REPORT OF PROCEEDINGS BEFORE

STANDING COMMITTEE ON LAW AND JUSTICE

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

¾ ¾ ¾

At Sydney on Tuesday 7 August 2001.

¾ ¾ ¾

The Committee met at 10.00 a.m.

¾ ¾ ¾

PRESENT

The Hon. Ron Dyer (Chair)

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

MICHAEL JAMES STRUTT, Voluntary activist with Justice Action, 2/8 Ormond Street, Ashfield 2131, affirmed and examined:

CHAIR: Mr Strutt, did you receive a summons issued under my hand in accordance with the Parliamentary Evidence Act 1901?

Mr STRUTT: Yes, I did.

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

Mr STRUTT: Yes, I am.

CHAIR: 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 STRUTT: Yes, it is. I do have some changes of detail to some parts of the submission. None of them affect the overall points I make. They are mainly things like dates and references to web pages which are mistyped, and things like that, that I will be lodging with the Committee over the next couple of days. Apart from that, yes, I stand by my submission.

CHAIR: Thank you. 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 members of the Committee, the Committee will accede to your request.

Mr STRUTT: Thank you.

CHAIR: I invite you briefly to elaborate on your submission before we ask you any questions.

Mr STRUTT: What I might do first is to tell you why I presume to be sitting here talking about forensic evidence considering that I am not a forensic scientist and I have no formal legal training whatsoever. I have a science-maths-based education and 20 years of computer experience, which gives me a fairly strong basis in mathematics and statistics. Mainly I have been doing about 2½ years research in this. I have written well over a dozen articles. I have received some recognition from academic circles on one of the DNA articles I wrote for a crossbench group and which is now part of the book of reading for Griffith University law students. So, I am not speaking as an amateur in the area but I do not formally qualify as an expert.

The summary of Justice Action's position is that we do not object to the introduction of forensic DNA into the New South Wales criminal justice system. In fact, we recognise it is both inevitable and desirable, and we support its equitable and responsible use. But we strongly object to the Crimes (Forensic Procedures) Act as a vehicle for the introduction of forensic DNA into the New South Wales criminal justice system. As a general statement of principle on these matters, Justice Action has come up with a six-point spiel which covers our position.

It is that no-one, whether convicted or not, should be forced to give a medical sample of any kind unless it is determined in open court that their right to bodily integrity and privacy is exceeded by overwhelming issues of public interest in the evidence that is likely to be produced; that police and prison officers should not play a part in gaining the consent for voluntarily forensic procedures or for collecting forensic evidence; forensic samples and the profiles they produce should remain the property of the person who sourced them, whenever that is known, no matter how they were obtained, whether it is from that person or from a crime scene or surreptitiously, such as from the garbage; and when they are no longer required as evidence, control of them should revert to that person, and it is totally unacceptable for the Government to hang onto samples and profiles indefinitely and pass them on as it sees fit, even if they have been de-identified.

The mass databasing and cross-matching of DNA profiles in an attempt to gain cold hits which might provide evidence in suspectless crimes actually exceeds the theoretical and practical limitations of forensic DNA testing and will result in wrongful convictions if it is used routinely. It is

totally unacceptable and discriminatory that prisoners should overwhelmingly be the ones subjected to that risk, especially as they are likely to be in a worse position than most when it comes to defending themselves from DNA-based accusations. Although there is massive government funding of police forensic laboratories and computer systems, and probably more on the way, so far there has been an absence of legal aid funding which would enable the impoverished access to the sort of technical expertise they require to defend against DNA evidence, and that will tend to further tilt the criminal justice system in favour of prosecution and the wealthy as DNA evidence is used more and more in criminal cases.

Also, Australian forensic scientists have an extremely poor record in presenting forensic evidence in court and have been responsible for a disproportionate number of wrongful convictions. They are way overdue for proper independent monitoring and oversight, and this need becomes urgent as forensic evidence is playing a part in an ever-increasing number of criminal cases. Justice Action hopes this Committee will recommend the repeal of the Crimes (Forensic Procedures) Act, an immediate halt to the forensic testing of prisoners and the destruction of the data and samples taken so far; an immediate halt to the databasing of profiles and passing on of data to other jurisdictions or CrimTrac, and the formation of a consultative committee with representation from key stakeholders including non-government and academics in relevant fields. Its task would be to facilitate the development of a best-practice model of forensic DNA laws, probably in the context of genetic privacy in general, and make appropriate recommendations regarding oversight bodies, laboratories and database resourcing, etcetera, by consulting with various representatives of the wider stakeholder groups and the community in general.

Above all, an oversight and monitoring body should be formed to audit, evaluate and accredit those likely to be recognised as forensic expert witnesses in New South Wales courts, and it should be able to make non-binding recommendations with regard to what areas of expertise should be legally recognised in certain individuals, standards for presenting and admitting the forensic evidence, and the capability to perform things like blind testing to evaluate error rates in forensic laboratories and with individual forensic scientists, and counselling and retraining for forensic experts who give confusing or misleading evidence in court as found through the auditing process.

That is pretty much a summary of our position. I have brought a few papers to table here. This is essentially a summary of what I have just said plus a list of about 14 articles produced by Justice Action concerned with DNA evidence in case the Committee is interested in any of that. This is a copy of an article that appears in the current Sydney Institute of Criminology magazine. It is called *Genetic Policing and Forensic DNA Testing in New South Wales* by Ben Saul, and I highly recommend it to the Committee. I will table that. It is very relevant to most of the things being considered. Here is another one from the same magazine by Don Weatherburn and Joanne Baker of the Bureau of Crime Statistics and Research, and which has to do with transient offenders in the secondary school system. I am tabling this because it makes the point that by the time most Australians have finished high school well over 50 per cent of them have committed an offence which would allow them to be imprisoned. So, you can see if you have a 100 per cent DNA surveillance going you are actually exposing about 50 per cent of society to imprisonment. I think that is something that not even Bob Carr is really ready for.

CHAIR: Do you wish to table those three documents?

Mr STRUTT: There are actually quite a few more here.

CHAIR: I will not interrupt you until you identify all of them.

Mr STRUTT: This is just an email that was sent last year to several people, including at least two members of this Committee, and which details some of the offensive questions on the questionnaire associated with the Wee Waa testing and points out some of the problems with it. There are a couple of media articles from the web, the *Chicago Tribune*. This is mainly to do with the biopiracy issues, the diversion of human bodily samples and the commercialisation of that, which is becoming quite rampant. I think it is something that needs to be considered when developing legislation such as the Crimes (Forensic Procedures) Act. There is an article from APB News that talks about the current expense in America of constantly expanding forensic testing facilities to meet

the demand of the criminal justice system, something else I do not think has been considered in the Australian laws.

I have quite a few articles relevant to the United Kingdom experience, both mistakes and problems they have had there. There are articles from the *Sydney Morning Herald* to do with problems with Profiler Plus. I have extracted a couple of pages from the United States Department of Justice book that I would recommend to the Committee, *The Future of Forensic DNA Testing: Predictions of the Research and Development Working Group.* I have just extracted these particular pages because there is quite a bit of interesting material to do with the way of gathering matches, database searches, and things like that. It also contains revelations of the number of duplicates of DNA one can expect to find on a DNA database system. That is people who are not related but who actually have the same DNA profile. That is something that is not generally spoken about.

This is an article about the abuses exposed in the FBI DNA laboratories in the late 1990s. It is worth keeping in mind that Dr Bruce Budowle of the FBI is probably now considered to be one of the foremost authorities on standards for DNA testing, but certainly as little as three years ago they were exposed to be seriously abusing it. Dr Budowle is the director of DNA in the FBI and one of the co-developers of the Profiler Plus system which is used in every forensic laboratory in Australia. I have some articles from the *Canberra Times* to do with DNA testing of prisoners in New South Wales, particularly the Federal and Australian Capital Territory ones, and also to do with the innocence panel.

CHAIR: Is that the innocence panel in that jurisdiction?

Mr STRUTT: The proposed Bob Carr innocence panel.

CHAIR: In New South Wales?

Mr STRUTT: Here in New South Wales, yes. This is some *Hansard* which relates also to the same innocence panel and to some questions asked of Paul Whelan in estimates committee hearings, which shows that he is not really aware of how the DNA laws work with respect to families of missing persons and particularly the matching provisions. This is a copy of a legislative alert that was circulated and should have gone into the pigeon holes of all parliamentarians just before the bill went through the upper House. It points out a lot of the problems that are very obvious, but they were actually pointed out before the bill was passed. This is an article I have written and submitted to the magazine of the Indigenous Social Justice Association, but I will not try to pronounce its name. It basically details why the current regime of forensic DNA testing will come down disproportionately on Aboriginal Australians.

CHAIR: You wish to tender that bundle of documents?

Mr STRUTT: That is right.

CHAIR: Is there anything further you wish to say to the Committee by way of preliminary observation?

Mr STRUTT: No. I have been given a list of various topics and questions. I have prepared myself to answer those as the Committee asks them. I suppose about the only other thing I would say is that I really do think the shortcomings of forensic DNA testing with regards to suspectless crimes and mass database matching has been very much underreported both in the media and in the professional forensic press. Also I feel a big problem with the Act which is not widely acknowledged is that once samples and data have been de-identified essentially all the protections are gone and what the Government has basically got is forensic information no longer linked to a particular person—although I am sure people have pointed out the possibilities it can be relinked. Essentially it can be used for any purpose whatsoever including, say, sale to biotechnic companies for research, and I find that completely unacceptable. In fact, it has been done already by the Tongan Government, the Lithuanian Government and the Icelandic Government, and I would really hate to see it happen in Australia.

CHAIR: I understood you to say that you or your organisation would like to see the present legislation repealed.

Mr STRUTT: That is right.

CHAIR: That sounds rather radical.

Mr STRUTT: Yes.

CHAIR: I could understand you saying that you believe it is imperfect in various respects and may need substantial revision. Could you tell the Committee why you think the legislation is so unsatisfactory that you say it ought to be repealed?

Mr STRUTT: First of all I would suggest the legislation has already, due to various patchings, compromise and alterations, developed a level of complexity where to do any further would make the level of complexity almost completely unmanageable. But mainly I would suggest the model on which it is based—also I point out there are a lot of drafting errors in the legislation which could be fixed with amendments and I expect they will be, or a lot of them will be—I believe is conceptually flawed. It does not even begin to try to deal with the range of uses of forensic DNA that exists even now much less how it is likely to be expanded in the future. It also really fails to adopt a position that is consistent I think with the genetic rights and privacy of Australian citizens. It does not really approach the problem from that direction at all. I think it is approaching it from a direction that seeks to technically expedite convictions, which I do not really think is the right way to look at it.

CHAIR: You are probably aware that the Committee heard evidence last week from Dr Jeremy Gans of the University of New South Wales Law School. It would be entirely fair to say that Dr Gans was very critical of the draft of the legislation in numerous respects. Am I correct in thinking that what you are saying to the Committee goes well beyond that; that you have a fundamental objection to the scheme or purpose of the Act?

Mr STRUTT: Well, on the most superficial level, if you take the purpose of the Act, which is to allow for the collection of forensic samples under some circumstances and for use in solving criminal cases, no, I certainly do not have an objection to that. I do have an objection to the way the Act seeks to enable the databasing of large numbers of forensic samples and the search for people who are not even suspected to link them to crimes. I think that is conceptually wrong and it does not reflect a true appreciation of the possible problems that can occur with forensic DNA testing. Mainly I think the way it has been approached has not really been from the basis of thinking about how DNA is and will be used. It is probably best I do not try to speculate on where the approach has been coming from, but I can certainly see that it does not seem to have been based on a realistic understanding of the technology or its implications for privacy and civil rights.

CHAIR: Will you concede that DNA testing has some positive roles to play even from your point of view, such as establishing the innocence of some people or establishing the identity of missing persons, to give two examples?

Mr STRUTT: Yes, certainly that is true. As I said, Justice Action supports the introduction of forensic DNA testing to the criminal justice system because we recognise how much of an asset it can be. But what we definitely do not support is the Crimes (Forensic Procedures) Act as a vehicle for doing that.

CHAIR: You also said that in your view police and prison officers should not play a part in testing?

Mr STRUTT: Yes, inasmuch as it is possible.

CHAIR: Could you tell the Committee why you believe that to be the case and what alternative you may propose as to who should conduct the testing?

Mr STRUTT: I believe Dr Gans went into quite a few reasons in front of the Committee why or how police officers would naturally tend to compromise the consent procedure or affect the

consent procedure with regards to a gathering of samples. That certainly is something I agree with. I would also suggest that there is adequate record of the involvement of New South Wales police in the manufacturing of evidence. Just yesterday we saw the longest serving woman prisoner in the State was released because doubts have been raised over whether a police officer involved manufactured evidence in the case. Certainly the way I see it, it is endemic. I think it has already resulted in a lot of wrongful convictions due to manufactured forensic evidence and I would suggest that as forensic evidence is introduced more and more into our criminal justice system, if police are allowed to play a major part in it that that will increase.

With regard to prison officers, certainly I have heard of reports of how prison officers have been dealing with prisoner testing regime, but also the way the Act is drafted at the moment. For instance there is the myth that the presence of a prison officer somehow constitutes an observer independent of the police whereas there can be little doubt to anyone actually in prison that prison officers are partisan with regards to police and will actually support them if there is any question over what happens. I would suggest from a prisoner's point of view that at least prison officers are not independent of the police force. I would support something more akin to what currently happens in the United Kingdom where an independent agency does the collection of forensic evidence both from individuals and from crime scenes. In the UK that same agency does the analysis and testing. I am not sure that that is necessarily the best way to go, but it would be a big improvement on what we have now.

CHAIR: Do you think it could be true to say that in regard to your criticisms of police practice in sometimes misusing evidence, or even planting evidence, is not so much a criticism of the technology involved but is really an argument in favour of cleaning up the Police Service?

Mr STRUTT: It certainly is and I would suggest that post-Wood that is yet to be done. My main concern with regards to DNA evidence is the extreme ease with which that kind of evidence can be manufactured. With forensic evidence in general but DNA evidence in particular, as I am sure has been mentioned before the Committee, it is very easy to, say, pick up a cigarette butt from the garbage or from somebody after a police interrogation that could be later found at a crime scene. Then, by the time that evidence reaches court a jury will be presented with odds of the order of millions or billions to one of the implication of the person being at the crime scene. In a case like that I can see why a jury might be able to evaluate whether or not the evidence has been planted, although a lot of transcripts I have read indicate to me that juries are very reluctant to find that police have been involved in that sort of thing even when there is very strong evidence that they have. I think the technical way in which some of this evidence can be planted as well would make it very difficult for a judge or jury to actually assert with any degree of certainty whether it has been planted.

The Hon. JOHN HATZISTERGOS: What evidence to you have of police having manufactured forensic evidence? Have cases come to light where that criticism has been uncovered, and if so, has it been reported to the appropriate authorities?

Mr STRUTT: Actually I have a book, which I have not tabled as evidence but brought just in case you asked. It is a book entitled *Travesty! Miscarriages of Justice*, which contains articles by various criminologists including a former Australian Institute of Criminology person, Paul Wilson, who I believe is now working as a criminologist in Queensland. The article entitled Miscarriages of Justice in Serious Criminal Cases in Australia lists 20 miscarriages of justice, although one of them is actually in New Zealand. Over half of those resulted from the misuse of forensic evidence, and in some cases it seems that police have actually planted it. You would probably be aware of the very famous case in New Zealand where police planted shell casings to try to implicate somebody in a crime that they had not committed.

CHAIR: Was that the case of Alan Arthur Thomas?

Mr STRUTT: I believe that is the one. There is also the material I tabled previously that includes cases of the FBI, who are the police, if you like, in America, manufacturing that kind of evidence as well.

CHAIR: Who is the editor or author of that publication?

Mr STRUTT: It is edited by Kerry Carrington, Maryanne Dever, Russell Hogg, Jenny Bargen and Andrew Lohrey. It is published by Pluto Press Australia in 1991. It was published by Pluto Press Australia in 1991. So, that is before DNA evidence was largely in use.

The Hon. JOHN RYAN: Do you want to table the book to which you referred?

Mr STRUTT: No.

CHAIR: It seems that the submission of Justice Action contains a number of criticisms of the legislation about which the Committee is inquiring. Does it suggest an absolute prohibition of the use of DNA testing?

Mr STRUTT: Absolutely not.

CHAIR: That being the case, would you tell the Committee under what circumstances and with what safeguards you consider DNA testing and forensic use of DNA to be appropriate?

Mr STRUTT: I have listed a few concerns that would have to be addressed in my submission and I will I trying to avoid going over those again. As I also mentioned before I think first of all it is important to bring forensic expert evidence under a fair bit more regulation than we have seen at the moment. I have read so many transcripts where I am in no doubt whatsoever that that evidence has been either deliberately or incompetently misrepresented to the court and, in some cases, it has resulted in people spending years in gaol. I know of a Queensland case where people have spent three years in gaol for evidence that basically was misrepresented in the court. Primarily what really has to happen before it is introduced in a larger away is that some form of oversight and regulation has got to be done of expert witnesses.

The Hon. JOHN HATZISTERGOS: Why do you advocate that? Is an alternative ensuring that there is not corruption of evidence by the police, increasing penalties for example, doing some integrity testing of police officers, greater education and training and matters of that kind rather than setting up another agency?

Mr STRUTT: As we have seen, those sorts of measures are easier said than done. I do not think that, even if it were possible to completely eliminate the possibility of corruption by police officers, a lot of the misrepresentation of forensic evidence in court is necessarily due to corruption or a deliberate attempt to get a wrongful conviction. I think it is largely due to the adversarial nature of the court room and what tends to happen to difficult scientific concepts when they are basically translated through that. You have got a partisan group of experts on one side and a partisan group of experts on another side, with a very complex topic and with a large number of areas that people are likely to misunderstand no matter how carefully it is explained to them unless they have been expertly trained. I think one of the biggest problems is misrepresentation of real evidence as opposed to the planting of false evidence. In fact, that is why there are two people at least that I know of in Queensland gaols at the moment. The DNA evidence that was taken from a balaclava that implicated them really existed but then the interpretation of that evidence to the court was incorrect and resulted in the court getting a wrong impression of how likely it was that those people actually left that evidence on the balaclava.

CHAIR: Under what circumstances do you consider it to be appropriate for a forensic procedure—DNA testing in other words—to be ordered or requested, firstly on a suspect and secondly on a prisoner?

Mr STRUTT: On a suspect, certainly with regard to orders, they should usually be determined by a court. A lot of things that should be balanced are the seriousness of the crime and, above all, the likelihood that any DNA evidence taken from that person will actually contribute to say, solving the crime. For instance, if it is establishing somebody's presence at a particular time or something like that, and the person is not denying the presence at a particular time then there does not seem to be a lot of point in taking their DNA and data basing it in an attempt to prove that. Of course in a lot of rape cases it is not a matter of contesting whether intercourse took place, but it is consent and again it does not seem particularly necessary that DNA evidence will be taken. I would say

basically the DNA evidence has got to be shown to be useful and it has got to be seen to be more important in terms of the seriousness of the crime—

The Hon. PETER BREEN: What you say is not consistent with Dr Gans' suggestion that where there is a suspect in custody it should be sufficient to obtain a police order. Is it correct that you are suggesting that a police order is not good enough and that we should have a magistrate's order?

Mr STRUTT: I think for a compulsory test, generally speaking, yes, there should probably be a magistrate's order.

The Hon. PETER BREEN: Even in the case of a suspect?

Mr STRUTT: Yes, that is probably the case.

The Hon. PETER BREEN: Do you agree with me that that is inconsistent with the evidence of Dr Gans?

Mr STRUTT: It is my understanding that Jeremy would not support that position, yes.

The Hon. JOHN HATZISTERGOS: It is not like a crime scene where you can say that they have manufactured evidence. Why would it be necessary to get a court order if a sample has been taken from an individual, and there were proper procedures to ensure that it was signed off and there was no interference with it?

Mr STRUTT: It seems to me that it is not whether the evidence might be, sort of, interfered with, the issues are compromise of genetic privacy, interference with bodily integrity and potential for future DNA surveillance. They are very serious invasions of people's rights and they should not be taken lightly.

The Hon. JOHN HATZISTERGOS: On the other hand it also establishes innocence, and it is in the public interest.

Mr STRUTT: Should they be forced to prove their innocence?

The Hon. JOHN HATZISTERGOS: Taking a sample is not a huge event that will disrupt their bodily function. When one weighs up, on the other hand, the savings in police time and resources—and the public interest in ensuring an outcome of certainty, I suppose—and balances those things, I wonder what difference it makes. I can understand what you say in relation to crime scenes but I really wonder, when it comes to sampling, why you need to go to that extent.

Mr STRUTT: With regard to the convenience of police or whatever, again, I would suggest that in a lot of cases, and certainly the way the Act is drafted now, the DNA collected will not be for any particular convenience of the police, at least not with regards to the crime that is being investigated because probably DNA testing will have very little to do with the determination of actual facts in the crime. For instance, under the current legislation someone who could have been sentenced to five years or more for a computer hacking fraud—perhaps in Parliament—would be subject to DNA testing but it is not reasonable to imagine that they would be likely to be a recidivist in that area or that, even if their DNA were on file, it would have any impact on their future recidivism.

The Hon. JOHN HATZISTERGOS: Let us just take it one step at a time. Police officers can direct a sample at present, and you are suggesting that we should substitute that with a court order.

Mr STRUTT: That is basically correct.

The Hon. JOHN HATZISTERGOS: Are you suggesting that we should do away with compulsory testing?

Mr STRUTT: No, I think compulsory testing under certain circumstances should be allowed.

The Hon. JOHN HATZISTERGOS: You are simply trying to change the decision maker?

Mr STRUTT: Yes.

The Hon. JOHN HATZISTERGOS: What difference will occur by changing the decision maker?

Mr STRUTT: First of all I would suggest that when coming to a decision that there should be a bit of a presumption against it on the part of the magistrate. I would hope that a magistrate, or whoever concerned with making a decision like that, would be more able to evaluate the worth of the evidence and various other considerations such as the seriousness of the crime, et cetera, in a nonpartisan manner rather than the police. I cannot see, according to my understanding of how the police currently operate, how police could be made accountable for any decisions that they make with regards to ordering forensic testing. It might be possible if they were forced to, say, write down the reasons for the decisions in the same way as a judge and that might be reviewed later to make them more accountable—I have not really thought through that.

The Hon. JOHN HATZISTERGOS: Are you complaining about the openness and transparency of the decision-making process?

Mr STRUTT: Yes.

The Hon. JOHN HATZISTERGOS: You think that would the enhanced by court procedure as opposed to a police administrative decision?

Mr STRUTT: Yes, and also I do not think, for instance, a magistrate would be likely to order forensic testing that might be designed to harass or intimidate somebody into giving some other kind of evidence, as Dr Gans has touched on in his evidence. I do not think a court would be likely to do that. I think a policeman saying whether there are reasonable grounds would probably consider that reasonable, but I think society in general might not.

CHAIR: What are your concerns about the retrospectivity of the provisions in the Act relating to prisoners?

Mr STRUTT: I have quite a few concerns, and the article by Ben Saul in the magazine I tabled has got a very good explanation of a lot of those concerns. One of the biggest of course, is that it was not intended by the original magistrate, when those people were sent to gaol, that they would lose their right to bodily integrity and genetic privacy, and would be subject to DNA surveillance for the rest of their lives. It seems to me to be a penalty that is being added on after the sentencing. If a magistrate knew that that was going to happen at the time of sentencing, some of the sentencing considerations might have included the likelihood of recidivism or something and if he knew, in the case of a potential sex offender, that he would be spending the rest of his life under DNA surveillance it might have actually resulted in a lower sentence because he was not so concerned about the possibility of recidivism. Of course that magistrate will never be asked now. Mainly what I do not like about it is the way that it has retrospectively formally created—I would suggest that people who have been convicted and sent to gaol are already an underclass in our society—an underclass who have less rights to bodily integrity and genetic privacy and the right to avoid surveillance than the rest of us.

CHAIR: The Minister for Police and the Premier have referred to the innocence panel. How should that panel be constituted? How should it operate when set up?

Mr STRUTT: First of all, I think the innocence panel as proposed by the Minister for Police and the Premier is actually a fairly marginal sort of development anyway. I do not think it is terribly important. The case for DNA exonerations would be better pushed by, for instance, the UTS innocents project which has recently been announced, or the various types of innocence projects that the innocence panel was allegedly modelled on that are in the United States of America. They are not government bodies. I think the if the Government were sincere about wishing to realise the potential of DNA evidence to exonerate people there would be a lot more in the legislation about guaranteeing the rights of those convicted to access not just evidence taken from their own body, as is currently the case, but crime scene evidence without which evidence from their own body is irrelevant. There is

nothing in the Act that guarantees prisoners access to crime scene evidence that might exonerate them. If the Government did that, that would be far more useful.

With regard to the panel, I can see why a panel, for instance, might have a good basis for, say, developing procedures for evaluating that kind of evidence and making recommendations. But the way it is currently formulated, it seems to me, that with the exception of the privacy commission virtually everyone on the panel has got a stake in not seeing current convictions overturned. A lot of those convictions will probably have been obtained by either a deliberate or negligent malpractice on the part of, say, police or the Director Public Prosecutions so we cannot really expect them to be enthusiastic about overturning those convictions. It seems to me that a lot of victims are really wanting closure; finality. I think, 10 or 15 years down the track from a serious crime, a lot of victims will be very reluctant to open the question again as to whether the right person has been sent to gaol.

CHAIR: To the best of my knowledge the membership of the panel has not at this stage been identified or announced.

Mr STRUTT: No, I am basing my understanding both on announcements that have been made by the Minister for Police and the testimony he gave in the police estimates committee as well. My understanding is that the formulation of the panel is meant to be a person from the Director of Public Prosecutions, the police, victims and the privacy commission.

CHAIR: The Law Society gave evidence to this Committee last week and told us that it would like to be included on the innocence panel.

Mr STRUTT: It seems to me that there should be someone from the legal profession who is likely to be defending, as opposed to prosecuting, people, so certainly it is a good spot to look. Someone from Legal Aid ought to be able to estimate the likely cost of testing and evaluation of that evidence, et cetera, and what assistance might be required; also, perhaps someone from Treasury or Premier's Department could work out appropriate matters of compensation when these cases actually go through and people are released. As I said, I think these cases are better pursued by bodies independent of the Government, for example, the University of Technology Sydney [UTS] Innocence Project.

The Hon. JOHN HATZISTERGOS: I cannot see why a representative of the Treasurer or the Premier should necessarily be a member of an innocence panel. It would seem to me that their decisions would flow from the decision of an innocence panel. I would hate to have a person's guilt or innocence determined on the basis of costings being done by Treasury or Premier's Department, as to whether it would be cheaper or more expensive to keep them in or let them out.

Mr STRUTT: I think the police Minister has made it clear that the panel is not meant to be determining guilt or innocence. I would certainly suggest that, if it were, what you say would be true. The impression I am getting increasingly is that its role is more to oversee some of the administrative and intersectorial potential privacy problems and things like that that might flow from these cases.

CHAIR: Would it be your view that an innocence panel, when established, should be set up administratively or should it be subject to special legislation?

Mr STRUTT: I do not think the panel should require special legislation. I think that the legislation needs to be modified so that cases likely to go before the innocence panel can clearly be done, and that is not a matter of some kind of executive decision as to whether are they will allow this prisoner to be tested but will not allow that prisoner to be tested. I think that ultimately that should probably be a matter for the court.

The Hon. JOHN RYAN: I note that you have drawn attention to the fact that clause 87 of the Act states:

> If an order is obtained under section 75 for the carrying out of a forensic procedure on a serious indictable offender and the offender's conviction is quashed after the making of the order, the police officer who obtained the order must, as soon as practicable after the conviction is quashed, ensure that any forensic material obtained as a result of the carrying out of the procedure is destroyed.

Are you aware of any inmates in New South Wales correctional facilities who have refused to voluntarily consent to procedures in order to one day possibly benefit from the capacity for forensic material to be destroyed in the future?

Mr STRUTT: I certainly know of some that have resisted it. My understanding is that the ones that specifically said that they would not give consent—the ones I am aware of from my most recent knowledge—still have not been tested. That is either with or without consent. Some of them have been subject to various penalties, though. I also know of at least one prisoner currently in Lithgow gaol, who I expect will be probably one of the early cases of DNA-based exoneration to be considered by the innocence panel or whatever.

He intended to not give his consent, because it would have resulted in him losing the right to have his entry removed from the DNA database—prisoners will only retain that right under the current maldrafted legislation if a court order has been obtained for the taking of their DNA. If they provide a DNA sample by way of consent or because of a police-ordered test, they do not have the right to have their entry removed from the database if their conviction is later overturned. I know of at least one prisoner who intended to hold out for a court order, but at the time he was asked to consent he felt so physically intimidated by the presence of a large number of police officers and prison officers in the testing area that he decided to consent anyway.

CHAIR: Was this in New South Wales?

Mr STRUTT: Lithgow prison.

The Hon. JOHN RYAN: Are you aware of any inmates who may have intended to have the test taken in such a way that they could take themselves off the database in the future if they were demonstrated to be innocent—who refused to voluntarily consent to a test—who have, as a result of that, lost privileges within New South Wales correctional facilities because they wanted to view of our sample as a result of an order?

Mr STRUTT: I know of at least three prisoners specifically who have lost privileges, being reclassified or transferred to higher security prisons often in inconvenient locations for them, because of where their families are located et cetera. Yes, I do know of cases like that.

The Hon. JOHN RYAN: Are you sure that the reclassification or transfer was the result of their refusal to participate in a DNA test?

Mr STRUTT: If you ask Corrective Services—and I have done in a couple of these cases—they will say, "Oh, no. This prisoner was reclassified as a result of an intelligence report that we received and decided to look at because he had refused DNA testing. It made us think a bit." I think that is testimony to the sort of self-incrimination that can come from the consent procedure that I believe that Dr Gans has spoken about a fair bit. For instance, I know of one prisoner—who I believe has made a submission to this Committee—who refused consent, and the prison officer who sought to obtain consent from him made the outrageous claim that he was involved in numerous other crimes for which he had not yet been detected, and that is why he refused to give a DNA sample. It was like the classic verbal. That was taken as being true by the prison officers, and as a result of that he was reclassified and transferred.

In another case the reason given for reclassifying and transferring the prisoner related to events that had happened more than six months before, but in fact he was reclassified and transferred the day after he refused to consent to a DNA test. I would suggest that the prisoners themselves are in no doubt whatsoever as to the reasons are they have been penalised. More importantly for Corrective services, a lot of the other prisoners they are in contact with have no doubt as to why they have received that sort of treatment—even though I am sure that Corrective Services would come up with other reasons for any one particular case.

The Hon. JOHN RYAN: Are you aware of any standard procedures within Corrective Services relating to how many prison officers will attend when the sampling procedure occurs?

Mr STRUTT: We are talking about attending in the same room. I believe there are standard procedures. It might be as low as half a dozen, or perhaps even less. Certainly I have heard reports that large numbers of prison officers are often standing immediately outside the room, and that prisoners have been told that if they do not consent to a test—I am quoting from one letter now—"I've got 16 to 18 Corrective Services officers on standby, ready to make sure that you do." So, yes. I am aware of physical intimidation with regard to the presence of those officers.

The Hon. JOHN RYAN: Is it common for Official Visitors to be present when tests are taken?

Mr STRUTT: I am not aware of that. I have not spoken to any prisoners who have mentioned that Official Visitors have been present when tests have been taken.

The Hon. JOHN RYAN: Do you think there is a role that Official Visitors could play in, perhaps, reducing the level of intimidation that prisoners might feel, to ensure that the consent is genuine?

Mr STRUTT: I think there is a good case for having them, especially if they received adequate external support, which up until now they probably have not; they have probably been subject to intimidation, if you like, by Corrective Services as a lot of the prisoners have, but I think that with the Inspector-General's position at the moment there is good reason to think that that is going to change. Prison visitors could probably act as interview friends with a fair degree of effectiveness if and when they are fully brought under the wing of the Inspector-General of Corrective Services.

The Hon. JOHN RYAN: While on the subject of interview friends, you indicated in your submission that there were specific difficulties for inmates with an indigenous background obtaining interview friends that are provided for them under the terms of the Act. What you care to elaborate on that?

Mr STRUTT: There are a couple of the areas where I have been aware of problems. One is that, at least in Goulburn prison, a number of Aboriginal prisoners have been directly intimidated by other prisoners. The other prisoners have been incited to intimidate them, I believe, by the fact that ATSIC prisoners can get interview friends whereas Pacific Islander prisoners cannot. There is some sort of racially discriminatory provision in the bill. People are basically using that and are involved in, sort of, like splitters and racially discriminate. Anyway, it has been explained that the way it is administered in Goulburn has created racial tension which has led some Aboriginal prisoners to waive their rights. Particularly, I have also heard complaints from people that, first of all. they are told they will have to pay for the interview friend.

Often the person they may have in mind is, say, a family member who might live a fair distance away and there would be cost involved in getting them there. Then there is the problem that the test can be rescheduled without notice. If a family member comes on one day the test may be rescheduled for another day; also, they could be refused entry to the prison as being unacceptable. No reason has to be given for that. It can essentially be done arbitrarily. Basically, prisoners run the risk of putting up a fair amount of money for no reason. I think a lot of them decided not to exercise their right to getting interview friends because of that.

The Hon. JOHN RYAN: Section 56 of the Act provides for some limitation on the number of police officers who may be present during the carrying out of the forensic procedure. It indicates that it must not exceed that which is reasonably necessary to ensure that the procedure is carried out effectively and in accordance with the Act. Do you think, in the circumstances of inmates in New South Wales correctional facilities, that the presence of prison officers has pretty much the same effect as the presence of additional police officers, and that some distinction might need to be made that essentially refers to people who might be in uniform and have some sort of custodial or police function?

Mr STRUTT: Absolutely. I would suggest that within the New South Wales prison system the distinction for the purposes of this sort of thing between police officers and prison officers is largely arbitrary and abstract, that the same sorts of provisions that apply to police apply to prison officers. The other thing is that everyone would be aware that the Ombudsman has to monitor how

police conducting themselves under this Act. That is not something that happened in Victoria. What we have seen is police being involved in the abuse of prisoners during testing. That is something you would have seen if you watched the SBS program about that.

CHAIR: My understanding is that program was based on events that occurred in Victoria.

Mr STRUTT: Yes, that is what I am saying. In Victoria the police are not subject to the oversight that they are subject to in New South Wales. What you see is police being involved in the abuse of prisoners during testing. In New South Wales police are subject to that sort of oversight and the procedures involving police can be videotaped in prison and generally are, but prison officers are not. I would suggest that the events that occurred in Victoria are not being carried out by police in the New South Wales prison system; they are being carried out by prison officers, and not within the formal period or location involving consent and testing but in the period leading up to it.

The Hon. JOHN RYAN: Has your organisation had any specific complaints that would substantiate such a claim?

Mr STRUTT: It is my understanding that a couple of months ago—I believe it might have been the middle of May—at least one prisoner was transferred from John Moroney prison to Bathurst gaol. He had refused consent for a forensic procedure. After that what was supposed to happen was—and he was told this would happen—that he would get a 10-day or one-week or whatever cooling off period; that he would be asked again; and that the police could order a compulsory test, blah, blah, blah. What actually happened is that people burst into his cell in the middle of the night and transferred him to Bathurst gaol. I gather there was a fair amount of violence associated with that.

The Hon. JOHN RYAN: The forensic procedure is largely one that is going to assist police. It is hard to see how Corrective Services would be interested in the outcome of the forensic test or have much do with it, other than perhaps that it probably represents something of a disruption to the normal routine of the prison. When would Corrective Services officers be in any way interested in assisting the police in the manner you have suggested—if one could call that "assistance"?

Mr STRUTT: I would prefer not to speculate about why. I suggest there is evidence that they do. ICAC has investigated the use of prison informants that seemed to be extremely dodgy indeed in propping up core police cases. Anyone familiar with the Hilton Hotel case will know that that is done. I would suggest the real reason is because we are talking about thousands of prisoners in the New South Wales correction system. Of course they want to do it on a production-line basis to try to increase efficiency; they want all prisoners to behave in exactly the same way and they bring a fair amount of pressure to bear on prisoners who might provide an example for other prisoners to not act according to their preferred model of how people are tested, according to the convenience of the Department of Corrective Services.

The Hon. JOHN RYAN: You have referred in your submission to a brochure, which has apparently been distributed by the Department of Corrective Services, which details penalties under section 75 under the bold-type heading "What happens if I refuse?"

Mr STRUTT: That is right.

The Hon. JOHN RYAN: What is your concern about that?

Mr STRUTT: I should point out that that particular brochure has now been corrected, but I believe the original version of the brochure is still available. I do not know whether it is still being distributed, but it is still available in New South Wales prisons. But my main concern is that certainly a lot of prisoners who have phoned and written to us to ask about their rights with regard to DNA testing have got the impression from that brochure that to refuse consent to a voluntary test could possibly result in 12 months extra imprisonment, and that is certainly not the case under the Act.

The Hon. JOHN RYAN: Does your organisation have a copy of the brochure in its original form?

Mr STRUTT: As a matter of fact, I did bring one along, which is the original. Actually, I think I may have brought another original, but the original copy of that brochure is already part of the paper copy of consent by coercion, which formed part of my submission as one of the appendices. I have another brochure here which is also of the same ilk.

The Hon. JOHN RYAN: My final question concerns a matter that is not necessarily related to your organisation, but I notice one of the last issues you have referred to in your submission concerns the rather unfortunate case of the death of a baby in a motor vehicle.

Mr STRUTT: Yes, that is one part of my submission that will require a minor correction. I think I say in my submission that it happened early this year. It actually happened last December, so, technically, it was not under the provisions of the current Act.

The Hon. JOHN RYAN: Your concern there was that the family of the victim was keen to keep the victim's body intact, so to speak, and when they discovered that one of the organs had been removed from the body they attempted to recover that. You have said that there ought to be some procedure whereby they might also recover the DNA material, and that in your view it is possible that the baby sample and data will be treated as a volunteer and used for unlimited purposes, that it may be possible that that baby's DNA remains part of the statistical profile but it will continue to be identified. Is that your understanding?

Mr STRUTT: Yes. I imagine that if it continues to be identified, it will not go onto the statistical index. Another point I want to make is that it is absolutely unnecessary to keep profiles on a statistical index. Statistical indexes of DNA frequencies are available on the Internet all over the place, and they do not contain individual profiles. They contain breakdowns of frequencies for large numbers of people, and you cannot extract individual profiles from them. There is no real justification for keeping those profiles on a statistical index.

As I was saying, my understanding of the reading of the bill is that the baby would be sampled; it would be a forensic sample taken from a deceased person whose identity is known, and I believe that would cause it to be classified as a volunteer for unlimited purposes, and there would be reason to believe that it could stay on the database indefinitely. I would have to review the Act to be sure that there is not some sort of time that whereby that sort of sample should be taken off.

The Hon. JOHN RYAN: Is Justice Action in receipt of any specific complaint from the family concerned?

Mr STRUTT: Not related to the actual DNA, no. We did receive a complaint with regard to the missing organ.

The Hon. JOHN RYAN: You received a complaint with regard to the missing organ, so you had some contact with the family?

Mr STRUTT: Indirectly, yes, through a third person.

The Hon. JOHN RYAN: Do you think it is an anomaly that a person who is ordered to give a sample can have his or her information removed from the database, but a person who consents voluntarily cannot?

Mr STRUTT: I certainly think it is an anomaly, but I think that, the way the laws are currently formulated, it is probably not important anyway, because basically all the data on our database would be shared with CrimTrac, and that would be shared with other MCCOC-compliant jurisdictions, which includes Tasmania. Tasmania has no provisions for ever omitting the information from the database. Because Tasmania can then share data with us, basically all of that information would be available to New South Wales police, whether or not it is actually stored on a New South Wales database.

The Hon. JOHN RYAN: Would you explain what CrimTrac is?

Mr STRUTT: CrimTrac is the Federal body concerned with—it has quite a few concerns, but the area concerned with maintaining a national database of DNA samples and facilitating the exchange of information for investigation between police forces is to do with the national criminal identification database, which CrimTrac has developed and which started operation in late June I believe.

The Hon. PETER BREEN: The Committee has heard evidence from Ms Wilson-Wilde from the Police Service that only five persons have refused to consent to DNA sampling. Is that consistent with your information?

Mr STRUTT: It depends on what you call consent. My understanding is that only a handful of people—and five sounds about right to me—went right through the procedure to the point of taking a court order. In some cases that was to with their own status as a non-responsible person or something like that. In other cases, people were even shaved down so that police could not take hair samples, so that a blood sample had to be taken. My understanding is that far more than five prisoners have been subject to compulsory police hair sampling because they have refused to consent to a buccal swab, and that at least a number of prisoners have refused to consent to testing, and as yet—in some cases as long ago as January—they have not been tested. Some of the people have made submissions to this inquiry, and to the best of my knowledge they still have not been tested, so they would not be appearing in those figures.

The Hon. PETER BREEN: Do you know of any proposals to review the testing procedure? We were told that so far about half the prisoners have been tested. Are you aware of any proposals to review the testing procedure?

Mr STRUTT: I am aware that Corrective Services have been finetuning it in an ongoing way. For instance, a change to the brochure is one of those. I believe they have changed the way in which prisoners are handling the testing in prisons and some aspects of how the education is done, but I am not aware of any major review of how testing is going to be done. One change is that when they discovered that they were testing Federal and ACT prisoners within the New South Wales system without the appropriate legislative powers to do so, they introduced measures to stop that from happening. I received an inquiry from a prison officer just last week about the legislation and procedures regarding that. I should point out that prison officers phone me for information about DNA legislation, as well as prisoners. There still seems to be some confusion amongst prison officers as to whether Federal and ACT prisoners should be tested, but it is my understanding that they should not be.

The Hon. PETER BREEN: Are you aware of any proposals to inform prisoners who have not yet been tested about issues surrounding consent and about their rights to obtain a court order?

Mr STRUTT: No. I certainly know that prisoners have been informally told that, "There is no way we are going to let anyone get a court order for this." But, no, I am not aware of any specific procedures. As I said, I think with some of the areas of consent, the wording of consent for instance, the people who will be giving the information and things like that, have been finetuned as the testing has gone on, but I am not aware of what you might call a version change in the procedures.

The Hon. PETER BREEN: Would you agree with Dr Gans' evidence to the Committee that consent as it stands ought to be abolished and that it ought to be replaced with orders in all cases?

Mr STRUTT: Yes. Personally, I would suggest that consent as it currently exists within the New South Wales prison system is farcical. I would suggest the vast majority of prisoners who have been tested should not be tested anyway, and I would suggest that in relation to the much smaller minority of prisoners in respect of whom there are perhaps good reasons for DNA testing them, it should not really be a matter of whether they give consent or not, because it will not be an issue; it will be farcical one way or the other, and it is only likely to complicate later legal proceedings that might flow from it.

CHAIR: When you say it is farcical, does that mean that you believe no true consent has been given?

Mr STRUTT: They are told right from the start, "If you don't consent, you will be forcibly tested." What sort of consent is that? Quite apart from any threats or anything that might be held over them.

The Hon. PETER BREEN: Earlier you expressed a view about getting orders from magistrates rather than police in the case of suspects in custody. What about in the case of prisoners? Do you think that the orders in those cases would be adequate if they were police orders?

Mr STRUTT: No. For a start, the way it is being done for prisoners, typically there is not a police investigation involved anyway. So it does not seem to me that the police really have any input into whether the prisoner should be tested or not. The police are involved at the moment because it has been decided that they are the ones to administer it, but I do not think that there is anything inherent in the way the police carry out an investigation that makes them particularly suitable to either make the orders or carry out the testing.

The Hon. PETER BREEN: But a police order would be an independent assessment of a particular situation, which would be removed from the prisoner involved?

Mr STRUTT: One would hope so. But I can also see plenty of potential for abuse of that, particularly where perhaps a prisoner is trying to be encouraged to inform on another prisoner with regard to a case that the police are currently prosecuting. I can see why, for instance, the threat of DNA surveillance in an attempt to match them up with crimes that might not yet have been detected might be abused.

The Hon. PETER BREEN: Would that be any different, though, if a magistrate were assessing the situation and the magistrate were making the order?

Mr STRUTT: I would hope that the magistrate would not be involved in attempting to get prisoners to give potentially false informant information to prop up police cases, so I would hope that that would not be the case.

The Hon. PETER BREEN: My concern from a civil liberties point of view is that the magistrate could simply rubber stamp requests for orders, and then you would be right back where you started.

Mr STRUTT: Indeed. I think if there were evidence that that was happening under a procedure like that, it might be good grounds for reviewing the criteria and the reasoning that magistrates are expected to apply to each situation. I think we have seen a similar sort of thing in Victoria, where magistrates were initially rubber stamping them with what amounted to bench warrants. Eventually there was a test case and it was decided that that was completely inappropriate, and now they are expected to make the decisions in open court.

The Hon. PETER BREEN: You expressed a view earlier in relation to Dr Gans' evidence concerning suspects in custody. What about the situation of police carrying out an investigation where there are no suspects and yet, using the example Dr Gans gave of an apartment building, the police might want to seek an order or adopt some other procedure for sampling people in an apartment building? Would you see any avenue for doing that under the legislation?

Mr STRUTT: It seems to me that the procedures that we expect police to undergo now—for instance, if they want a search warrant for a house—are somewhat akin to that. I would expect to see similar procedures for, say, mass screening of a relatively small number of people, maybe five times as many people as could have been involved in the offence. But by the time you are getting into major disruptions, of, say, a whole town, like Wee Waa, or a very big apartment building, it seems to me that not having a suspect is one thing, but declaring that perhaps the 300 occupants of an apartment building or the 300 male occupants of a country town are all suspects and proceeding from there is inappropriate. Even with crimes that are extremely difficult to detect, I would hope that police would have better grounds for narrowing the list of suspects than would be implied by, say, getting an order to test 100 or so people. For instance, I believe that in Wee Waa they had much better grounds for narrowing the suspects than were generally raised when they were requesting the mass testing.

The Hon. PETER BREEN: I take it you do not agree with the Wee Waa testing?

Mr STRUTT: No, I do not. I think it was a PR exercise and it was very cynical.

The Hon. PETER BREEN: Last week we heard evidence from Ms Wilson-Wilde to the effect that people in the Wee Waa testing procedure were able to remain anonymous. They were given questions that they could answer in the privacy of their homes and, according to the evidence we received, there was no way of attributing the answers to those questions to a particular individual. Are you aware of that?

Mr STRUTT: I am aware of Ms Wilson-Wilde's evidence. I was not aware before then that the testing could be done in people's actual homes. But that would only slightly reduce my concerns, because I think in a town like Wee Waa—and I do have some familiarity with Wee Waa—it is reasonably likely that that information would tend to get out, even if it is only in the form of a rumour, if someone had refused to test.

The Hon. PETER BREEN: Certainly anonymity would be a safeguard.

Mr STRUTT: Against vigilantism if they had not found the person who committed it and, say, four or five people in town were known to have refused the test, that would provide some safeguard. But, as I said, in cases like Wee Waa I do not think it is a strong guarantee; it is a better guarantee.

CHAIR: How would they have been known to have refused the test if the testing in the main was done in the privacy of individual homes?

Mr STRUTT: I would suggest that most people do not live alone. In a town like Wee Waa there are other people who might also be in the privacy of the home who might pass it on. I believe that the police involved in the testing were brought in from outside, but some of them would have varying degrees of association with police in Wee Waa and they might just happen to mention who acceded to testing and who did not to the local police and it could easily get through the town in that way as well.

The Hon. JOHN HATZISTERGOS: I am not clear on your objection to the police taking samples from individuals. From the point of view of contamination, it would seem to me that that would be a relatively easy matter to disprove. If there was contamination from a suspect then obviously the suspect could be resampled.

Mr STRUTT: Yes, unless it was something like a scraping taken from underneath a fingernail that was meant to show the victim's—

The Hon. JOHN HATZISTERGOS: Fair enough, but from a buccal swab, which is how the majority of these examinations would take place on individuals, you would be able to retest and establish whether in fact the police sample was accurate or not. That concern does not seem to trouble me that much. But you seem to say that a voluntary sample is only voluntary because the individual, if he refuses to volunteer, can then be compelled. A number of steps would have to be taken under the Act before that can actually occur. For example, in the case of police, a suspect has to be under arrest. Obviously, the police have to have amassed evidence before they can take that action. The person cannot be a child or incapable person. There have to be reasonable grounds to believe that the suspect has committed an offence or another offence.

Mr STRUTT: Or any offence, or may not have committed.

The Hon. JOHN HATZISTERGOS: There have to be reasonable grounds to believe that the forensic procedure might produce evidence tending to confirm or disapprove a suspect has committed the offence and the carrying out of the forensic procedure without consent is justified in all circumstances. Bear in mind, it has to be a senior police officer under the legislation. So the police officer has to go through a number of steps before the test can be ordered. The most important of those, of course, is that the suspect has to be under arrest. Why are those safeguards inadequate?

Mr STRUTT: I would certainly suggest that there is no trouble in arresting a suspect if that is what is required. The suspect does not have to be under arrest for the crime that is being investigated. If you talk to representatives from Aboriginal legal services I think you will find that trifecta-type charges can be used to arrest suspects under a wide range of circumstances. That test has some validity but it is fairly weak. The majority of the other tests that you mentioned are essentially empty in that basically they will always be passed but they may raise some procedural questions at the time that the evidence is being admitted in court about whether the t's have been crossed and the i's have been dotted. It is a three-part test: the crime concerned, any other crime related to the crime concerned—any crime whatsoever virtually. It might produce evidence which would tend to prove or disprove. I would suggest that is a null test.

The Hon. JOHN HATZISTERGOS: All of those tests can be the subject of an examination at trial on a voir dire to determine the admissibility or inadmissibility of the material in question.

Mr STRUTT: The point I am making is that those tests would always be passed because—

The Hon. JOHN HATZISTERGOS: They may be passed but they may not get the evidence in if the court is satisfied that it is improperly or illegally obtained and the balance of convenience does not justify the evidence being admitted, right?

Mr STRUTT: Yes.

The Hon. JOHN HATZISTERGOS: So it seems to me that there is a safeguard there. The fact that the material may be obtained does not necessarily mean that it gets admitted.

Mr STRUTT: I would emphasise that the test that we were just talking about—that is what the court I presume would have to consider—is virtually impossible to fail unless it is by some sort of procedural glitch as happened recently in which rather than the senior police officer involved the secondary police officer ordered the request so technically they breached the procedure. But I would suggest that it is possible to technically fail those tests but I do not think that they are real tests after the consideration of the court and therefore they are not anything that can give the court a basis for deeming the evidence inadmissible.

The Hon. JOHN HATZISTERGOS: You suggest that in the United Kingdom the situation was somewhat different.

Mr STRUTT: In what respect?

The Hon. JOHN HATZISTERGOS: Taking the samples of suspects. Is that what you were saying?

Mr STRUTT: Yes, my understanding is that UK police, particularly now I believe recent amendments to the Act by Jack Straw have given police far more power to order samples from suspects.

The Hon. JOHN HATZISTERGOS: As I understand it, it has not taken away the power of superintendents in the UK to order samples to be obtained. Has the situation changed? I am only referring to a briefing paper that we were given by the library.

Mr STRUTT: No, I am not aware that situation has changed. I do not particularly endorse the way the UK approaches the questions of consent or compulsory testing.

The Hon. JOHN RYAN: The Department of Corrective Services has provided to us a copy of a brochure that it uses that it concedes has been amended as a result of the complaints from a community organisation—I imagine it was yours?

Mr STRUTT: Yes.

The Hon. JOHN RYAN: Have you seen the new brochure and are you satisfied with how it is written?

Mr STRUTT: I have seen the new brochure. I saw that version last night for the first time. There is an earlier version of it. There were still a couple of minor concerns that I communicated to the people in Corrective Services concerned but I have not actually gone through that version yet to see whether the concerns that I have communicated have been addressed. I concede that that brochure is a big improvement on the original brochure or the most recent version that I have checked. But I would also point out that the original brochure still seems to be getting distributed in prisons.

The Hon. JOHN RYAN: The current brochure refers to what happens in regard to an appellant, and indicates that if a person's appeal is successful—that is, he is no longer convicted of a serious indictable offence—then the Department of Health will be directed to locate and destroy the physical material, for example, the saliva sample from which the DNA profile was obtained. The appellant's name is linked to the profile. After a successful appeal the link and the appellant's name will be deleted from a searchable database and so on. Do you believe that to be correct advice?

Mr STRUTT: That is one thing I have to check. I have seen quite a few statements—both that one and coming from the DAL, also similar statements coming from CrimTrac, where they say that they will actually destroy the samples. Certainly neither the State nor the Federal legislation requires the sample to be physically destroyed. Perhaps cynically I have a suspicion that when they use "destroyed" there they are using it in the same sense that it is used in the Act, which I consider to be deceptive. It will not really be destroyed; it will be de-identified but legally destroyed.

The Hon. JOHN RYAN: Does not your capacity to have your sample de-identified only exist for people who are subject to a court order?

Mr STRUTT: That is true too, and that is another thing I will have to check. My understanding is that the Department of Corrective Services largely are not testing people who are on appeal until after the appeal is complete at the moment, but I could not guarantee that is always the case.

The Hon. JOHN RYAN: The submission of the Department of Corrective Services says, "The department has produced a video and a brochure on the law relating to forensic procedures and these educational resources have been available to inmates since last year." Have you seen the video? Are you satisfied with its contents?

Mr STRUTT: I have not seen the video. I have certainly seen the brochures. From what I have heard from prisoners who have seen the video, they believe that some of the material is misleading as well, but not having actually seen it myself I cannot comment.

The Hon. JOHN RYAN: Has your organisation requested a copy of the video?

Mr STRUTT: No, we have not.

The Hon. JOHN RYAN: It says, "The department's officers have been specifically instructed not to coerce or attempt to persuade inmates to provide a sample of forensic material. At all times inmates are encouraged to seek legal advice should they have concerns with providing a forensic sample. Any inmate who refuses to provide a sample is advised of the procedures that will be followed to obtain the sample in accordance with the legislation." Would you agree with that?

Mr STRUTT: Yes, that is probably all true but not all prison officers seem to be complying with those instructions to not try to coerce inmates. I have had phone calls from prisoners on work release who have been seeking my legal advice with respect to the DNA Acts while they are not in the prison because they feel it likely that if they did that from prison their call could be monitored and they could be penalised for it. Whether there is a good basis for them to believe that in their individual case I cannot say, but that is certainly a perception that some prisoners have.

The Hon. JOHN RYAN: The submission of the Department of Corrective Services—I think it is dated early July—says, with regard to the change to the brochure, "The department's brochure was amended in recent times in consultation with the New South Wales Ombudsman. It is anticipated that the revised brochure will soon be in circulation within the correctional service."

Mr STRUTT: Yes, my understanding is that the original brochure is still being circulated in correctional services.

CHAIR: Mr Strutt, you will be aware that the Committee has submitted to you a series of questions, the last of which relates to the Police Service submission to the Committee and various amendments that the Police Service is seeking to the Act. At this stage we have not had evidence from the Police Service. Would you like to comment now, or alternatively take these matters on notice and advise the Committee in writing of your view regarding the amendments that the police are seeking?

Mr STRUTT: I will make some brief comments now. The first amendment, to enable time out for forensic procedures to be permitted at the beginning of the investigative period, is one that I have not looked at hard and I have no particular opinion about that. I have certainly got a strong opinion that the police should not be able to detain people either fully legally or implicitly by implying that they are detained. I have had experience of this myself. It has been implied to me by New South Wales police that I am being detained when in fact there have been no grounds to detain me. I do not think that should be allowed for the purpose of gaining consent, but I do not have any particular opinions with regard to the extra time out, though I would be worried about longer periods in custody and an investigative period in general. To enable a suspect on remand to be treated as they suspect under arrest so that the procedure can be carried out with a court order at any time—

CHAIR: Without a court order.

Mr STRUTT: Yes. I would suggest that it is not necessary. Basically, this person will be appearing before the court for various reasons anyway such as committal hearings and everything like that. It seems to me that it is appropriate for the court to decide, perhaps based on a request from the police, as to whether the person should be forced to submit to a sample. I can certainly see how somebody on bail might be harassed by requests for that. I note in the Act that there is no particular reason for the police not to get multiple samples from somebody. They might say that they did not get enough material in the last sample or there might be a lack of certainty with the analysis. They might go back without really needing to justify why to take repeated samples.

I can see how that could result in the harassment of people on bail. It should probably be similar to what happens with people on appeal. People on remand should be treated in a pretty similar way. If there is a real reason why the forensic evidence might be applicable in a person's case, in the case of somebody on remand, it seems to me that it would be well within the scope and responsibility of the judge or magistrate in the case to make that order. I do not see that the police should be able to arbitrarily order it. The legislation needs to be simplified in regard to information sheets. A lot of information should be included if you are to have anything like informed consent the way the Act currently runs. People who give consent should be told about the possibility for matching profiles off database and that that is not regulated by the Act at all.

People should be told that the data can be shared with other jurisdictions that do not have the privacy and removal of evidence restrictions that apply in New South Wales. People should be told of the availability of forensic DNA, especially in relation to cold hits and the fact that what is called an advantageous cold hit could result in the person being investigated for crimes to which they are not connected; this has already happened in the United Kingdom. People should be told that information taken from the samples could reveal family relationships of which they are not aware, for instance, two people supplying samples and believing themselves to be full brothers. However, a forensic scientist analysing the sample could deduce that the two people have different fathers, of which they might not be aware. People should be told that they will never regain control of their samples or their profiles. Even if their name is removed from the database and the stuff is de-identified the Government or police, if you like, would keep that material indefinitely. It is important that people realise that before they consent to this procedure.

CHAIR: Would you like to comment on an interview friend?

Mr STRUTT: I think if an interview friend is going to be excluded, the police should be forced to record their reasons for reasonably suspecting that the interview friend will obstruct the

process. If it is later found that those reasons are reasonable or justified, the forensic procedure should be declared illegal and the material and data taken from it should be destroyed.

(The witness withdrew)

DANIEL BREZNIAK, Lawyer, Level 6, 82 Elizabeth Street, Sydney, sworn and examined:

CAMERON LIONEL MURPHY, Electorate Officer, Level 12, 70 Phillip Street, Sydney,

SHELAGH MARIE DANIELS, Clinical Team Leader, 174 Broadway, corner Shepherd Street, Broadway, and

JOHN CHRISTIAN MURRAY, Policy Officer, Suite 317, LMB 18, Newtown, affirmed and examined:

CHAIR: Did you each receive a summons issued under my hand in accordance with the Parliamentary Evidence Act 1900?

Mr BREZNIAK: Yes I did.

Mr MURPHY: Yes.

Ms DANIELS: Yes.

Mr MURRAY: Yes.

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

Mr BREZNIAK: I am.

Ms DANIELS: Yes I am.

Mr MURRAY: Yes.

Mr MURPHY: Yes.

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

Mr BREZNIAK: I appear as a member of the committee of the Council for Civil Liberties.

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

Mr MURPHY: As President of the Council for Civil Liberties.

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

Ms DANIELS: As the team leader for CRC Justice Support.

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

Mr MURRAY: As founding member of the Positive Justice Centre.

CHAIR: If any of you should consider at any stage during your evidence that in the public interest certain evidence or documents you may wish to present should be heard or seen only by the Committee, the Committee would be willing to accede to your request. I invite such of you as wish to do so to make a brief oral submission to the Committee. As far as the Council for Civil Liberties is concerned, Mr Murphy could you briefly make an opening statement?

Mr MURPHY: Certainly. I will sum up some of the issues we want to talk about today. The first problem we have with the Crimes (Forensic Procedures) Act is the ability for third parties or others to use the DNA. That use is not precluded under the legislation and it encourages other bodies, such as the police in other jurisdictions and private investigative bodies such as insurance companies, to use the DNA information in jurisdictions in other States or territories in which there is not the same level of protection that New South Wales may provide.

The second problem is that information provided to prisoners in relation to the ability to remove forensic samples of DNA needs to be more comprehensive. At the moment prisoners are told only about the procedure for obtaining the DNA, they are not provided with information about how the DNA will be stored and that their profile is kept on record for ever. Should the legislation change in future and the prisoners provide consent as opposed to an order having to be sought, they may have an ability to remove the DNA later. At this stage there is no way to remove the DNA profile, but if that opportunity were given later there may be a problem with the fact that they have provided consent.

Relating to the storage of DNA that has been collected from crime scenes, there are many concerns. It is not so much a problem with the DNA which has been collected from prisoners, but we have received complaints that evidence from crime scenes is stored in plastic bags that are in files and attached by sticky tape to bits of paper. It is dubious whether that DNA information can be accurate. We understand that DNA has to be stored in controlled conditions, and that has not taken place in the past for all DNA; although it might be the case now. This is also the DNA that the prisoners will be matched to under the profiling scheme.

Under the current legislation there is potential for discrimination against prisoners and their descendants through DNA forensic material being used by third parties. Perhaps there is an ability to do so through profiling. We received an email from the United Kingdom, from someone who described an insurance company accessing DNA forensic material in order to investigate an insurance fraud. The prisoner was cleared of the insurance fraud but in the course of the investigation the insurance company decided to test the forensic material for other things including genetic diseases. I understand that the prisoner had a propensity for Huntington's disease and was a carrier of it. The insurance company denied life insurance to the prisoner's daughter of the basis that she could develop Huntington's disease. At the moment this is not confirmed. We have contacted the United Kingdom to seek further information about it. But certainly the potential is there if the DNA is given out to third parties.

The ownership of the database and DNA information is unclear. Prisoners do not seem to retain ownership over their DNA samples. It seems that either the Government or the courts do, certainly the Government through the Police Service. In the future a government that is cashstrapped could sell DNA to fundraise. There is nothing to prevent this under the legislation, it seems. Prisoners have complained to us about duress in the DNA samples being taken. These issues include threatening them with increased security ratings, transfers or reductions in privileges. Under the current legislation, if inmates want their own medical practitioner present to remove the blood sample or be there while it is being done, they have to incur the cost themselves. Prisoners just do not have the capacity to do that. It is not an option for them.

I will now run through some of the complaints about duress that we have received. A prisoner in the Lithgow correction centre says, while waiting to be called into the forensic procedure, "I was warned by the Department of Corrective Services officer that police were removing hair samples from inmates on the spot for not consenting". The prisoner goes on to say, "Under the circumstances I unwillingly consented to this mandatory DNA forensic procedure to avoid any conflict between the officers and myself as well as avoiding any future retribution by the Department of Corrective Services that would have resulted from any conflict with Corrective Services officers". He also goes on to say that a copy of the consent form was given and the only part read out was the reverse side. The reverse side was the only information the police read out from the form.

We have many of these complaints. Another prisoner was at Silverwater. He was told that he was to lose his C2 security rating and placement at Silverwater and be moved to Cessnock and have the security rating increased to C1. He says that after accepting that that was the case he was let out of a holding cell where he had been held for the past eight hours to consider his position. He asked for a copy of the Act to find his rights. He said a copy of the Act was made available in the library the following day, but he was not made aware of this until a few days later when he was already moved to the MRRC centre in Silverwater.

He was told he could view the department's display video about the procedures but he said, "I could not have possibly viewed the department's display video, because I work seven days a week in

the prison kitchen, was ignorant of the fact that such a video existed until informed by an officer, and the video was played only during working hours". Since that time he was moved from Silverwater works release prison to the MRRC prison within the Silverwater complex. He was called before a case management team and informed that they had been directed by the Acting Director of Classification that he was now to be a B classification. He says all of this arose out of his refusal to give consent for the DNA to be obtained.

We wrote a letter to the Ombudsman about this complaint. The Ombudsman wrote back to us and said that he has decided an inquiry should be made into the complaint, and referred the matter to the Police Service to deal with. It seems to be a case of the police investigating the police. There is not a procedure in place where someone else deals with these complaints. As yet we do not have a response from the police about it. Our correspondence went to them in May this year. We have a whole series of complaints. To give you another example, "Today I was forced against my will to the removal of hair and root of hair from my right lower arm. I had refused the taking of a buccal swab by one sergeant"—I will not name the sergeant—"and he proceeded to inform me what would be done to me if I wished to go on with my complaint, at which point I took his remarks as a direct threat against my person. The cooling off period was not offered to me and I was not in a presence of mind to deal with it otherwise. I did ask to see a copy of the legislation and I was refused the only literature".

The Hon. JOHN RYAN: Is that the report of an inmate?

Mr MURPHY: That is a letter from an inmate to us. He also says he requested a copy of the video taken during the procedure. "I was refused an immediate copy and told to request it through FOI". So, what seems to be the immediate problem is that not enough information is given to prisoners about the procedure, about what their rights are. Not enough information is given to them about the way the DNA information will be stored and that it is going to be kept forever, and there are serious problems about the way police are informing the prisoners that they have a right not to consent, what information they are giving to those inmates, and they are not observing the cooling off period. Inmates feel they are under duress and they have to comply. I think that has serious consequences later if, for example, Parliament was to decide that DNA information should be removed and their profile could be removed from the database. A problem might be posed with prisoners who have consented to having it removed as opposed to those who had orders issued. They are the main concerns I wanted to draw to your attention.

The only other one is the form. The consent form given to prisoners is badly designed. There is a question wanting them to understand they do not have to say anything while the procedure is being carried out but it may be used in evidence, and police are to ask them whether they understand that. Other information is not provided to prisoners about that. They are often not able to have legal assistance or advice on the spot, and prisoners are not consenting on the form but the samples are being taken anyway on the spot. A prisoner has written that he was not consenting but the sample was taken without a cooling off period. So, any suggestion that the police should be able to streamline this procedure any further is laughable, because it seems they are not following the procedure laid down already.

CHAIR: Thank you, Mr Murphy. Ms Daniels, would you like to say something?

Ms DANIELS: CRC Justice Support works with prisoners, ex-prisoners and their families. We have received earlier this year—and also there have been a few over the past few months—a lot of complaints similar to what has been stated here. A lot of the written complaints we have passed on to the Council for Civil Liberties because the CRC is not in a position to be able to follow through and assist with that. One of our major concerns with this is around information regarding storage and information about the keeping of that DNA material for ever. That is something that is not clear to the inmates as far as we have been able to determine. Also, we have had complaints, similar to what has been stated already, that we are not consenting, we are more or less choosing the method of DNA being taken, we are not consenting, we are not been given information around the cooling off period or the right to refuse consent, and so on.

The other side that we get is from family members. More often than not we get family members ringing us about similar things. They are getting second-hand information from their partners or their sons or daughters or whoever from inside saying that their loved ones were forced to

consent to this sort of stuff. Family members also have a lack of information. They do not have access to the videos or written materials or, if they do, it is limited access and limited understanding because a lot of the material is fairly jargonistic, to say the least. It is difficult language for a lot of the clients that we work with. A lot of our clients do not have the greatest education levels, so the written material they do have is limited and does not make a lot of sense. So, we spend a reasonable amount of time reinterpreting the written material, reinterpreting the legislation, which is difficult for most of us to understand let alone family members to understand, especially when they are feeling rather distressed. So, we would like it stated that the families also need to be recognised when giving out information as to what is happening, what are the consequences, what are the issues of consent and so on. I will leave it at that for now.

CHAIR: Mr Murray, would you like to make some brief comments?

Mr MURRAY: Yes, I would. The Positive Justice Centre has concerns about a whole raft of aspects with this system. For example, it seems that once profiles are uplifted to the CrimTrac database there is no chance for New South Wales authorities to seek that these profiles be removed. This has concerns for us through things that went on at Wee Waa. We are concerned with what would take place if police officers ask family members to provide DNA samples in the absence of the suspect. What would take place with those samples? Some of the most major concerns we have are with the inherent dangers in the process with failures, such as false positives. The CrimTrac system says it will be using 10 locations on the DNA strand to make a profile, and that gives them a one in a billion likelihood of two profiles matching, according to CrimTrac. But we know from America and other overseas models that false positives occur in around about one in 100 tests.

One particular North American laboratory was actually getting one in 44 results ending in a false positive. The system is not quite as strong as it is made out to be. The reality is in a very badly or dodgily run laboratory you can have a one in 44 chance of having a match, yet in court they can be saying you have a one in a billion chance of having a match. Those sorts of dangers are inherent and hopefully technology will change to fix that. Those things come from the minor processes that take place to actually produce the final profile. Numerous problems such as profiles not being stored at correct temperatures, contamination with foreign chemicals, and things like that, can do all sorts of damage.

At another level we are very concerned with the innocence panel. It is not up and running yet. We believed it would be running in July and previously. The big problem we have with the panel is its jurisdiction. It seems to be under the New South Wales Police Department. To our knowledge this is not the practice in any other jurisdiction. Innocence panels sit with legal bodies, especially Attorney General's. Where they are not with the Attorney General's they usually run through university departments in law schools and other major bodies. So, this is a departure from traditional process. Currently in New South Wales any allegation that someone has been wrongfully convicted is raised with courts through the appeals process or, where the appeals process has been exhausted, through representations to the Attorney General. We find it concerning that police, who may have had, either through fault or design, some actual role in an unsafe conviction, could then be involved in clearing someone's name. It does not seem quite safe.

The last innocence panel we had, after the royal commission, was run through the legal aid service through the auspices of the Attorney General's Department. We would like to see it rest there. The members on the innocence panel as it is presently constructed wobbly the Department of Public Prosecutions, the police, Privacy New South Wales and the victims of crime. We see that three of the constituents of that panel are probably not the best people to be there. Certainly all of them are involved in the prosecution process. The Positive Justice Centre would feel that for the panel to run properly it should be in the Attorney General's purview, and that public defenders, the Attorney General's Department and numerous other bodies should be represented on that panel. If we are going to have victims of crime perhaps we should have people from the Council for Civil Liberties sitting on it. I cannot see why we should have victims of crime sitting on something that is looking at the fact that a crime was not committed by that person.

CHAIR: Last week evidence was given to the Committee by Dr Jeremy Gans of the University of New South Wales Law School. He expressed himself as being supportive of DNA testing, although he had substantial criticisms. In his view the current legislation is not well drafted; in

fact, he described it as, among other things, a drafting disaster. Have any of you given consideration to the actual drafting of the legislation? Do you wish to express any view regarding that matter?

Mr BREZNIAK: Talk about the drafting of the legislation is not assisted by such expressions as in the police submission: "The forensic procedure implementation team has provided the Division of Analytical Laboratories with a list of rejection criteria". What does that mean? The police have done a submission and have made specific suggestions, much of which on the question you have raised we would like to be recorded as specifically rejecting. They are: part 3, section 10 in relation to the reasonable practicability test; part 5, section 37 in relation to whether police have the power to detain a suspect not under arrest for the purpose of making application for an order; and part 6, sections 54 and 55, which deal with giving the power to exclude a friend in circumstances where police reasonably suspect something. They want that extended and we would like to specifically disagree with that. The others are section 6 of the Act, where the police ask for the Act to be amended so that a person who is a suspect on remand can be treated under this Act as a person who is not on remand and otherwise subject to the Act; and section 6, in relation to the extension of the investigating period.

All of those matters seek to expand and elasticise the Act in ways that we say are unwarranted. For that purpose may I say this: This legislation was passed in order to assist crime detection. It was justified as being put upon prisoners because of the question of high recidivism, that is, it is more likely you will be able to catch suspects because they are prisoners. But the fact is that a lot of crime is committed by people who are not prisoners and who have no previous record. The community has made a decision not to test everyone in the population; it has made the decision to test a section of the population. If that is the case, then the safeguards which are in place are safeguards which are particularly important because we deem the right to test people at large as not being available to law enforcement authorities. We say, from what the president has said, there are complaints about the loose interpretation or application of the provisions.

The Act is being buried in lots of fancy words about implementation teams and rejection criteria. This is all about taking people and getting samples from them, if necessary by force. It is all about an invasion of a person's right to their own body tissues and it is all done because of the greater need in the community to clear up crime. In those circumstances where you have a particular minority of people who are going to be subject to tests which are not available in relation to other persons in the community, then we say the safeguards have to be rigorously imposed. We urge this Committee to not just listen to what the representatives of organisations have to say but to speak directly to those who are tested and those whom our president has referred to who have complaints and see what the reality is of the testing in the correctional institutions. In our submission that requires the Committee to perhaps visit a correctional institution where the so-called implementation teams liaise with the Division of Analytical Laboratories to detect rejection criteria.

CHAIR: In connection with the suggestions made by the Police Service, from which we have not taken evidence in connection with this inquiry, for changes to the legislation, the Council for Civil Liberties would not see any particular merit attaching to any of the suggestions the police make?

Mr BREZNIAK: We are going to support our submission today with a submission in writing going to the precise points that have been raised in that police paper and seek to persuade this Committee that those recommendations made by the police have no momentum and should be rejected.

CHAIR: I refer now to the matter of the innocence panel, to which Mr Murray in particular referred. It is my understanding the Minister for Police has made some public announcement of a general intention to establish such a panel. The Law Society gave evidence to this inquiry last week and urged that we should recommend that the Law Society be one of the bodies represented on such a panel. In regard to the innocence panel, if established, is it satisfactory that it is established by administrative means or is it your view that it should be subject to any statutory provision?

Mr MURPHY: Can I say at the outset that the DNA innocence panel was first promised by the police Minister 12 months ago. He said it would be set up by 1 July this year. That was repeated by the Premier in February this year in *Hansard*. We are now in the middle of August and we still do not have anything and we cannot seem to find out from the police Minister how it is to be constituted

or who exactly is going to go on it. There are serious problems with the panel if it is going to have the people on it that have already been discussed: the privacy commissioner, victims of crime, the Director of Public Prosecutions and the Police Service. In our view it clearly looks like it is stacked. It has people who you could say, apart from the privacy commissioner perhaps, all have an interest in keeping people in gaol. I cannot see the Director of Public Prosecutions or the police quickly acting to overturn a conviction in which they made mistakes that led to someone innocent being convicted.

So, there are real problems with it if it is going to be constructed in that way. Otherwise I think what it needs is a broad representation of people who are actually interested in finding the truth and in dealing with inmates' concerns about their wrongful convictions. So, you need groups, perhaps an indigenous representative group and other groups, who do not have an interest in keeping people in gaol. I am just confounded to understand how representatives of victims of crime could possibly fit into this innocence panel. It needs to be independent. Having it attached to the police Minister, as we have already heard, means it is going to be buried. I do not think it is going to be productive. Frankly, all prisoners who believe they are innocent are entitled to access DNA if it can clear their name. I cannot see how the panel is proposed to work. It seems to be limiting the amount of people who can access that DNA to clear their names. That seems to be the objective. If that is the objective, then it is not a very good idea.

CHAIR: This Committee has a statutory duty to review this legislation, determine how it is working in practice and make appropriate recommendations to the Government. I take it you are saying to the Committee that you are not opposed to the concept of an innocence panel, however, you think it should have a balanced composition as between, shall we say, the prosecution and defence sides, using that in a broad sense?

Mr MURPHY: You need to eliminate the perception of bias. Even if there is not going to be actual bias, there is a perception of bias. You cannot expect people to regard the innocence panel as being independent if you have representatives like the Director of Public Prosecutions on it. They clearly have a perceived interest in maintaining their record of convictions of people. You cannot see it as an independent panel while you have those sorts of bodies represented. The same with the Police Service.

CHAIR: Is that inappropriate though, given that the same criticism arguably could be made of people representing convicted persons? I am not saying they should not be represented, but does the same argument not apply to people who are urging that a conviction could stand or should be set aside as they are both interested in the outcome, are they not?

Mr MURPHY: The difference is that the panel, as I understand it, is about giving people access to the DNA. It is not about making a decision; it is about giving access. There might be a perception that the Director of Public Prosecutions or his representatives will try to limit access. It may not occur, but there is a perception. With other groups you might not have that perception. It is not about making a final determination; obviously that is for the court. It is about access to DNA information.

Mr BREZNIAK: And we would prefer a statutory approach rather than administrative.

Mr MURRAY: I see it in the Attorney General's purview resting with the police as it does as problematic, especially as it is presently going to be constituted. I actually see much more for the innocence panel. What happens if we discover 500 people are innocent and one police officer is responsible for 30 per cent of those convictions? Are we going to ignore that or are we going to send that to the Police Integrity Commission [PIC]? What happens for people who are in custody who are intellectually or mentally handicapped and cannot access it for themselves? If we can say, "This police officer seems to have been a very naughty boy," should we not be then reviewing lots of his convictions or at least the ones where people are not in a position to be able to defend themselves? The whole thing raises lots of interesting questions. I think one of the roles of the panel should be that any outcome that is found and upheld as a wrongful conviction should at least be forwarded to the PIC just for its knowledge.

CHAIR: On another matter, do any of you have any concerns regarding the retrospectivity aspect of the legislation as it applies to prisoners?

Mr MURPHY: We will not comment at this stage. We will put it in writing.

CHAIR: You will make some considered views available to us?

Mr MURPHY: Certainly.

CHAIR: Under what circumstances and with what safeguards would any of you consider DNA testing and the forensic use of DNA to be appropriate? In particular, in what circumstances do you consider it appropriate for a forensic procedure to be ordered or requested on, firstly, a suspect and, secondly, a prisoner?

Mr MURRAY: I guess the Positive Justice Centre would have major concerns with the legislation as it stands whereby it states quite clearly the police can order a test to be done if they believe that it is likely to prove or disapprove that the person is a suspect. That certainly overturns all sorts of traditions in the justice system for them to be able to do that. That is an invasive practice. It just allows them very wide scope. We believe it will show that you are guilty or it will show that you are innocent. It just seems to be way too wide.

Mr MURPHY: The only reason in our view that it should be available is if someone is a material suspect and there is an evidentiary purpose in their conviction for the use of DNA. At the moment we are testing all prisoners because they are prisoners and for no other reason than that they might reoffend or have committed other crimes. That leads to a subjective approach of dealing with crime where you first link someone to the crime and then try to make the facts fit a person. There is no reason for anyone to be taking DNA unless it is of particular importance in evidence. Storing the DNA on a database, as I have said, has got plenty of adverse consequences—it can fall into the wrong hands or be misused or provide other information that is not relevant to solving crime.

CHAIR: From the point of view of the Council for Civil Liberties, are you saying to the Committee that the mass testing of prisoners is inappropriate?

Mr MURPHY: Absolutely. You should only be testing prisoners or other members of the community when it is directly required as evidence for a case or for their conviction. They should not be tested just because they are prisoners. You can pick out segment of the community, for example, politicians and say that every politician should be tested to see if we can link them to any former crime or unsolved crimes that are around at the moment, or keep their DNA on a data base for future reference. It is just arbitrarily picking a group of people. No-one that I know of has done any research into the recidivism of politicians in terms of committing crime.

The Hon. JOHN HATZISTERGOS: Is it any different to what we do with fingerprints?

Mr MURPHY: Yes, fingerprints cannot be used for other purposes. As I have said before, DNA can be misused by insurance companies testing for disease, by people wanting to find out family information from people and there are other adverse consequences from DNA that you do not have with fingerprints. DNA is the most private thing of an individual.

The Hon. JOHN HATZISTERGOS: If safeguards are provided to ensure that that does not happen—

Mr MURPHY: In our view the safeguards are not there at the moment.

The Hon. JOHN HATZISTERGOS: What would be the difference between fingerprints and DNA is there were adequate safeguards to ensure that there was no misuse of DNA?

Mr MURRAY: DNA would be very attractive to medical research companies.

The Hon. JOHN HATZISTERGOS: I am sure it would be. As I understand it, your argument says we picked out a section of the community and why should not the broader community be also the subject of DNA? Why have we identified certain groups for DNA? My response is, is it any different to fingerprinting? If you are arrested you are fingerprinted, and if you have been

convicted of a criminal offence and you have not been fingerprinted you are ordered to be fingerprinted. Is there any difference?

Mr MURPHY: There is a material difference. Fingerprinting is not as informative as DNA. Fingerprinting cannot be abused in those ways. With fingerprinting you are supposed to be able to have your fingerprints destroyed and there are protections in place to make sure that that occurs if you are not convicted of an offence. People know that it has been misused and abused by police for years.

The Hon. JOHN HATZISTERGOS: Is it just the misuse aspect that troubles you?

Mr MURPHY: The main problem is that it is very difficult to prevent that misuse. The second problem is that it is different to fingerprints. It is very difficult for someone to plant fingerprint evidence at a crime scene. It is a lot easier for people to plant DNA evidence, so it is the misuse. But essentially the answer is that there is no reason in a free society why people should be subjected to this. In a free society you do not go around mandatorily taking information and then keeping it on record in case someone does something, you only do it when there is evidence. The other issue is that it subjectively links people to a crime. The first thing that police do when they investigate these unsolved crimes would be to try to link a person to the crime scene. That has the potential to cloud the investigation so it focuses on the person whose DNA they have not seen so instead of objectively looking at it, it becomes a subjective decision where you might try to make the facts fit the person instead of looking at the facts independently and trying to solve it otherwise.

Mr MURRAY: We are not the only persons concerned with this. The Western Australia Department of Health destroyed all their samples of blood taken from babies at birth just because of the fear that it could end up on the system without the child, as an adult, having committed any crime.

CHAIR: A short time ago a comment was made that no study has been carried out—to take the example you gave—of the propensity of politicians to offend or reoffend. However, clearly such studies have been carried out on almost innumerable occasions regarding prisoners. It is an undoubted fact that there is a varying propensity, although a greater propensity, of prisoners to reoffend than the general community. Given that that is the case, is it unreasonable for the purposes of convenience or public policy, shall we say, for DNA testing to be carried out on prisoners as a means of protecting society?

Mr MURRAY: If that argument is to be relied on, I would point out that State wards who are extreme risks of reoffending—as soon as we go through the court process and make a child a ward of the State are we going to take this action?

Ms DANIELS: I would also add that once again when we are looking at recidivists we are going instantly into the committing of a crime, are we then not looking at the issue as to why someone is repeatedly committing an offence, such as not being able to re-establish themselves back into the community, not being able to get accommodation. All those sorts of psychosocial issues are getting lost again. We are going straight from the DNA testing, because they have got a history of reoffending, we are going to go for the reoffenders and not look at the wider issues as to why they are reoffending. That gets lost in this as well.

Mr MURPHY: I endorse those comments and add that you then run into the problem of where do you draw the line? Are we going to allow people to do research to find out if they can identify the criminal gene, for instance? Do we then take action against people based on their propensity to commit crime because we have identified a criminal gene? It leads into all of those areas and the whole press undermines the fundamental principle of people being innocent until proven guilty. What you are doing is, in advance, dictating that a particular community has a higher propensity to guilt so we will treat them differently. I do not know that that is the case, it is just that there is more focus of attention on them and other members of the community.

CHAIR: Is it not the case that DNA technology can exculpate innocent people and establish that they did not commit a particular crime? Furthermore, it has other uses such as identifying missing persons?

Mr MURPHY: Of course it has, and that can be a good thing but the problem at the moment is that the entire focus of DNA testing has been about convicting people. It is expensive and difficult for people to get access to DNA to clear their names, and there is no process is available. A DNA innocence panel could assist that and, as I said, it is not here yet. We have been waiting for more than a year to have a DNA innocents panel. I know the Minister for Police has made comments about the large numbers of people, and how surprised the public will be as to how many people are in gaol that are innocent but, as yet, nothing has happened.

CHAIR: What, if any, are the consequences for partners and children of prisoners or prison visitors of DNA testing of prisoners?

Ms DANIELS: There seems to be a lot of fear present in family members which is due largely to not knowing what this is all about or what the consequences are. In the family members quite often everything is pinned on the idea that so-and-so will be home on this particular date. Everything in their life—where they live, the schools the children go to and all sorts of things—tends to pin on that date. We get asked all the time "Does this mean that they will be held longer?" "Does this mean they will be fixed up for other offences?" "Is the person going to be matching the crime?" as we have heard here. There are a lot of questions coming from family members around release dates. "Will release dates stay the same?" "Will release dates be extended for the purpose of working out DNA?"

CHAIR: I do not understand how a release date would be extended for the purpose of working out DNA?

Ms DANIELS: The question that has come through is that if their loved one is a possible suspect in a case then are they still going to be released or will they be held while investigations are happening?

CHAIR: Surely a person can only be held as a sentenced prisoner according to law?

Ms DANIELS: We understand that but family members are not always up on what the law is. That is what I am saying at the very beginning, there is not a lot of information that the families are having access to on how this will impact on sentences or how it will not impact on sentences and release dates. It needs to be made very clear to them that the release date is going to be staying the same unless there are exceptional circumstances but that is something that we repeat to family members. While we might be clear about that, family members in the community are not necessarily aware, familiar or secure with that.

Mr BREZNIAK: And they can be forgiven for not understanding that when they see the police paper which does try to increase the period of time that a person can be detained for the purpose of testing. It is a fine point. A convicted prisoner that gets released. and the police are seeking to extend the period of remand for the purpose of testing, why would not the average non legally educated person not come to some misunderstanding about it, in our opinion?

Ms DANIELS: A lot of my role, and a lot of the role of the prisoners advocates who have now become transitional workers and so forth, is around working through what the perceptions of the family members are around the DNA legislation, consent issues, storage issues and what have you. We have spent time with family members going through it in language that they understand so that they can explain it to other family members—children—or whatever they need to do. They do not always have the benefit of the information that we have got access to. Yes, we can send them copies of the Act but does that Act mean anything to them when they read it through? Possibly not and probably not. Family members feel that they had been left out of the whole process. Family members feel uncertain and that creates fear, panic and, therefore, leads onto confusion and not listening to the information that you are saying.

CHAIR: You are saying that there is the case for the Corrective Services institution to communicate what is happening to the families of prisoners?

Ms DANIELS: Absolutely. We work a lot with the families as well as prisoners and ex prisoners and we have not had a lot of communications with Corrective Services or the other way

around, about giving information to families and visitors centres or to allow service or through other community services or through the rural bus run that we run. The clients of that run is 100 per cent family members. There has been no communication there at all. I do not think family members have been considered a great deal, if at all, in this process.

The Hon. JOHN RYAN: The privacy commissioner in his submission has made reference to the fact that a DNA test that is consented to is administered by the police in the form of a buccal swab. If a test is not consented to then it appears that the procedure of the police is to remove hair or, other more intimate procedures provided for in the Act. The commissioner made the point that that might in fact be a form of duress on its own and that people will consent to what appears to be the less intrusive provision in order to avoid a more painful procedure involving the removal of hair. There do seem to be some difficulties in overcoming that from a logistics requirement. It might be difficult to actually obtain a buccal swab if a person simply refuses and if they have not consented it would be very difficult to administer procedures safely in terms of the workplace safety of the police officer concerned. Do you know of any way which might assist in making that perhaps a less point of stress?

Mr MURPHY: They might try. At the moment the complaints that we have had from prisoners are that if they do not consent, they get the buccal swab, if they do not consent to that they immediately proceed to take hair, and that is the way it operates under the Act
I do not think anyone tries—after they have gone through the procedure—to get an order to get a swab. Perhaps it could be a two-stage process whereby, even if they do not consent and the order is given, they are given an option of either having a swab or are hair taken. At the moment I do not think it is at that point. They immediately move directly to take the hair sample.

The Hon. JOHN RYAN: You claimed that police remove a hair sample almost immediately. Have you received a complaint from a specific prisoner in that regard?

Mr MURPHY: Yes.

The Hon. JOHN RYAN: Did you refer that complaint to the Ombudsman?

Mr MURPHY: Yes.

The Hon. JOHN RYAN: Did the Ombudsman find that the complaint had been sustained, in so far as the inmate was not given the opportunity of a cooling-off period—which appears to be a procedure that is adhered to, at least for some others.

Mr MURPHY: I received a letter from the Ombudsman about that, which said:

> I refer to your recent correspondence enclosing a complaint—

I will not state the prisoner's name. He has asked that the matter be treated confidentially—

> I have decided that inquiries should be made into the compliant and have referred the matter to the Police Service to deal with. I have written to the person directly informing him of the above, together with an explanation of the complain process.

There was no finding by the Ombudsman, just a referral to the Police Service to investigate it.

The Hon. JOHN RYAN: Was that the complaint you referred to in your opening remarks?

Mr MURPHY: Yes.

The Hon. JOHN RYAN: I wondered whether there had been a specific complaint. As I understand it, there were other issues involved in that complaint relating to the removal of privileges and so on. I was interested in whether or not the Ombudsman had sustained the complaint when the only complaint was from an inmate to the effect that he did not have an opportunity to properly consent because the police officer administering the test moved from giving an opportunity for a buccal swab straight to removal of a hair sample

Mr MURPHY: That was one complaint, moved straight to taking a hair sample—was not given the opportunity of a cooling-off period or to have it explained. There was a separate complaint from another prisoner about the threat of increased security rating and a shift from the Silverwater correctional facility to another facility. There has been no response unit to that complaint.

The Hon. JOHN RYAN: What was the date of the letter you quoted from a moment ago?

Mr MURPHY: The letter from the Ombudsman was received on 18 June.

The Hon. JOHN RYAN: When was the complaint lodged?

Mr MURPHY: The complaint was lodged with the Ombudsman on 14 June. We got a letter straight back saying it had been referred to the Police Service.

The Hon. JOHN RYAN: I suppose it would take a month for police to carry out an inquiry, at least.

CHAIR: I wonder whether the CCL in particular would be prepared to collate the statistics of complaints to which Mr Cameron has been referring in his evidence this morning, detailing the number and nature of complaints—on an anonymous basis, of course—to assist the Committee. Would that be possible?

Mr MURPHY: Certainly. What time frame would you be looking at?

CHAIR: The Committee will continue to take evidence for the remainder of this month. If you could provide it within the next few weeks, that would certainly assist us.

Mr MURPHY: Certainly.

CHAIR: I referred earlier to evidence given to the Committee last week by Dr Jeremy Gans of the University of New South Wales. I am looking at the transcript of what he had to say and I quote the following passage:

> The idea that police should ask for consent first, in fact the Act seems to force the police to ask for consent first, is a mistaken idea. There is no need to ask for consent. It does not protect rights because the consent is obtained under heavy pressure. It just gives offenders and suspects are good argument that what was done to them was illegal. It is just a mistake, again done because the model criminal code officers committee were influenced by procedures drawn up 13 years ago in Victoria.

Do you have any views that you would care to express regarding that?

Mr MURPHY: I think people should be asked for consent. There is no need to move to a situation where it is just extracted. The other issue I think is related to the way in which the forensic material is stored or later used. There may be issues that arise over differences between material that is collected by consent and material that is collected by an order of a police officer or magistrate. It may conceivably not be possible for people who have consented to provide their DNA information to have been destroyed, if that was allowed, at some later stage. Everybody should be entitled to be asked first, before being subjected to a procedure. Certainly, with the difference in the Act, the way the it is operating at the moment, if you do, consent you get a lesser treatment in terms of the DNA extraction; if you do not consent you have a harsher procedure. That seems to be the way it operates.

Mr MURRAY: I was just thinking that in dictatorships they ask for, "your papers, please".

CHAIR: Doctor Gans appeared to be arguing last week that a court order ought to be obtained in regard to volunteers, rather than a mere consent. What would your view be regarding that suggestion?

Mr MURPHY: Do you mean a court order in terms of gaining every sample?

CHAIR: Yes. Well, in regard to volunteers or in regard to mass testing, that a court order ought to be obtained—as in the Wee Waa case.

Mr MURPHY: In terms of the Wee Waa case, I do not think there is any cause for mass testing of DNA into public sense.

CHAIR: No. But, supposing the court had to be satisfied that there was a legitimate reason for the court to make such an order, and the court had to be satisfied. Do you think that would be a good thing?

Mr MURPHY: At the moment the legislation allows DNA to be taken without any reason, apart from the fact that someone is a prisoner or a serious indictable offender under the Act. That is the only reason needed for the DNA to be taken. In terms of it going to a magistrate, a judicial officer or a court for a hearing so that some reason is given, I think that is an improvement. If a reason has to be shown that the DNA is necessary for investigation of some crime, that would be an improvement—if that is what you are suggesting?

CHAIR: Perhaps I could well have asked a question such as this at the beginning. What in your view are the implications of this legislation for, first of all, protections against self-incrimination; and, second, privacy?

Mr BREZNIAK: It is a powerful new technology. It infringes our commonly accepted understanding of the rule against self-incrimination. But the community has decided that it is a legitimate forensic tool and we are here today, not to argue that DNA testing should be abolished, but to that it should be regulated in a manner which makes it consistent with our idea of a humane application of the law. We certainly agree that it does infringe against what we understand to be our idea of self-incrimination.

Mr MURPHY: In terms of privacy, it is the most private thing someone has. It is information about their genetic make-up and everything about their person, and there are serious problems with the way in which DNA can be used by other parties, or third parties, as I described—for example, insurance companies using it for purposes other than that for which it was intended. It is discrimination, not only against the prisoner the subject of the DNA testing, but any of his or her descendants. At the moment under the law you have a duty to disclose any disease you know about. This information can be made public through the database, even though the person may not want it all may not know it themselves.

There are a lot of problems that can occur with the release of this private information that we are only beginning to find out about. There are not enough protections in place at the moment to ensure that it is adequately controlled, in the way that is used; who has access to it; all that those authorities all groups that have access to DNA have privacy protections in place. As I mentioned earlier, other States and Territories that might have access through the CrimTrac database do not have the same level of privacy protection that New South Wales has. It is a serious concern. There are other groups that might work in co-operation with police, such as insurance investigators, who cannot be trusted to use this information in the way intended. There is a whole host of endless possibilities. You could have people finding out about relatives; people unintentionally finding out that they have a relative they did not know about, or a child they did not know about. There are endless possibilities. There are no protections at all at the moment to prevent those things from happening. That is necessary, if this is going to succeed as a tool for investigating crime.

CHAIR: Another matter that Dr Gans put to the Committee last week was that, in his view, DNA testing is a form of surveillance, in the sense that the demeanour of the person asked to provide the DNA sample can be observed. He saw that as oppressive, in some ways. Do you think that is a sound argument?

Mr MURPHY: Certainly, you can extrapolate information about a person from their DNA. We referred earlier to the great difference between DNA and fingerprints. Fingerprints have a limited use so far as solving crime is concerned—placing someone at the scene of a crime, or identifying where they are. DNA can be used to investigate the person as such, to find out what type of person they are, what diseases they make carry or their propensity to do things.

CHAIR: I am not really referring to that. I am referring to the way a person may react to a request to provide a sample.

Mr BREZNIAK: On the aspect, if I may. You referred to what Dr. Gans said about there being no true consent. I wonder if, in our written submission, we could address that question and the question you just raised, and give that further consideration? For that purpose, do we require the consent of this Committee to obtain access to Dr Gans' remarks to the Committee?

CHAIR: We would greatly appreciate any additional comments you may wish to make to the Committee. No consent is required from the Committee for you to access that material. It is available on the Internet and in printed form as well.

Mr BREZNIAK: We would like to address those questions. In particular the question relating to demeanour raises some important aspects that we would like to assist the Committee with in written form.

CHAIR: Some passing reference may have been made to this earlier. What concerns, if any, do you have about the provisions of the legislation relating to the destruction of forensic samples and profiles? In your opinion, what potential problems arise from deidentifying, rather than destroying, forensic material and analysis?

Mr MURPHY: As I understand it there is no capacity for the DNA profile to be destroyed at the moment is entered into the CrimTrac database and it stays there. The only capacity is for the forensic sample that is taken to be destroyed after 12 months. I think that is wrong. I think that the DNA evidence, once taken, should be destroyed. There is no reason for rich to be kept to identify people. I think that is problematic.

The Hon. JOHN HATZISTERGOS: It should be destroyed when? As soon as the profile is taken?

Mr MURPHY: As soon as a profile is taken from someone, it should be destroyed.

The Hon. JOHN HATZISTERGOS: What happens if the profile is challenged?

Mr MURPHY: The first problem, I think, is that you should not be taking DNA from people unless it is to be used as material evidence in a crime. There is no reason for taking random samples from every prisoner or serious indictable offender. It should only be used to profile the person, or whatever material need there is for evidence, and kept for so long as that is necessary. At the moment, you are taking samples from every prisoner and you are keeping it for an undefined period because of that problem, in case it is used to link someone to a crime in case it is challenged. I think you need to limit it only to people who are material suspects in crimes.

The Hon. JOHN HATZISTERGOS: I wanted to ask you about a proposal that Dr Lesley Burnett from the Laboratory of Community Genetics unit at the Cullen Institute of Medical Research put forward last year. Her proposal was to have a genetics broker who would actually keep the samples, specifically in relation to prisoners, and provide profiles to the police without identifying the individual. If the police wanted to know the identity of the individual, they had to go to the broker, who would, in defined circumstances, release that information. Dr Burnett put that proposal forward as a means of greater protection of privacy of the individuals who had been sampled. Do you see any merit in that proposal?

Mr MURPHY: There could be merit in it. We are happy to consider that.

Mr BREZNIAK: I read the recommendation when it was published last year, and I thought it was a terrific idea. If we could get a copy of it again, we would like to include that in our submission as well. It was a good idea. The recommendation that Dr Lesley Burnett put up last year seemed to resolve many of the questions.

The Hon. JOHN HATZISTERGOS: Would you like a copy of the article?

Mr BREZNIAK: Yes, because I have not retained it. The suggestion which Dr Burnett made last year appeared to have a lot of merit—in effect, for an independent person or body to keep the samples.

CHAIR: Do any of you wish to add anything further regarding the matter that has been raised this morning?

Mr MURRAY: Is there still time to make written submissions to the Committee?

CHAIR: Yes, you may make a written submission. In fact, we would welcome that.

(The witnesses withdrew)

(The Committee adjourned at 12.49 p.m.)