such a place?" "Yes." "What happened next? At some stage where you asked for a DNA sample?" "Yes." "How was that DNA sample taken?" It would be a swab, hair removal or blood removal. The type of sample would tell you straight away whether I consented. There is a series of ways in which that sort of thing can be got around. There will be pressure on people to consent in exactly the same way as there will undoubtedly be pressure on people to make admissions because claims will be made about what DNA evidence does or does not show. We will see from experience how that will be tested. We will see over time what use the courts, prosecuting authorities and defence counsels will make of the various provisions. Frankly, there is no way of getting through this issue other than by letting it run, watching what happens and hoping that, if gross abuses of the system are demonstrated, people will be prepared to take the necessary corrective measures. However, I want to limit the possibility of those misuses from day one.

The Hon. JOHN RYAN: Are you concerned that part 8 of this legislation has not yet been proclaimed? It contains all the provisions relating to the taking of forensic material from volunteers

and includes the reasonably important provision that when a person volunteers to give a DNA sample the police officer is supposed to inform that person of the purpose for which the sample is being taken. It is possible that the police and the volunteer will come to some sort of written agreement about limiting the use of that material—whether to the general index, a specific crime scene or for some other purpose. Are you concerned that police are probably carrying out DNA procedures at present without some of those provisions in operation?

Mr PUPPICK: We must consider what the Police Service and the police commissioner have put forward in their recommendations to the Committee in relation to the way in which information should be provided to people and the issues that a police officer must deal with—this is set out on page 6 of the police submission. It says that the forensic procedures information sheet for both suspects and serious indictable offenders is too complex, and it goes on to say why the police think it is too complex. I think there is an admission on the part of the police that they are having difficulty adhering to those sorts of regulations in relation to people who have really no say in the matter other than to consent or not to consent—those in a custodial situation certainly have no say. As to taking mass samples and having 20 or 30 different individual agreements with people as to what they have consented to in terms of whether their DNA will be used, kept, put on this database or matched against that database, the sheer logistics of ensuring that the particular arrangement negotiated with Chris Puplick, John Ryan or Ron Dyer, for example, is properly recorded and adhered to are untenable.

The Hon. JOHN RYAN: It has been suggested to the Committee that forensic material should be obtained under only one circumstance—as a result of an order—and that, to some extent, the concept of volunteering is a legal charade and should be dispensed with accordingly. Do you have any comments about a recommendation such as that?

Mr PUPPICK: There has clearly been a very lively debate about the extent to which the Wee Waa exercise was really an exercise in community coercion as distinct from genuine volunteering. On the other hand, there is no doubt that the Pitchfork case in the United Kingdom appeared to be much more of a genuine case of "let's all pitch in and see what we can do about this." There have certainly been cases in France, the literature for which you are probably familiar with, of quite extensive mass screenings for the purpose of crime detection. The Wee Waa exercise persuaded me that community pressure and the consequences for people in that community who objected or refused to be part of the screening process, were unacceptable.

Here I rely only upon press reports, but considering that the person eventually convicted was a suspect at a very early stage of the investigation, and that it was not reliance upon the DNA evidence itself that led to the confession and the conviction, there is considerable strength in the argument, first, that we should restrict testing to circumstances where there is a specific order given for that testing to be undertaken and, second, that the use of mass screenings to build up databases, and the social consequences that flow for people in communities who, for good and proper reasons, will not be part of that mass testing, goes to a very important issue about relationship between citizen and State, which I think we are getting badly wrong at the moment.

The Hon. JOHN RYAN: You have raised the issue of concern about interstate transfer information. Yesterday the Committee heard evidences that to some extent provisions relating to the destruction or de-identification of DNA material are somewhat pointless in New South Wales because once DNA information is put onto a national database New South Wales police would have no concern about destroying that information in New South Wales as they will easily be able to access it on another database at any time that they might want it. Do you think we need some sort of legislative provision that prevents New South Wales police from largely circumventing provisions to do with the express intent of destroying DNA material?

Mr PUPPICK: Very definitely. If I may refer to the quite lengthy debate in the Senate committee report. What I have expressed concern about is what I have called the lowest common denominator, namely, a national database accessible to every police service in the country. If the rules in New South Wales are set high—so that one can access the database only in particular circumstances—and the rules in the Northern Territory are set very low—so that one can access that information in any circumstances—then the temptation will be for someone in a jurisdiction that has a higher threshold to invite one of their colleagues in a State or Territory that has a lower threshold to undertake the interrogation of the national database on their behalf and let them have the information

back. Whatever we do in New South Wales will be corrupted by having such a lower standard. This is why the national CrimTrac arrangements for the national database are not in operation, because there has been considerable disagreement about the quality of access and protection.

If we have a national database which is accessible by each State or Territory on a different basis, then at the end of the day we will be operating on a national database at the lowest common denominator. That is what will happen inevitably, and all of the protections that we say we have built into the New South Wales legislative framework suddenly will count for nothing if they are subverted through the interstate transfer of information and the mates network of exchange of information within law enforcement authorities. Further, it will constitute no offence on the part of the Northern Territory policeman, for example, to access the database at the lowest possible level. Under provisions that are in place at the moment for the exchange of police crime intelligence, it will be no offence for say a Northern Territory officer to tell his mate in New South Wales what he has found out.

The Hon. PETER BREEN: Mr Puplick, the Committee had evidence from Dr Gans about abolishing the consent procedure altogether. I must say that evidence was quite compelling, in the light of evidence given by the Police Service that only five of the total number of 10,000 or so inmates from whom samples have been taken have not consented. Dr Gans raised serious questions about whether those who gave consent were under duress. If those figures are accurate, then there is a problem with consent. Dr Gans suggested that the samples be taken pursuant to orders. He suggested police orders for people who are suspects but court orders for people who are not suspects. Would you draw a distinction along those lines?

Mr PUPPLICK: Firstly, I am not sure that I entirely buy the figure of five only. From statistics I have seen, for example, of inmates tested, in at least 290 cases what was taken was hair. Whether that indicates a lack of consent, I do not know. In relation to suspects, in 15 cases what was taken was again hair. Whether that indicates lack of consent, I do not know. This business of suspects seems to me to be really problematic if you have a low threshold test—a "might possibly" type of test. I think that the legislative provision on the treatment of suspects is essentially open-ended. It seems to me that if you had a system that had a higher threshold, you would only test people whom you had arrested because there would be that higher degree of suspicion that they are the person about whom you really want to make the inquiries.

In terms of the old, traditional view, "Until I have solved this crime, everybody is a suspect," it is very easy, particularly in smaller communities and in particular neighbourhoods, when undertaking an investigation to cast the net of suspects or persons of interests so wide as to have a system in which a police officer can simply designate people as suspects for the purpose of building up the database. Then, of course, if the crime is not solved, there is the question of how long that material is kept. If you are the suspect in an armed robbery, but nobody is convicted of that armed robbery, the question of how long that sample is kept means that because you were a suspect you are on a list that might be checked for any other purpose at any other time.

The Hon. PETER BREEN: The reason I raised the issue of getting a magistrate's order, as opposed to a police order, is that Dr Gans suggested that a policeman walking down the street and confronted by five juveniles behaving inappropriately theoretically could get an order that they be sampled for DNA, that four may consent and one might refuse, which would prejudice the right-privilege against self-incrimination of the fifth person. He suggested that in those circumstances it would be appropriate to get a magistrate's order, not a police order. On the other hand, in the circumstances of a policeman investigating the crime and having a serious suspect in respect of whom there is other evidence, getting a magistrate's order is not appropriate and it should be sufficient to get a police order. What concerns me about that is, first of all, the police are likely to rubber stamp a request for an order and, secondly, if in every case the request were to go to a magistrate the administrative issues involved would be considerable. I wonder if you have some thoughts about a solution to the problem.

Mr PUPPLICK: Some of these matters are addressed in more detail in Dr Gans's article, which I have tabled for the Committee, on the question of self-incrimination in particular. I would have to say my interest is to build into a system as many protections against the improper gathering and use of information as one can. To that extent, I think that the intervention of an independent judicial authority—whether it happens to be a magistrate or judge—is far and away more preferable to

the difficulties that arise with the circumstance in which this question is left entirely to the police. I find it almost inconceivable to think that, if a police officer asked a senior colleague to issue an order for a test to be taken, the senior colleague would not agree on the spot, without further concern or investigation. Indeed, were those senior officers to get a reputation of not co-operating with their colleagues in the investigation of offences, it is unlikely they would have a very good time of it in the Police Service.

The Hon. PETER BREEN: Or indeed that they might not get many requests for consent orders.

Mr PUPLICK: Indeed.

The Hon. PETER BREEN: You mentioned the Wee Waa case. The Committee had evidence last week to the effect that the people of Wee Waa who were given the questionnaires apparently were given the opportunity to answer them privately, so that in fact there was no way of identifying who had answered what in relation to the questionnaire. That protection, on the evidence we heard, was not generally known. But, if it were to exist, would you have a different view about the kind of sampling that went on at Wee Waa?

Mr PUPLICK: I think that suckering people into a police operation on the basis that "All we are asking you to do is to come forward and give a swab," and then when you arrive there to be told that you are going to be photographed and administered a questionnaire as well, was grossly dishonest and entirely improper. I do not believe with any of these mass screening there should be an opportunity to put citizens under pressure either to be photographed or to answer questions for the police to enable the police to build up profiles about people and their attitudes in a way which, under other circumstances, they would not have access to. If you are going to have a screening operation, and if people are to be asked to co-operate with it, in my view the screening should be just that: the giving of a sample that is identified by a name, with a clear guarantee of the destruction of both the name and the sample within a reasonable period of time.

The Hon. PETER BREEN: You have suggested that in the circumstance of a mass screening there ought to be an order made. Would you suggest that order be made by a magistrate or by a judge?

Mr PUPLICK: By some independent judicial authority.

The Hon. PETER BREEN: From my point of view, if I were judge, I would find it very difficult to make that kind of an order. I wonder if that generally is a problem. One might have circumstances in which there appear to be reasonable grounds for a mass testing, yet the appropriate judicial officer would not agree and would not make an order. Has that been a problem overseas?

Mr PUPLICK: Not that I am aware of. I think that is potentially addressed by having some legislative guidance to the judiciary about circumstances in which orders should or should not be granted.

The Hon. JANELLE SAFFIN: Could you elaborate on the independent oversight of the Act referred to in your submission? What form should it take? You also referred to the publication of statistics and so on.

Mr PUPLICK: As you know, the Act provides a role for the Ombudsman that is consistent with the sort of responsibility that the Ombudsman has under part 8 of the Police Service Act on an ongoing basis. My concern is that the interests of the Ombudsman and the interests of the Privacy Commissioner are not necessarily one and the same. The Ombudsman's responsibility for is to ensure that the provisions of the Act are properly discharged and the police adhere to procedures. I think that there is a role for the Privacy Commissioner in giving advice about whether the procedures and protocols are themselves correct—not whether they are adhered to or not but whether they were right in the first instance.

If you look at what the model code suggests and at the statements that were made particularly by Senator Vanstone as Justice Minister you will see that both of them suggest that the Federal

Privacy Commissioner has a substantial role in the oversight of the national DNA database. The suggestion is very clear that privacy commissioners or privacy authorities in each State and Territory should have a similar degree of oversight of the operation of the national database by the law enforcement authorities within the State and Territories in which they operate. The Federal proposal also gives a complaints function to the Federal Privacy Commissioner which I think should be replicated in terms of the New South Wales privacy Commissioner vis-a-vis New South Wales law enforcement authorities. I think that the State Privacy Commissioner should have the right that I have—that he or she has—in relation to other areas to undertake random audits and spot checks of what is going on.

The Privacy Commissioner of New South Wales, under the Privacy and Personal Information Protection Act, has the right to go into government departments, with adequate notice, to undertake an audit of what they are doing in relation to privacy standards. I think it is appropriate, particularly in the start-up phase of such a revolutionary new technology, that that power and responsibility should be replicated in relation to the Police Service vis-à-vis the use of the database. In terms of the publication of statistics, I think it will be very useful—this will obviously take some time—not just to have an indication of the number of swabs, hair samples and blood samples; it will be very useful to have some other data available. That would include data about the number of cases in which that material was eventually presented in court or whether that material was admitted as evidence or not admitted as evidence. You will not get that for a couple of years but I think that should be on the agenda.

I hate to raise this vexatious issue but I would not be averse, at least in terms of information that might be available for scrutiny by the Ombudsman, the Privacy Commissioner or the Police Integrity Commission, to seeing whether there was any linkage between DNA samples and things like ethnicity: whether every indigenous person ended up on the database or every person of Middle Eastern appearance ended up on the database but only 10 per cent of persons of Caucasian appearance ended up on the database. I would like to see that sort of information available because I think it goes to the way in which the Act is administered and to the way in which relationships between the citizen and the State manifest themselves. In those circumstances I cannot see a problem about that. It is not as if one is dealing with hypothetical questions about the relationship. One is here simply interrogating in more detail the information which is held on a database to get a profile so that we know as citizens what sort of profile is being kept on the database. If the profile on the database has no relationship to patterns of crime or to the rest of the general population one would want to ask some questions about whether it continues to be appropriate.

CHAIR: You will have received a copy of the formal questions that the Committee submitted to you. The next set of witnesses have arrived so time does not permit us to deal with them fully. You will see that question No. 8 deals with the Police Service submission, of which you have a copy. You will also notice that the submission seeks a number of amendments to the Act. Could you take those matters on notice? If you have any supplementary written comments you might wish to make about any of those claims for amendments to the Act the Committee would appreciate that. It is entirely a matter for you.

Mr PUPPICK: We have already discussed these at Privacy New South Wales and come to some views about them. I appreciate the limitations of time. Rather than go through them with you today, I am more than happy to respond to you in writing about each of the proposals put forward by the Police Service. I should be able to do that within a fairly expeditious time framework.

CHAIR: Thank you very much. I understand that Mr Jarratt, the deputy commissioner, will be giving evidence to the Committee next week. We certainly will be asking him to justify each and every one of these claims for amendments to the Act. However, we would like your views as well.

Mr PUPPICK: In that case I will try to have something to you by Monday of next week.

(The witness withdrew)

JEFFREY JOHN BRADFORD, Chief Executive Officer, New South Wales Aboriginal Land Council, 33 Argyle Street, Parramatta, affirmed and examined:

ANTHONY LOGAN McAVOY, Barrister, 53 Martin Place, Sydney sworn and examined:

CHAIR: In what capacity do you appear before the Committee?

Mr BRADFORD: As Chief Executive Officer of the New South Wales Aboriginal Land Council.

Mr McAVOY: As an adviser to the New South Wales Aboriginal Land Council.

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

Mr BRADFORD: I did.

Mr McAVOY: Yes, I did.

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

Mr BRADFORD: Yes, I am.

Mr McAVOY: Yes, I am.

CHAIR: Is it your wish that the written submission be included as part of your sworn evidence?

Mr BRADFORD: That is my wish.

Mr McAVOY: Yes.

CHAIR: If either of 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 the Committee, the Committee would be willing to accede to your request. Mr Bradford, I now invite you to make a brief, opening statement to the Committee.

Mr BRADFORD: I take this opportunity to make a preliminary comment and to state that Mr McAvoy will address your specific questions. I begin by acknowledging, with respect, the traditional custodians of the land which we are on—the Gadigal people of the Eora nation. It is on behalf of the Eora nation and other Aboriginal nations of New South Wales that the New South Wales Aboriginal Land Council, or NSWALC, is before you today. NSWALC, the peak body for Aboriginal people in New South Wales, is a non-government entity comprising a network of 13 regional areas with an elected council representing each area and 118 local Aboriginal land councils to which the members of the relevant communities belong. In addition to our principal function of administering the Aboriginal Land Rights Act and being the State native title representative body, NSWALC undertakes an active role of representing the views of our people as a non-government organisation in international forums and in national activities and forums such as this.

The Committee may be aware that the highest population of Aboriginal people in any Australian State or Territory resides in New South Wales. Indeed, the most populated Aboriginal community is in the western suburbs of Sydney. According to the 1996 census, the indigenous population in New South Wales was 109,900, which is 28.5 per cent of the total indigenous population. I add that NSWALC is of the strong opinion that the census figures are significantly lower than the actual number of Aboriginal people in the State who identify as Aboriginal people and who access and rely on Aboriginal specific services. It is a well-documented fact that Aboriginal people continue to be marginalised in all areas of life—social, economic and political. It is a similarly well-documented fact that marginalisation from active participation in social, economic and political

activities are underlying causes for the relationship between Aboriginal peoples and the criminal justice system. That relationship is overwhelming.

According to the 1996 census, nationally Aboriginal juveniles were overrepresented by about 17 per cent and indigenous adults were more likely than non-indigenous adults to have contact with legal and correctional services, with almost 19 per cent of the adult prison population in 1997 being identified as indigenous. The imprisonment rate for indigenous adults was over 14 times that for non-indigenous adults. In New South Wales, Aboriginal people are currently gaoled at 15 to 16 times the rate of non-indigenous Australians. That was reaffirmed only last week by Mr Debus, the Attorney General. In 1997, 11.3 per cent of Aboriginal people were refused bail in local courts compared with only 4.5 per cent of non-indigenous people.

In September 1999 Aboriginal women in full-time custody represented 23 per cent of the total female inmate population. In 1999 Aboriginal juveniles in New South Wales comprised approximately 40 per cent of all juveniles detainees. As can be expected, with such levels of overrepresentation of Aboriginal people in custody there is a correlative overrepresentation of Aboriginal deaths in custody. In the eight-year period after the Royal Commission into Aboriginal Deaths in Custody there was an increase of Aboriginal deaths in custody in New South Wales of 33.8 per cent. Whilst our people continue to be taken into custody at such rates and they continue to die in custody, NSWALC is highly cautious in the face of reforms of laws and policies relating to criminal justice.

Specifically, in relation to the review of the Crimes (Forensic Procedures) Act 2000, whilst recognising its potential benefits, the position of NSWALC is that the law in its current form has the effect of further disadvantaging Aboriginal people who come into contact with the criminal justice system—a matter that is raised in our submission. The New South Wales Aboriginal Land Council acknowledges that the regime is seeking to promote a level of protection and security that society not only demands but deserves and it is conscious of the need to balance the tension between protecting the rights of the victim and the rights of the accused. However, NSWALC does not believe that balance is appropriately and adequately achieved in the absence of controls over the DNA process, as identified in our submission. I thank the Committee for the opportunity to further expand on the New South Wales Aboriginal Land Council submission and I welcome any questions that you may wish to address to us.

CHAIR: I indicate in commencing the questioning period that any question that I or any other member of the Committee might ask may be responded to by either or both of you, as you choose. I start by referring to a general matter. At the beginning of your submission, for which the Committee is grateful, you state:

The Act does not address in any effective manner the significant cultural and customary law rights of Aboriginal and Torres Strait Islanders in NSW.

I invite you to tell the Committee what you mean by that.

Mr McAVOY: The answer to that question can be found in our written submission. The statements in the introduction are expanded upon in the submission. However, for the purposes of today's hearing, to my knowledge there are existing throughout Australia and in New South Wales cultures and customs within the indigenous community that indicate that people hold strong beliefs that the taking of human samples is a matter that gives rise to certain spiritual connotations.

The way in which medicine—and, in white terms, sorcery—is practised in some communities is such that the taking of a hair, blood or saliva sample is the basis upon which harm can be inflicted upon a person. Those issues have not been dealt with in any fashion in the legislation which we are dealing with. Above and beyond that, there are the cultural rights to the ownership of the material. In the annexures to the submission of the New South Wales Land Council there are ample extracts—mainly taken from the Internet—which show that indigenous peoples the world over have expressed concern about the use of their cultural and intellectual property, including genetic resources, for any purposes without their consent.

CHAIR: In what way would you see the Legislature as possibly being able to deal with the cultural matters that you raise, given that the matter specified in the legislation applies to the people of New South Wales generally?

Mr McAVOY: I think that that has been dealt with in the submission. However, the first point should be that bodily samples should be taken only on a voluntary basis. If a person chooses to give up his or her samples for the purpose of DNA testing, that is a matter that he or she can freely do. However, if a person chooses not to, for customary or cultural reasons, that should also be observed. If it is restricted to voluntary samples, then that issue is met. The next point is the destruction of the samples after they have been used for a particular purpose. That is an issue that poses perhaps the greatest concern for the New South Wales Aboriginal Land Council. The collection of a database in which DNA samples or bodily samples may be used at any time in the future raises all sorts of problems. So the destruction of samples once they have been used is one way of alleviating the problem of cultural concerns.

CHAIR: I raise with you the issue of having an interview friend present. I note that on page 2 of your submission you state:

The legislation ostensibly allows for the protection of suspects rights by allowing an "interview friend" or legal representative to be present, but they may be removed if they are suspected of contaminating samples or in the case of legal friends unreasonably interfering or obstructing.

When the Police Service appears before the Committee next week it will be seeking, via its submission, an amendment to the legislation to enable police to exclude an interview friend when the police reasonably suspect that an interview friend will obstruct the process. The existing provision in the legislation is that, if obstruction is occurring, a person can be excluded. What comments would you like to make, both regarding the existing provision and the more draconian provision that the police are apparently now seeking?

Mr McAVOY: Two aspects of that question concern me. First, the issue about the exclusion of the interview friend would be removed if there were grounds for Aboriginal people to refuse to give samples on customary or cultural grounds. The obvious situation in which an interview friend might be seen to be obstructing the taking of sample is when an Aboriginal person says, "I do not want to give that sample" and the interview friend is advocating on his or her behalf. Second, there is the issue of when the interview friend should be there. I understand that the legislation currently states that reasonable attempts should be made to get the interview friend there. NSWALC's position is that such an invasive procedure should not be allowed to go ahead in the case of Aboriginal people when the interview friend or legal representative is not present. If they cannot find the person, then the taking of such samples should be delayed until such representation can be found.

CHAIR: So you regard the presence of the interview friend as being quite crucial to the integrity of the process, or at least to the fairness of the process in relation to the Aboriginal community?

Mr McAVOY: Not only does the New South Wales Aboriginal Land Council find it crucial; the courts in all jurisdictions of Australia have recognised the value in having legal representation present when Aboriginal people are dealt with by the police.

The Hon. JANELLE SAFFIN: I ask a question that flows from part 3, section 10 of the Act. An Aboriginal or Torres Strait Islander can have an interview friend if the police officer believes on reasonable grounds that that person is an Aboriginal or Torres Strait Islander. How does that sit with the question of people self-identifying? The provision in the Act states that the police officer will allow an interview friend if he or she believes on reasonable grounds that that person is an Aboriginal or Torres Strait Islander. Do you have any issue with that?

Mr McAVOY: We have addressed this in the submission. If a person self-identifies, then it should not be a question for the police to make any value judgments about whether that person is Aboriginal or not and entitled to an interview friend. If the person says, "I am an Aboriginal person and I want somebody here while this procedure is being taken out on me", then that should be mandatorily provided for.

The Hon. JOHN RYAN: While we are on that subject, yesterday it was suggested that there was some discrimination whereby some inmates in custody were giving Aboriginal inmates some trouble because the Aboriginal inmates were entitled to have an interview friend present when a DNA sample was taken and others were not. Under those circumstances, do you think it would make life easier if every person who is having a DNA sample taken had the capacity to have an independent person present?

Mr McAVOY: From a broad spectrum, social justice position, of course. But we are here advocating indigenous rights and in respect of the general administrative recommendations that the New South Wales Aboriginal Land Council have made, most of them could be transposed to the broader public, I would think.

The Hon. JOHN RYAN: I am only asking really whether you would have any objection to everyone having an interview friend. Is there any special reason why people of Aboriginal backgrounds have to have this as a special requirement for them in view of the fact that it might in fact be working to their detriment, particularly in correctional centres where some are not utilising that capacity because they are worried about being discriminated against by other inmates who do not have an Aboriginal and Torres Strait Islander background.

Mr McAVOY: The ability for Aboriginal people to have an interview friend present is something that has been widely recognised and advocated for as a special measure that is needed in order to protect indigenous people's rights when interacting with the justice system. If people are being victimised for exercising their right, then that should not be the basis on which the right is taken away. That should be a basis for greater scrutiny about how the procedures are carried out.

The Hon. JOHN RYAN: I was not going to suggest that we take it away. I was going to suggest that we extended it to everyone. Would you foresee any particular objection from people of an Aboriginal background who may feel that something that has been a special provision for them had been extended to everyone else?

Mr McAVOY: I cannot see any problem with that at all.

The Hon. PETER BREEN: If I can make a similar point, the provision for Aboriginal and Torres Strait Islander people also extends to the requirement that the police officer must give the suspect a reasonable opportunity to communicate, or to attempt to communicate, with a legal practitioner. My question is the same as the Hon. John Ryan's except that I wonder whether it should also include the right for everyone to have a legal practitioner. Would there be anything detrimental to the rights of Aboriginal people of that were to happen?

Mr McAVOY: No.

CHAIR: I think I am correct in saying that the Aboriginal Land Council has a general opposition to the testing of entire communities.

Mr McAVOY: Yes.

CHAIR: In that regard, I note that page two of your submission which includes a reference to what is described as the Wee Waa experience where the entire male population virtually volunteered to give samples for DNA testing in order to identify the possible offender. You state:

To undertake DNA testing in a broad and speculative matter is offensive and promotes vigilantism.

Would you like to say something to the Committee in support of that view?

Mr McAVOY: It would appear to me—and this is my personal view—that it is highly likely that were an entire remote community sought to be tested and the Aboriginal sector of the community decided on cultural grounds that it did not wish to participate in that testing process, then the remainder of the community would leap to conclusions about who the offender might be. That erodes the cultural rights of Aboriginal people who refuse to participate in the process, and allows those

people in the community who are so minded to take matters into their own hands and perhaps build a fictional case. That is a very real concern.

CHAIR: It is said on page three of the Aboriginal Land Council's submission:

The result in terms of DNA data-banking is a much greater percentage of any Aboriginal community are likely to have DNA samples taken and recorded, and therefore the potential damage as a result of misuse is accordingly enhanced.

Why do you say that? Could you say something to the Committee about that view?

Mr McAVOY: The comments were made on the assumption that the collection of any data of this type is open to some form of misuse. It may not happen tomorrow; it may not happen next year; but even the most secure systems where electronic data are stored seem to be available. That particular comment specifically relates to—and I would refer to the opening comments by Mr Bradford—the high percentage of Aboriginal people coming before the justice system and the ratio of data about Aboriginal people as opposed to the broader public being greatly increased. Therefore, the extent to which that data can be put to misuse is potentially increased to that extent. It might be possible to have information about a whole sector of the Aboriginal community whereas there would be only small pockets of information about the broader community. If that information is legally accessed, then the potential for misuse is much broader.

CHAIR: In your submission, you refer to some provisions of the International Convention on Civil and Political Rights [ICCPR]. I ask you to indicate to the Committee the significance you attach to that convention in relation to the Crimes (Forensic Procedures) Act 2000.

Mr McAVOY: There are a number of provisions that I have identified, starting with Article 7 of the ICCPR which states:

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

But it states:

In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

At this point, the taking of samples is regarded as scientific experimentation because it is not known to what uses the samples may be put at a later date. Article 4.2 speaks to the presumption of innocence which is also dealt with in the submission. I think I might take you to Article 20 which provides:

Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

By allowing the testing of entire communities, it would seem that the New South Wales Government is sanctioning that type of behaviour. Finally, in Article 27—

CHAIR: Before you go on, in relying on Article 20 and in making the comments you just made, if we take the case of Wee Waa as an example, it was not only the Aboriginal community that was tested, was it?

Mr McAVOY: No, but if I take you back to the example I gave earlier where a community might refuse to give samples, then it is that type of racial division.

The Hon. JANELLE SAFFIN: Which could be incitement, as referred to in Article 20?

Mr McAVOY: Yes. I am sorry. I jumped through that a little bit.

CHAIR: I just want to understand properly the point you are making.

Mr McAVOY: That is the point. Article 27 is probably the most directly related and states:

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

The legislation as it stands does not make provision for Aboriginal people to exclude themselves from the process on cultural grounds and it would seem to be in contravention of that right.

CHAIR: At page 10, point 31, of your submission you state:

Indigenous people have existing legal structures within the community which have been substantially ignored by the NSW legal system. This Act further entrenches this erosion of cultural legal rights.

Would you like to say something to the Committee about that?

Mr McAVOY: That statement is made in the context of Aboriginal systems in relation to law and medicine which I spoke about in answer to a previous question. The way in which Aboriginal medicine is recognised is very structured and controlled. For the Government to give a broad fiat to the Police Service to take samples from people outside that system of laws is a failure to recognise the existence of those laws and customs.

CHAIR: At points 37 and 38 of your submission on page 11, you refer to the development of the capacity to collect and record DNA information. You refer also to the experience in the United States, Canada, the United Kingdom and in Australia and you go on to state:

The approaches by the different jurisdictions have been distinct with that the US focussing fairly strongly on using the databank to release offenders wrongly convicted ... and the UK boasting about cleaning up its unsolved crime rate (92% of outstanding major crimes were matched against DNA profiles of people in prison).

Is there anything wrong with either of those matters?

Mr McAVOY: As an outcome, the New South Wales Aboriginal Land Council's position is not that it is in opposition to the clearing up of outstanding crimes; nor does it necessarily support the use of DNA in that way. What is obvious, though, is that the very real potential for people to use the DNA system to prove innocence has not been properly included in the legislation. The development of an appropriate innocence project would seem to me to be a highly desirable outcome. The point that is being made, I put it to you, is that it demonstrates an approach, rather than what the outcomes are about. The approach in the UK is one of, "We are doing a great thing by ensuring that these criminals are detected", whereas in the US there is a much more balanced approach which says, "At the same time, we are ensuring that innocent people are released". Were it not for the foresight, I suppose, of the lawyers involved in the Frank Button matter in Queensland, his innocence might not have been known and he might be serving a sentence today. We do not have the provisions in New South Wales to actively seek out and identify those people who claim innocence and use DNA to that effect.

CHAIR: While we are dealing with the question of innocence, you may be aware that some considerable time ago the Minister for Police announced a general intention to establish what was termed an innocence panel. That has not in fact been given any form or shape as yet. Could you indicate to the Committee, if such a panel is established, how it should be constituted and whether it should be set up administratively or subject to legislation?

Mr McAVOY: My view is that it should have some legislative backing and it should be given similar resources to those put towards detecting criminals or offenders in order to achieve some sort balance, in line with the longstanding well-known legal maxim about convicting an innocent person. On that basis it is more important that the resources be directed to finding those who are innocent and that should take priority.

CHAIR: I want to return to the interview friend aspect, which I regard as quite crucial, particularly so far as the interests of the people you represent are concerned. You say at page 13 that there appear to be no provisions which allow the representative of the Aboriginal legal aid organisation to effectively intervene to assist the suspect. Is that so, given that if the interview friend provisions are given full force and effect which, speaking for myself I think they should be, is that not one means by which that organisation could be involved?

Mr McAVOY: Could you direct me to a particular paragraph of the submission?

CHAIR: Yes, page 13 following recommendation No. 8 there is reference to a particular provision of the legislation. You say that provision is effectively useless without giving the representative of the Aboriginal legal aid organisation the capacity to intervene, and so on.

Mr McAVOY: Yes, and that comes back to the need for Aboriginal people to be able to refuse to give samples on cultural grounds. If the interview friend or legal representative is unable to advocate on behalf of the person in order to stop the sample being taken, their presence is useless, apart from merely rubber-stamping the process, that is to say, the sample appears to have been taken cleanly.

CHAIR: At point 50 on page 15 you say that DNA analysis, although increasing in accuracy, is an inexact science based largely on the theory of probability. Would you like to say something to the Committee about your views in that respect?

Mr McAVOY: I ask you to note the footnote and the reference to a paper from the Department of Justice in the United States of America. My background is not in science but I understand that DNA matching is a science that is still developing and I would hope that the Committee is receiving the appropriate scientific evidence from independent sources as to the value which can objectively be attached to such matching techniques.

CHAIR: I want to draw your attention to the submission made by the Police Service to the Committee in connection with this inquiry in which it is seeking a number of amendments to the existing legislation. I invite you to make comment with regard to the amendments or, alternatively, I invite the Aboriginal Land Council to make written comments subsequently.

Mr McAVOY: We would like to take the question on notice and provide written responses. The world appears rosy according to the submission I received copies of.

CHAIR: I have considerable concerns regarding some of the things being asked for. They seem to go beyond the existing legislation.

Mr McAVOY: I am not saying that the New South Wales Aboriginal Land Council thinks the propositions put forward by the Police Service and the Corrective Services Commission are rosy. I am saying that if you believe what is in the submission you would think that everything is right with the world is far as the way the legislation is going and that the provisions, which any right-minded person ought be extremely concerned about, do not give them enough power to carry out what they need to do to protect the citizenship. That is a quick overview. I only received the papers recently but we will respond in writing.

The Hon. JOHN RYAN: It is probably fair to draw your attention to one proposal from the New South Wales Police Service which proposes an amendment to section 10 (3) that an interview friend must be present only if reasonably practicable when an Aboriginal or Torres Strait Islander is requested to consent to a procedure.

Mr McAVOY: And I referred to that in answer to a previous question, although it was not directed particularly at that provision but it is the view of the New South Wales Land Council that the invasive nature of that process and the potential use to which DNA might be put dictate that reasonable practicalities is far from good enough and that an interview friend should be there in all cases.

CHAIR: An example of the concern I hold regarding the amendments sought by the Police Service is that they want police to be able to exclude an interview friend where police reasonably suspect the interview friend will obstruct the process. They have an existing right to exclude such a person if they in fact obstruct the process. It seems to me that if they were to be given that power before the process even starts, they could exclude someone at will on the basis of what they say is a reasonable suspicion that they may in fact obstruct the process.

Mr McAVOY: Yes. I have similar problems. As I have said, I have only had the opportunity to read through the proposals briefly and would like to respond in writing.

The Hon. JOHN RYAN: With regard to recommendation No. 5 in which you recommend "In recognition of the rights of indigenous peoples to own and therefore control their own genetic material, the New South Wales Government should enter into a negotiation with the New South Wales Aboriginal Land Council over the operation of the Crimes Forensic Procedures Act 2000, what specific issues did you think needed to be discussed in terms of a memorandum of understanding or a negotiation?

Mr McAVOY: Without trying to pre-empt which way the negotiations may go, it appears to me that some form of agreement the New South Wales Aboriginal Land Council could take some solace from is in how the samples are dealt with and how they were taken across the whole range. If you are going to go into the process, you would deal with all the issues that arise as a result of taking such samples.

The Hon. JOHN RYAN: My final question relates to the fact that the legislation creates the capacity for the police to take DNA samples from a wide variety of people but in particular people they have arrested. It would not be news to you that a substantial number of Aboriginal males have been arrested by the police in some small communities. In some communities a significant percentage of the Aboriginal population has been arrested. Do you think any safeguards are needed or any procedures should be introduced to at least monitor the extent to which this occurs or to prevent it from happening. The Police Service might be in position to monitor the behaviour and conduct of a significant proportion of a population simply because over time they have been able to get a significant number of people on to a database from a particular cultural group.

Mr McAVOY: That is but one of the potential misuses of such data. There is a whole range of other misuses. The way in which people might be protected against that misuse appears to be only possible through the destruction of a sample upon testing as against a particular offence.

The Hon. JOHN RYAN: Even if the sample itself is destroyed the legislation provides there are certain circumstances under which the information can remain identified. Is the land council in any way concerned that a great deal more information will be available to the New South Wales Police Service about the Aboriginal population than there is about the non-indigenous population or other communities?

Mr McAVOY: Very concerned. When I speak of the samples, I speak also of the information drawn from the samples.

The Hon. JOHN RYAN: The issue was raised this morning with the Privacy Commissioner but I do not think the Committee has any good information that indicates communities where this might be the case but perhaps the land council could provide additional information of communities that maybe under genetic surveillance by the New South Wales Police Service and how that might be a specific concern for indigenous communities.

Mr McAVOY: I do not know that the New South Wales Land Council has access to that data. I would be quite certain that the Aboriginal legal services that operates in particular regions around New South Wales would have access to data of that nature. I indicate that the New South Wales Land Council is interested in responding to that question in further detail and will undertake some inquiries and see what we can bring back.

The Hon. PETER BREEN: Are you aware of any aspect of the DNA profile that can identify that a person belongs to a particular ethnic or cultural group or whether it can be statistically inferred that that person belongs to a particular ethnic or cultural group?

Mr McAVOY: No, I am not.

The Hon. PETER BREEN: You are not aware of that?

Mr McAVOY: No.

The Hon. PETER BREEN: Other evidence has been taken by this Committee which, to my mind, raises at least that question and that was the reason for asking the question. It does appear that there are certain aspects of the DNA profile that can be used statistically to infer the answer to certain questions about whether a particular suspect belongs to a certain cultural or ethnic group.

Mr McAVOY: If I might say, there is a swag of material attached to the submission in relation to the human geno project and my understanding is that that project is directed towards deconstructing DNA so that those particular racial, ethnic, health and other genetic factors might be determined from a particular sample.

If that is a so, then profiling is a natural follow-on from that ability, but it is not something that I would be prepared to give evidence on. It is not something within my personal knowledge.

The Hon. PETER BREEN: Given that 25 per cent of the population of the Northern Territory is Aboriginal, do you have concerns about the practice in the Northern Territory whereby samples from a person who is a suspect are not deleted from the DNA database as is the case in New South Wales?

Mr McAVOY: That is the major concern that comes through in the New South Wales Land Council submission. Wherever information of this nature is collated it is open to misuse, and there is a term I have come across called "functional creep" where a particular function is brought into existence under one guise and, over time, it is used for all manner of things. But once in the door it is very hard to stop.

The Hon. PETER BREEN: Your objection to the Northern Territory's profiles being on the national database would be similar, I suspect, to your objections to the fact that a higher number of Aboriginal people than the rest of the population are in custody? I am concerned about the distortion of the database that might prejudice Aboriginal people.

Mr McAVOY: That is a very distinct possibility, although it is difficult for the New South Wales Land Council to comment on things in relation to Northern Territory Aboriginal people. But the impact on the Aboriginal population of New South Wales is very real from that type of data collection.

The Hon. JANELLE SAFFIN: Were there any opportunities before the Act came into being for the Aboriginal community or the Land Council to have negotiations or input into it?

Mr McAVOY: I do not think the people before you today are able to answer that question. I will take the question on notice and we will respond in writing.

The Hon. JANELLE SAFFIN: Your recommendation 5 deals with negotiation. Given the things that are in your submission, a lot of these issues would have been better dealt with before the Act than after it, would they not?

Mr McAVOY: Absolutely.

The Hon. JANELLE SAFFIN: Recommendation 5 talks about the negotiation to take place. Have you made approaches to the Government?

Mr McAVOY: Not on this issue. We are using this submission and this inquiry as the basis from which to take the matter further. In answer to your question, it is fairly generally known that there was not a lot of consultation about this particular legislation. It is something that the New South Wales Land Council has not made any significant contribution to, talking about the development of the legislation, in the past, although I cannot say that with absolute certainty. Not being an employee of the Land Council I have not got corporate memory at my fingertips.

The Hon. JANELLE SAFFIN: Do you have any concerns with the retrospectivity of the provisions of the Act for testing serious indictable offenders? That is the general legal question

CHAIR: The provisions are retrospective so far as they relate at least to current prisoners serving sentences in New South Wales

Mr McAVOY: The Land Council has not taken a position on that issue.

The Hon. JANELLE SAFFIN: Perhaps you could take that on notice.

CHAIR: Is the New South Wales Aboriginal Land Council the organisation the Government could be expected to consult, if it consulted at all, regarding legislation of this sort, or is there another Aboriginal organisation it would have consulted?

Mr McAVOY: The correct path is through the Aboriginal Land Council as the elected representative of the Aboriginal people of New South Wales. Although there may be some value in talking to organisations such as legal services, they operate on a regional basis and it is much more difficult to have a collective and unified position, and ability to negotiate on a bilateral basis.

CHAIR: To use an expression that is commonly used, is your organisation more or less the "peak body"?

Mr McAVOY: It is the peak body, yes, in New South Wales.

CHAIR: So you would expect that it would be appropriate to be consulted regarding legislation such as this?

Mr McAVOY: Yes.

Mr BRADFORD: Could I just add something to that in relation to how the New South Wales Aboriginal Land Council is structured? In my opening address I referred to the 113 local Aboriginal land councils. They can be viewed as 113 communities throughout New South Wales. We have direct access to those through our branch offices that we operate throughout New South Wales. The council is established by the democratic process of elections, which are conducted by the Electoral Commission. We are truly the representative body of the Aboriginal population of New South Wales. Membership to local Aboriginal land councils is open to every adult Aborigine. Once you are member you have the right to vote, you elect your councillor, and that forms the New South Wales Aboriginal Land Council.

The Hon. JOHN HATZISTERGOS: Recommendation 7 of your submission refers to a person who, when asked, claims to be of Aboriginal or Torres Strait Islander descent is deemed to be such a person for the purposes of section 10 (1) (b), which is the primary section that deals with Aboriginals in the Act. At the moment the Act says that that section applies when a police officer believes, on reasonable grounds, that a suspect is an Aboriginal person or a Torres Strait Islander. That, in turn, takes you to the definition of Aboriginal person or Torres Strait Islander, which is defined as a person who is a member of the Aboriginal race, identifies as an Aboriginal and is accepted by the Aboriginal community as an Aboriginal. Are you advocating specific reform to section 10 (1) of the Act, or are you stating that for the purposes of the Act we should change the definition of Aboriginal and Torres Strait Islander to delete paragraphs (a) and (c)? Do you follow what I am saying?

Mr McAVOY: Sure. I am not advocating a change to the definition.

The Hon. JOHN HATZISTERGOS: That is the only definition that applies to this section in this Act.

Mr McAVOY: Sure. What is being advocated is that the discretion in the police to accept someone's profession to be an Aboriginal is removed and that people be allowed to self-identify. It is open to misuse and it is not a case where a police officer should be put in the position of being able to determine whether somebody is of a particular racial or ethnic background, in particular Aboriginal people.

The Hon. JANELLE SAFFIN: That requires an amendment to the section.

The Hon. JOHN HATZISTERGOS: That would require an amendment. There would be no purpose in having that definition in the Act. There is no purpose of having "Aboriginal" defined in the Act in that way if the person is able to self-identify. It would basically mean that an Aboriginal person is a person who identifies as an Aboriginal person irrespective of whether they are accepted as an Aboriginal and irrespective of whether—

Mr McAVOY: No, not quite because Canadian indigenous people refer to themselves as Aboriginals. In this case we are saying Australian Aboriginal people. The definition does hold for Australian and Torres Strait Islanders. A Papua New Guinean might say he is an Aboriginal person, and he is entitled to.

The Hon. JOHN HATZISTERGOS: You could say identifies as an Aboriginal of an Aboriginal race in Australia.

The Hon. JANELLE SAFFIN: The particular section that would have to be amended would be the part that gives the police officer a discretion to determine who is an Aboriginal and Torres Strait Islander person.

Mr McAVOY: That is what we are suggesting, that the discretion be removed, that the person says "I am an Aboriginal person" and that has a meaning within the Act. Then they are entitled to certain administrative measures by reason of that. I do not think it is only in that section that Aboriginal and Torres Strait Islander is referred to, either. There are other provisions within the Act in which Aboriginal and Torres Strait Islander—

The Hon. JANELLE SAFFIN: It is in section 55 as well, and there may be some others. There are a few other provisions.

Mr McAVOY: There are a few other provisions as well. The definitions section has used—

The Hon. JOHN HATZISTERGOS: But in a similar context.

The Hon. JANELLE SAFFIN: That is right, it is the same wording.

Mr BRADFORD: Could I add something to that, if I may? The definition that was read out is also the definition that is used in the commencement of the Aboriginal Land Rights Act. It has worked very well in the past 17-odd years in relation to identification of Aboriginal people. There have been very few cases run challenging that, because we know who is who in the community. That section has worked very well, especially if you go to the second part where it says "identifies in the community and is accepted in the community". When you shift to another community you may have trouble with your Aboriginality because of appearance, skin colour and so forth, but you have no trouble back in the community you come from. I will not go too far into it, but an example is a chap from Brewarrina who was considered back while he was there, but when in Newcastle another term was attached to him. He said, "In Brewarrina I was a black so and so. Now I am in Newcastle I am a white so and so." We know who we are in our communities. The problem with allowing the police to come to the decision as to who is Aboriginal and who is not is extremely dangerous.

The Hon. JANELLE SAFFIN: It is a break with accepted policy right across Australia. That is what hit me about it when I read it, and I think that is what Mr Hatzistergos was trying to clarify.

The Hon. JOHN HATZISTERGOS: To your knowledge has this particular provision caused problems in any demonstrated cases to which you are able to refer?

Mr BRADFORD: That identification?

The Hon. JOHN HATZISTERGOS: Yes.

Mr BRADFORD: No. Carrying on from some other questions that were asked earlier about whether we would have any objection to the friend being present carried to the whole community and

we said no, if that were the case it removes the argument as to whether the person is Aboriginal because everyone would be entitled to have that particular friend or representative there.

The Hon. PETER BREEN: I would call that a good solution, but a pretty unlikely one.

CHAIR: We appreciate your assistance, but we would also appreciate your taking on notice the amendments the Police Service is seeking. We very much value your detailed comments regarding those proposals that you are making to us.

Mr McAVOY: Is it possible to get some reminder of the questions we took on notice?

CHAIR: Yes, the committee secretariat can certainly tell you that.

(The witnesses withdrew)

(The Committee adjourned at 12.45 p.m.)