REPORT OF PROCEEDINGS BEFORE

STANDING COMMITTEE ON LAW AND JUSTICE

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

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At Sydney on Tuesday 31 July 2001

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The Committee met at 10.00 a.m.

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PRESENT

The Hon. Ron Dyer (Chair)

The Hon. Peter Breen
The Hon. John Ryan
The Hon. Janelle Saffin

MARK RICHARDSON, Chief Executive Officer, Law Society of New South Wales, 170 Phillip Street, Sydney, sworn and examined, and

SHERIDA RAE CURRIE, Senior Legal Officer, Practice Department, Law Society of New South Wales, affirmed and examined:

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

Mr RICHARDSON: I appear in the capacity of Chief Executive Officer of the Law Society of New South Wales, to present to the Committee the submission made by the Criminal Law Committee of the Law Society of New South Wales.

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

Mr RICHARDSON: I did.

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

Mr RICHARDSON: I am.

CHAIR: I take it that you wish the Law Society's submission to be included as part of your sworn evidence.

Mr RICHARDSON: That is correct.

CHAIR: Ms Currie, in what capacity are you appearing before the Committee?

Ms CURRIE: I am an employee of the Law Society of New South Wales, and I am appearing as the officer of the Criminal Law Committee responsible for the preparation of the submission to the Committee.

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

Ms CURRIE: I did.

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

Ms CURRIE: I am.

CHAIR: I assume, as with Mr Richardson, that you are happy for the Law Society's submission to be included as part of your sworn evidence.

Ms CURRIE: Yes.

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

Mr RICHARDSON: Mr Chairman, we will make some general observations and some comments in relation to points made in the Law Society's submission. I would imagine that will take about 10 minutes to do. One of the general observations that we wish to make is that the Law Society has no problem, in principle, with legislation such as that that is before you for review. The concept of giving to the police greater powers to assist in the investigation of crime is one that is supported by the Law Society; and the Law Society is, in principle, content that additional powers have been given to the police to collect forensic evidence that might assist them in the investigation of crime.

That having been said, there are two broad concerns we have about the legislation. The first concern is that it does not provide to suspects and those who are required to be the subject of forensic examination any ability to obtain or receive legal advice prior to the examination being conducted. Secondly, the New South Wales legislation departs in some important respects from the model Commonwealth Code, and in regard to some of those areas that we will highlight for you the departures are in our view significant. In short, the necessary balances that are required to ensure that new procedures such as those in this Act are administered by the police appropriately and reasonably need examination by your Committee. The question of whether the checks and balances in this legislation are sufficient is, in our submission, one of major concern.

I turn now to the first point, which I will deal with very briefly. The type of legislation that the Committee has before it now is not unique. Legislation of this kind has been enacted in the United Kingdom and in other places, no doubt for very valid reasons in those other jurisdictions. But, in respect to the legislation before this Committee, there is one very significant departure from the United Kingdom model upon which this legislation is in its origin based. In the United Kingdom, in addition to giving to the police additional powers similar to those set out in the New South Wales legislation, the United Kingdom Government saw fit—appropriately, in the view of the Law Society—to make provision for legal advice to be available at police stations to those persons who are going to be subject to procedures such as those set out in this Act.

That facility has been in place for a number of years in the United Kingdom. It is a facility that enables the person who is going to be the subject of an examination to request that a solicitor attend upon him or her at the police station and give advice. The provision of that advice is paid for by the United Kingdom Government through its legal aid scheme. The service provided in the United Kingdom is, admittedly, not cheap, but it was and is regarded by the United Kingdom Government as one of the important balances and trade-offs necessary to support the kind of legislation that the United Kingdom introduced.

The current situation in New South Wales is that the Legal Aid Commission is not, on my understanding, funded or, indeed, in a position to provide for solicitors to attend on persons in police stations for the purposes of legislation such as this; nor, indeed, is the private profession in such a position. Absent a scheme which funds and provides for such a service, I would imagine and suggest to the Committee that these procedures will be undertaken in years to come pursuant to this legislation in circumstances where the suspect or the person who is subject to the process has received no advice as to his or her rights or entitlements.

The second observation we make is that in very general terms where agreement has been reached between governments of States and Territories to proceed down a path designed to achieve uniformity in law, particularly in the criminal law, it is generally desirable for the New South Wales Government to follow that particular path unless there are very good reasons to do otherwise. In relation to this legislation that the Committee is reviewing, there are some examples of provisions which depart from the model Commonwealth legislation. In the view of the Law Society, the departures that exist in some instances do so without proper justification. They are our two broad submissions. If I may, Chair, I will invite Ms Currie to highlight some of the concerns in our submission and then we will open it up for whatever you wish.

The Hon. PETER BREEN: Will you be addressing where we are departing from the model code?

Mr RICHARDSON: Yes.

Ms CURRIE: It is actually set out in the submission—the particular sections or particular provisions that have been deleted in New South Wales legislation. The Committee has the submission before it.

CHAIR: Page six onwards of your submission appears to me to deal with the inconsistencies.

Ms CURRIE: Yes. The reason why we believe that these particular Commonwealth provisions are so important is because, without them, the New South Wales legislation is incredibly

broad in the way that it can allow samples to be taken from suspects. Once samples are taken from suspects, then the other half of the legislation comes into operation whereby those samples can be profiled and put on the database. The Commonwealth legislation would require police and the court to have particular regard to the purpose of requesting, having or seeking an order for this sample to be made. That would mean that focus on the offender and the offence had to be given particular regard to as well as whether there might not be some other procedure or investigative tool open to the police that might be more appropriately used than taking a forensic sample.

I refer also to some of the difficulties with the current operation of provisions such as the requirement of police to adhere to the procedural requirements under this legislation which is similar to part 10A of the Crimes Act, detention after arrest for investigation of offences. Both pieces of legislation require police to adhere to quite a number of procedural matters in relation to providing suspects with information and ensuring that they are aware that they can contact a support person or seek medical advice or seek legal advice and so on. The courts recently in a number of cases have criticised police or found that their training has been lacking in how to actually comply with these procedures. We have a concern that the possible complexity of some of these procedures has meant that there are difficulties for police in ensuring that they do comply with them and are also complying with them properly rather than just going through the motions of, say, handing a suspect a card with their rights on it.

The value of having a solicitor at the police station to give advice to a suspect would assist police, I think, in making sure that they did adhere to their procedural requirements properly. It has been the experience of practitioners on my committee that in quite a number of cases where a person is properly advised at the police station the actual process of dealing with the suspect and determining whether not they should then be charged and proceed through the courts—hopefully, the aim of the police, that they will be successfully convicted—is made much easier by having a person properly advised at the police station.

The balance of the submission deals with a number of particular aspects relating to additional matters that we thought the Committee might take into account in reviewing the legislation. These were matters that the Criminal Law Committee and the Law Society raised during debate, but I think it was a difficult debate because the area of law is just so new and so complex. The ability of this Committee to be able to take into account these submissions and others of other agencies would be of great benefit to this legislation, I think. The sorts of things that we would like to highlight are what I referred to before, namely, the requirements on police in investigating suspects and in holding people in detention while procedures can be carried out.

The legislation, as it is currently framed, allows for periods of time to not be counted in the detention periods and in the investigation periods. The Law Society and the Law Committee in particular have been concerned on a number of occasions that these time-outs, if not being manipulated, have operated to see people being detained in custody for quite significant periods of time. The legislation in section 3 lists 11 instances where time is not counted in the period of investigation, and that is for things like transporting people to the police station, or waiting for a police officer or an appropriately qualified person to carry out the investigative procedure, to allow consultation with a support person or a friend or medical practitioner and so on. The committee has given one example in the submission about the way that these procedures can be delayed so that people are in custody for a long period of time.

Our submission basically is that there should be an upper limit on the length of time for which a person can be detained in custody, particularly for forensic procedures which are, in the most part, fairly quick if you are taking fingerprints or a blood test. Usually there is a medical practitioner, even in the country, who is available at fairly short notice and who can come and take a blood test. If it is a scrape of an inside cheek for the purpose of DNA testing, that is an extremely quick procedure and we fail to see why there cannot be an upper limit. We propose in our submission that there should be an upper limit of four hours.

The other issue is that there is a further inconsistency with the Commonwealth legislation in that the time period for which young people and Aboriginal and Torres Strait Islanders and other vulnerable people can be detained is limited under the Commonwealth legislation whereas in fact it is

not limited under the New South Wales legislation. We suggest that that inconsistency is one that should not be continued.

Just as an aside, it must make it terribly difficult for police who are investigating Commonwealth offences under one series of legislative powers or requirements and then at the State level other procedures are required of them. It is an area where we do not see why there cannot be some consistency.

Mr RICHARDSON: The point we make generally about inconsistencies is: What good reason is there for the difference? It is not obvious to us that there is good reason for it; there is just a difference.

CHAIR: Have you concluded, Ms Currie?

Ms CURRIE: The balance of the submission is fairly technical but fairly well explained. I can provide some of the supporting information if the Committee would like, or it may be easier if the Committee asked questions.

CHAIR: In commencing the questioning period, I indicate that any question from me or any other Committee member may be responded to by both or either of you as you see fit. The Law Society, at page 5 of its submission, makes this statement:

> The right of people to seek legal advice when they come into contact with police is an important component of the detention after arrest provisions of the Crimes Act and the Crimes (Forensic Procedures) Act 2000. However, the right to obtain legal advice is illusory unless there are practical measures in place to ensure access to expeditious, competent and free legal advice.

If I could link with that the society's recommendation No. 1 where its says that we should consider recommending to the Government that sufficient funding be provided to enable the Legal Aid Commission to operate the duty solicitor scheme so that the legislation might work as intended by the Legislature. Mr Richardson has adverted to this matter in his preliminary remarks. I assume it is a matter of some importance to the Law Society.

Ms CURRIE: Yes, it is.

CHAIR: I invite you to make any other additional comments you wish in support of that.

Mr RICHARDSON: A number of observations should be made. Leaving aside the question where the Committee philosophically believes that people who are subject to procedures such as those set out in this legislation should receive the benefit of legal aid advice before those procedures are carried out, a very practical consideration is the matter to which Sherrida Currie has already referred: Where the procedures are not adhered to by the police, the result is when the matter gets to the superior courts in New South Wales those courts will make findings that the police have not acted appropriately and in accordance with the requirements. That may lead to the case or conviction, should there be a case or conviction, collapsing. This is not an unusual situation, as was the experience in the United Kingdom over a number of years. I believe that this Committee would have its own views as to the way in which departures from procedures by police have been found by superior courts in this jurisdiction to amount to a miscarriage of justice sufficient to warrant appropriate orders being made.

So it is a very practical reason why people should be given advice. From the point of view of police officers, knowing that a person has been appropriately advised may be of some comfort to them in the discharge of their obligations. Knowing that has not occurred may cause concern for them. After all, in the New South Wales Police Service these days there is a very strong wish to adhere to appropriate procedures. I would imagine that this kind of legislation is the very thing that those new approaches being taken by the Police Service are directed to. I believe it is a practical argument. The difficulty with it is that it involves money. It does not come cheaply. The United Kingdom scheme is extremely expensive. It is a matter that has been the subject of special comment in the United Kingdom so far as the allocation of legal aid in that country is concerned. Nevertheless, it was deemed appropriate in that jurisdiction to have these checks and balances and the United Kingdom

Government was prepared to meet the cost. I would submit to you that the New South Wales Government should take a similar approach.

The Hon. JANELLE SAFFIN: The United Kingdom Government would also have to comply with human rights requirements, otherwise it would find itself before the European court if it did not have such a system in place. It would be bound to that.

Mr RICHARDSON: That is so, and Scotland and the United Kingdom have their own human rights Act which they have to adhere to as well.

The Hon. JANELLE SAFFIN: The human rights Act would mean that people would have to have the benefit of legal advice.

Mr RICHARDSON: That is right.

The Hon. PETER BREEN: Do you have any figures as to what it costs in the United Kingdom?

Mr RICHARDSON: No, but I would be happy to try to get them for you. I do know that it is not cheap. After all, it is a 24-hour on-call service. That country does not have salaried legal aid officers at all, in contrast to New South Wales where the majority of legal aid in the Local Court, certainly in metropolitan areas, is delivered by salaried solicitors employed by the Legal Aid Commission. The United Kingdom does not have any salaried service at all. It is all done by the private profession, but it is done on the basis that practitioners are on call to attend at a police station, if required. You can imagine that that sort of service does not come cheaply.

CHAIR: I suppose one of the difficulties in that regard, by which I mean the duty solicitor scheme, is that solicitors are likely to be required at very inconvenient times of the night, such as very late at night or in the early hours of the morning. I assume that the British scheme takes account of that?

Mr RICHARDSON: That is correct. From time to time in New South Wales 24-hour legal advice services have been established. Many years ago Redfern Legal Centre established a free service in which I participated as a solicitor. The service was not directed to people in custody, it was directed generally. Solicitors who participated could be called on to give advice to people in custody at all hours of the night. That was our obligation. Your observation is correct.

CHAIR: One of the differences between the State legislation and the Commonwealth legislation identified by the society in its submission relates to matters to be considered by police and the court before requesting consent to a procedure. The society points out that section 12 of the New South Wales Act provides that police should be satisfied that there are reasonable grounds to believe that the forensic procedure might produce evidence tending to confirm or disapprove a suspect committed an offence. On the other hand, the society in its submission also points out that the Commonwealth Act provides that police should be satisfied on the balance of probabilities that there are reasonable grounds to believe that the forensic procedure is likely to produce evidence tending to confirm or disapprove a suspect committed an offence. There is a clear difference between those two provisions.

Mr RICHARDSON: Yes.

CHAIR: I assume the society prefers the Commonwealth model, but I invite you to tell the Committee what the society's view is regarding those two provisions.

Mr RICHARDSON: No doubt the Committee and the society would prefer the Commonwealth model. It is the tougher of the two tests. At the end of the day, the application of these forensic procedures, which is entirely appropriate, should only occur where there is good reason to subject a person in custody or a suspect to the forensic procedure. "On reasonable grounds", which is the test referred to in section 12 of the New South Wales Act, is a far easier test to meet than a test that is based on the balance of probabilities. I would imagine that to satisfy a balance of probabilities test there would have to be sufficient circumstantial and other evidence available to a police officer to

justify to him or her that the application of this test is likely to produce a result one way or the other. In other words, there has to be something upon which the view can be based. Whereas with a reasonableness test, which does not seem to have any qualification, it would be much easier for a police officer to establish that it is reasonable. That is the difference. The Law Society's view is that the tougher test is the better test. The more rigorous tests ensures that a police officer has regard to a number of already known circumstances.

CHAIR: The Law Society says at page 9 of its submission that it sees no reason why there should be any delay in conducting a forensic procedure. It goes on to say that the provision of a buccal swab, for example, should take a matter of mere minutes. The submission then refers to the time period of four hours as the upper limit preferred by the Law Society, including any necessary time outs. I point out to you that in the definition of "time-out" in the legislation—and there are many examples of proper purposes for time-outs—one purpose is a delay to allow a legal practitioner, a friend, relative and so on to attend. Could it be the case that, particularly in the middle of the night, it may conceivably take a couple of hours for someone to attend?

Mr RICHARDSON: Yes.

CHAIR: Do you think the society is being reasonable regarding the upper limit it advocates?

Ms CURRIE: It should be noted that the attendance at a police station for the purpose of having a forensic test undertaken can be done in two ways. It can be done on the suspect immediately the person comes into the notice of police or a delay can occur. The police could make an appointment with the suspect to come back and have the forensic test. Under the second circumstance there should be no delay whatsoever. With respect to accommodating the other time-outs, the problem is the compound of the time-outs. The danger that we are trying to avoid is a specified time-out for one particular purpose and another time-out on top of that for a different particular purpose, where in fact the same period might accommodate all the time-outs. A person could be waiting for his legal practitioner at the same time as he is waiting for his medical practitioner at the same time as he is waiting for the qualified person to take the sample. It seems to us that by not having any check on those time-out periods, there is the potential for them to be open to abuse.

CHAIR: The aspects of "time-out" defined in the legislation seem to cover proper matters.

Mr RICHARDSON: Yes.

CHAIR: For example, one aspect is "Any time during which carrying out the procedure is suspended or delayed to allow the suspect to recover from the effects of intoxication due to alcohol or another drug or both."

Ms CURRIE: Yes.

Mr RICHARDSON: The first example you gave of a time-out to allow a friend or lawyer to attend on a person is a difficult one. I will leave aside "friend", because it may well be the case that the friend the person wants to have there is not even in New South Wales. It is conceivable that could occur.

With the lawyer there will no doubt be circumstances where the person will want his or her private lawyer, that is the lawyer they already have engaged for other purposes over the years, to attend. It is conceivable that that lawyer may well not be able to attend within a reasonable time frame. But where you are talking about a publicly funded legal advice service, such as they have in the United Kingdom, that problem does not arise—unless you want a private lawyer—because if you do not want a private lawyer, and you decide you want to have the service that is made available by the State then those who are rostered on to the service are people who are required to be in attendance within short time intervals. In the United Kingdom if you wish to be put on a roster to attend police stations which are too far away from your office to enable you to be there within a reasonable timeframe then you would not be put on the roster.

My knowledge of the United Kingdom rostering system is that local practitioners are the ones that go on the roster and they have not only to meet certain requirements about being there on time,

being available 24 hours a day, and matters of that kind, but they also have to demonstrate that they have a capacity to give advice to people in the circumstances appropriately. The equivalent to New South Wales, I guess, is we would ask them to the specialists in the area of criminal law. To my knowledge they do not have a system identical to that but they do require of the people who go on the roster that they are experienced practitioners in the area of law, that is, criminal law and procedure. You make a good point but if you have a publicly funded legal advice service I would hope and expect that those who provide it would be able to attend at police station well within reasonable timeframes but say within an hour at a maximum. So a four-hour time limit may not be so bad in those circumstances.

CHAIR: However, that does come at a substantial cost to the public purse?

Mr RICHARDSON: It does.

CHAIR: At page 11 of the submission of the Law Society you said that the Criminal Law Committee is very much opposed to the retrospective nature of part 7 of the legislation, and is concerned that the process of testing offenders is well under way. What do you want to say in relation to that point?

Ms CURRIE: Part 7 applies now to any offender, doesn't it? Our concern, I suspect, is philosophical in that retrospective legislation is generally abhorrent to the Law Society. It is in that regard, I would say, that the committee has expressed its particular concern about allowing offenders who have already been convicted, and were convicted prior to 1 January 2001 to require samples to be taken from them for the purpose of building up a database.

CHAIR: Recommendation 7 of the Law Society states that any order for testing convicted offenders, whether or not it is a non intimate procedure, should be a court order. Further, that testing should only take place if the nature of the offence committed by the offender, and the likelihood of reoffending, mean that the sample is likely to have evidentiary value.

Ms CURRIE: Yes, that is right.

CHAIR: Do you think it is appropriate to require a court order in regard to each testing of a convicted offender? The formulation you have there about reoffending seems to overlook the fact that the prisoner may have committed prior offences that might be disclosed.

Ms CURRIE: With respect to the second concern, perhaps not terribly well expressed there, the idea is that along with suspects there should be some sort of reasonable suspicion that the person, in fact, may have committed other offences of the type for which they were imprisoned. The ability to have a profile put on a general database and allow for the cold-hit fishing expedition type searching was not an original component of the model legislation. It made its appearance in the second model report and has been brought through into our legislation in New South Wales. The concern of the committee is to preserve the rights of people, even though they are convicted offenders, and to ensure that their views are taken into account by the court as to whether or not samples should be taken from them. We also wish to ensure that there is a link of suspicion between the person and the offence for which they might be tested against.

The Hon. PETER BREEN: There is a practical problem in relation to testing prisoners in the sense that you have suggested here that there ought to be a court order. It seems, according to evidence that the Committee heard last week, that about half the prisoners in New South Wales have now been tested and only five have refused. In the case of those five, when they refuse, they do then have the entitlement to a court order. Is it not the position that they can take advantage of the existing legislation simply by refusing in which case a court order will follow automatically?

Mr RICHARDSON: It is possible, it depends at the end of the day on what they are told before they exercise their right to refuse or consent. What are they told before they make their decision?

The Hon. PETER BREEN: I understand they are told, but if they refuse, it will be the subject of an application to the court and they will be ordered by the court.

Mr RICHARDSON: It gets back to this question of legal advice and entitlements. Are they told what will happen to the forensic material after they have been tested? How will it be stored? What usage will it be put to in the future? Are they told all those things? I do not know because I have not been involved, but one would hope they are. Indeed, if you were to have an advisory service of the kind that we are talking about then one would expect them to be told all these things before they make a decision. In relation to convicted persons in custody the Legal Aid Commission does now have a Prisoners' Legal Service. It has had that since 1988.I was at the commission when it was established and I am just scratching for the date but it was around about that time. The very purpose of the Prisoners Legal Service was to give to persons in custody legal advice as to not only internal prison matters but other court-based matters that were happening to them. That service exists and, if properly funded, could provide the basis of the kind of thing that we say is appropriate for persons who are convicted and in custody. Persons convicted and at large is a different story.

The Hon. Janelle Saffin referred to the international conventions and I do not know that we necessarily have to go into those things but, at the end of the day, the more information people have about matters such as this prior to having to make an election, the more likely it is that the system subsequently will stand up. That is the United Kingdom/European type experience and I would suggest to you, increasingly it is becoming apparent that it is important for New South Wales as well.

Ms CURRIE: The committee is also concerned, in anticipation not necessarily that it has actually eventuated, that there is no limit to the number of tests to which an offender can be subjected. There was a concern that by not having the requirement of a court order it may be used as some sort of intimidatory tactic—

Mr RICHARDSON: or it may be used to build up a database which is not, as I understand it, the purpose of this legislation. The purpose of this legislation is to facilitate the investigation of crime quite appropriately by using forensic procedures, not to build up DNA or other forensic database on the Australian population.

The Hon. JANELLE SAFFIN: Would you comment about retrospectivity because your submission says that the Criminal Law Committee is very much opposed to the retrospective nature of part 7 of the Act? We are talking about a lot of the practical issues with it but obviously there is a philosophical argument. Would you expand on the philosophical argument on retrospectivity?

Ms CURRIE: It is the general concern that you should not be subject to an offence or a penalty that was not available at the time that you were convicted. I have done a little bit of research on that but it is not quite fresh in my mind—

CHAIR: This is not really an offence or penalty though, is it? It is a procedure that is being applied retrospectively that may discover a past offence. Is that not rather different?

Mr RICHARDSON: You may discover a past offence or a future offence. It just depends on the circumstances in which these tests are administered. If you have provisions in place that enable informed consent to occur that means you will take away, in practical terms, a lot of the objections of the Law Society to this legislation. But that does not exist now and therefore one cannot argue necessarily that there is informed consent in the current process. This committee has received evidence on this, which I have not heard, but the processes that have been explained to the committee may lead it to the view that there is informed consent, but I would suggest that unless the advice and information is provided by someone who is independent, such as a solicitor, then it is unlikely that you will meet the test of informed consent. That is an important consideration.

If you were to see a system put in place whereby prisoners or convicted people were given the information in an appropriate and proper way, without fear or favour and objectively, much of the concerns that we have got about retrospectivity may in fact be removed. But it does not exist now to my knowledge, therefore, it is a valid concern. Our other concern is that I do not believe that this legislation was put in place merely with the purpose of building up databases. I believe this legislation has been put in place quite appropriately to assist with the investigation of crime. The more obvious examples of provisions in here that could be, in fact, used to build up databases are the ones about which we are concerned.

CHAIR: On page 12 of the submission of the Law Society reference was made to a decision of Justice Gillard in the Supreme Court of Victoria in December last year in the case of Lednar and Ors v Magistrates Court and Anor. You suggest that various issues should be explored which, I take it, arise out of that decision, the most important of which appears to be that the society is of the view that section 74 of the Act dealing with a court order for carrying out an intimate forensic procedure on a serious indictable offender that the court should be required to give reasons. Do you wish to comment on that matter?

Ms CURRIE: I have a copy of the Lednar case with me.

CHAIR: Are you in a position to table a copy of that particular decision?

Ms CURRIE: Yes, certainly, I can.

Mr RICHARDSON: Your concern is the requirement to give reasons, is it?

CHAIR: You are urging the Committee to recommend that the relevant section—that is, section 74—be amended to require the court to give reasons. I am simply inviting you to say something to us about the particular view that you are expressing.

Mr RICHARDSON: It goes to the transparency of the process. If reasons are given it is much easier to analyse the validity of the decision. I am not a member of the Criminal Law Committee but I imagine that that is what the committee is getting at. Is that correct?

Ms CURRIE: Yes.

CHAIR: I go back to the retrospectivity aspect that we were discussing a moment ago. Is the concern about retrospectivity a concern not so much about that as a concern about self-incrimination?

Mr RICHARDSON: It is a concern about self-incrimination. It is a concern that the processes are not utilised merely to build up databases, which we assert is not the purpose of this legislation. It is a concern about ensuring that people are properly advised before subjecting themselves to these processes, particularly as in our view retrospectivity in this area, as it is in any area of law, is something to which we are generally opposed.

The Hon. PETER BREEN: I think it is the case, though, that the legislation provides in its objects to set up a database. I do not think there is any dispute about that.

Mr RICHARDSON: But I do not think that is its primary purpose. That is my point.

The Hon. JANELLE SAFFIN: I thought that the criminal code officers committee recommended that in its last discussion paper and in the draft Commonwealth bill that is before the Parliament. I thought that it was that committee's recommendation that we have some sort of database of forensic procedures. Is that not part of it?

Ms CURRIE: Yes. They are trying to build up a database, but the point Mark is trying to make is that the database should be a facilitative tool for the investigation of particular offences, rather than a broad-based, wide-ranging mass database of profiles which can be used for any sort of purpose at the whim of whoever controls the database.

Mr RICHARDSON: If you wanted to have a DNA database of all Australians, why not just take DNA from all babies born? Let that process continue until such time as you have a database of the DNA of all Australian people. I do not think that that is what this legislation is designed to achieve. It is rather like the Australia card debate in many ways. This legislation is about providing the police with appropriate mechanisms and procedures to investigate crime, not to build up DNA profiles of the Australian community.

The Hon. PETER BREEN: But does one not go with the other? The title of the Act is "an Act to make provision with respect to the powers to carry out forensic procedures on certain persons

and to make provision with respect to a DNA database system". It seems to me that one goes hand in hand with the other. They want to set up a database in order to have a facility to investigate forensic crime.

Mr RICHARDSON: Yes, but it is quite confined. It is confined to the purposes of the Act; it is not a general database of a DNA that can be used for all sorts of other purposes, which is what I am directing my comments at.

The Hon. PETER BREEN: If the samples are taken only from serious indictable offenders who are in prison, that would certainly restrict the database. Hopefully, you and I would not be on it, for example.

Mr RICHARDSON: The point we were making to the Chair previously in response to his question was that if the DNA or whatever forensic material is taken from convicted persons in custody under appropriate circumstances—that is, they are made aware through an advisory service before consenting to it—a lot of the sting in our argument is removed. We do not necessarily believe that that is occurring. Indeed, there is no provision for it to occur routinely. Therefore, we are concerned about it.

The Hon. PETER BREEN: The example that comes to mind was given to the Committee last week by the police forensics: When the database was first set up in the United Kingdom—I think the system was discovered at Leicester University—the police took samples from two similar rape-murder crimes to the person at the university who had set up the system. Someone had confessed to the second crime after 15 hours of cross-examination but not the first crime. The DNA sampling revealed that in fact the two crimes were committed by the same person but not the person who had confessed. On further examination the person had confessed because after 15 hours of interrogation he decided that it was much too rigorous and it was easier to confess to the crime than to put up with the interrogation. I think that is one point that would support your argument.

Mr RICHARDSON: I would have to do some research to get some details, but there was a United Kingdom case on this point. The case was decided over a year ago, and it did in fact attract a lot of publicity in the United Kingdom press. The point of the decision in that case, which I would have to refresh my memory about, was that the process is far from foolproof. One does not object to the compilation of databases composed of forensic material; it is the way in which it is done. I do not mean mechanically; I mean in terms of obtaining informed consent. That is what is at the heart of our concern.

If the convicted prisoner is fully aware of the circumstances and the likely use to which this material will be put in the future, and that is done in an appropriate and objective way, then the provision of consent and the taking of the material is okay. But in the absence of that, what safeguards or guarantees are there? Having been a criminal lawyer for many years, and having acted for people in circumstances like this, I wonder what levels of comprehension convicted persons in prison have about matters such as those contained in the forensic provisions that are the subject of your examination. I suggest to you that the overwhelming majority of them have no idea what they mean, what is going on and why these things are happening because of reasons that I do not think you need to be told about.

The Hon. PETER BREEN: I suspect also that they would be concerned about the possibility of the samples they give being used and somehow mysteriously being discovered at other crime scenes. That would certainly be a concern of mine if I were a prisoner. I think the legislation provides for the samples to be destroyed, but the prisoners, for example, would need to know what protocols are in place—

Mr RICHARDSON: Precisely.

The Hon. PETER BREEN: —to make sure that they are in fact destroyed.

Mr RICHARDSON: The debate about the retention of fingerprints by police authorities in Australia has been going on for years; it is not a current debate, but some 15 years ago it was a very hot topic, particularly around the time when they were talking about the expungement of criminal

records and all the other things that have been the subject of attention by this Parliament over the years. There need to be proper procedures in place, and the Privacy Committee and other groups in the community have written reports and given advice as to what those procedures should be. There should be proper procedures for the retention, storage and disposal of information of this kind. In the absence of that, one is entitled to be sceptical and perhaps concerned.

The Hon. PETER BREEN: The only safeguard that comes to mind in the context of prisoners and what their position is, because of the unique nature of the DNA molecule, at the end of the day the prisoner can always give another sample to disprove the record. So in that sense there is an inbuilt safeguard against the misuse of the sample. But I agree with you that prisoners need to be properly informed about that, and I am sure the whole process would work better, particularly in the case of an accused person, if there was available proper legal advice and independent advice so that the accused person knows exactly what is happening. As the legislation stands, because it is such novel technology, it is unlikely that most suspects in criminal matters would even be aware that the technology exists.

Mr RICHARDSON: If you take your convicted person in custody—the example you gave—and as I understand the import of the evidence that was given to you last week, in years to come let us assume that a person who is convicted and who is now in custody has "consented" to the administration of some forensic procedure and it turns out that person then becomes connected with a crime that is committed in 15 years time as a result of material obtained from this person at the current date—I am assuming that it is possible to do that technically and in other ways—do you not think that that person's first response might be that the material was not obtained from him with consent? So my question is: What records are being maintained, what evidence is there now, that these people on whom forensic processes have been committed are consenting? Is the record of that consent appropriate? These are the kinds of things that I suggest should be looked at, rather than 15 years down the track find that this person is able to demonstrate quite conclusively that there is no record of consent having ever been obtained, that he was forced to give the forensic material, that he never consented to it, he had no idea what was going on, et cetera. That is the kind of difficulty that you find yourself in.

CHAIR: The final matter I want to ask about relates to the proposed Innocence Panel which is dealt with at the end of the Law Society's submission. The submission states:

> The Minister for Police has not considered it necessary to enact legislation to establish the Innocence Panel and its procedures.

I assume that there is an implied criticism there. What is the Law Society's view regarding the Innocence Panel and representation on it?

Ms CURRIE: The Law Society's Criminal Law Committee thinks that it is imperative for there to be a representative of defence counsel as well as a representative of accused people on the Innocence Panel to give it a balance. The amount of information available about the Innocence Panel is very small and none of it has been forthcoming to the Law Society from either the Police Minister or the Attorney General. So we are very much in the dark about what parameters the Innocence Panel is proposed to operate under.

CHAIR: Is the Law Society implying in the submission that the membership and procedures of the Innocence Panel should be subject to legislation?

Ms CURRIE: The Law Society is saying that it would like to be involved in developing the procedures, to be involved on the panel and to be consulted about it. If it then, through that process, formed the view that it would be necessary for legislation to be put in place, then that view could have been formed by having been involved in the process. At the moment we simply do not know what is proposed.

The Hon. JANELLE SAFFIN: Have you received any communications about it?

Ms CURRIE: We received a very short letter from the Minister for Police saying that basically he did not consider it necessary to enact legislation. At that stage the Minister indicated that the Innocence Panel would be operative from 1 July. We now understand from other sources that it

will not commence operating until January next year, but again we have had no formal confirmation. Our difficulty is that we are in the dark.

The Hon. JANELLE SAFFIN: Where did the 1 July date come from?

Ms CURRIE: I think the Minister mentioned that in his letter to us and I think it might have been indicated in Parliament but I am not sure about that.

CHAIR: I am still unclear as to whether the society is advocating legislation or whether it merely asks that the Government's intentions be clarified and that appropriate representation be granted.

Ms CURRIE: Initial clarification and representation and to allow the Society to be involved in the process as well as other appropriate bodies.

Mr RICHARDSON: The submission is not saying clearly that it should be underpinned by legislation but the Committee is probably not in a position to comment on that until it knows about the matters referred to on page 17 of the submission.

The Hon. JOHN RYAN: We have spoken in theoretical terms about the procedures for getting consent prior to DNA samples being taken. Are you aware of any practical difficulties that have occurred for specific suspects accessing legal advice or being able to exercise rights given to them under the law to give consent?

Ms CURRIE: No, not in my capacity. None of my practitioners has mentioned it at all. I do understand that New South Wales Young Lawyers is currently conducting a survey to try to find out that sort of information and it may be information that the Prisoners Legal Service or Legal Aid solicitors have but none has been brought from my committee to my attention, no.

The Hon. JOHN RYAN: If a prisoner has not consented to supply a buccal swab voluntarily do you think it is appropriate that that should have any impact on the classification within the prison system?

Ms CURRIE: Off the top of my head I would say none. I would think that would be totally inappropriate.

The Hon. JOHN RYAN: I understand you have been given a copy of some questions by the Committee.

Ms CURRIE: I do not have any questions.

The Hon. JOHN RYAN: The questions summarise some of the comments made by the New South Wales Police Service and I was interested in getting your response to some of their requests for changes to the law.

Mr RICHARDSON: We are not in a position to comment because we do not have the document.

CHAIR: In that case, if you are ill prepared to respond perhaps the Law Society might like to take the questions on notice and give the Committee written advice later.

Mr RICHARDSON: We have little alternative, having just seen it now for the first time.

The Hon. PETER BREEN: I think the document was given to Shaughn Morgan; that was the problem.

The Hon. JOHN RYAN: I draw your attention to the fact that they are requests made by the Police Service, some controversial, some less so, but perhaps you might get back to the Committee on those because the Committee would appreciate your response to that.

Mr RICHARDSON: Certainly.

The Hon. JOHN RYAN: The attention of the Committee has been drawn by other witnesses and submissions to the intelligence that police get when they take samples. For example, the police officer giving evidence the other day referred to the Wee Waa experience. He asked people giving samples to complete a survey and openly admitted that the purpose of the survey was to get circumstantial evidence at that time while people were giving a buccal swab. They looked for things such as shaky hands, sympathy with the alleged offender and so on. Do you have any comment to make about police using that as a means of getting ancillary evidence in the course of taking DNA samples? Is there any practical way in which protection can be afforded against that, if you believe it to be undesirable?

Ms CURRIE: The legislation already provides that suspects should not be questioned during the undertaking of a forensic procedure. I do not know that you could safeguard against police taking peripheral inferences from the way they are acting. Police would regard that as part of their job. We did have concerns about the actual questionnaire during the Wee Waa experiment. We would support the legislation to the extent that there be no questioning during the procedure, particularly of volunteers—no, of anybody. I will not restrict it to a particular group of people because each has different reasons for being afforded the necessary protections.

The Hon. JOHN RYAN: I will read to you a small sentence or two from evidence given by the police, who said:

> We had questions such as "Where were you at that time?" Then we had profiling type questions such as "Did you commit this offence on Rita Knight? Do you think the person who committed this offence would be feeling sorry for what he has done?" It's interesting to note that the only person who actually showed empathy for the offender said, "Yes, I think he would be fairly very sorry for what he's done and yes, he deserves a second chance" was the offender. Again, those surveys are a part of the intelligence component that allows us to prioritise all samples and work it out. It's a bigger thing than we are just going in and DNA testing everyone.

Do you have any concerns about the use of those sorts of ancillary investigative procedures together with DNA profiling?

Mr RICHARDSON: The Law Society was critical of that at that time. I do not think it is appropriate to ask people their opinion as to what ought happen. "What were you doing on the day" may be a valid question but the other questions as you reported them were to do with what the "offender" might be thinking at this point in time. How does that help to gather evidence that might lead to the identification of the accused?

The Hon. JOHN RYAN: The police officers said that it helped them prioritise the samples so one presumes that it makes them look more closely at some samples than others?

Mr RICHARDSON: I do not see it myself, unless they have some incredibly deep understanding of psychology that I do not have. Let us face it, these tests are designed to collect forensic material that can lead to decisions being made that a person is or is not the person responsible for the crime and I cannot see how any of the other peripheral things would necessarily assist them to reach that conclusion, except what the police say to you as being what they do. They classify their material according to the answer to a question like that but I cannot see why and I cannot see how it would help them.

The Hon. JOHN RYAN: Recommendation 16 of your submission suggests that where forensic material must be destroyed after pardoning or acquittal it is inadequate to simply remove identifying information as is provided by the New South Wales Act. Could you further explain your concerns?

Ms CURRIE: The concern is that it is only one-half of the equation. The identification material is one thing but the profile of an acquitted person is still on the system where, in our view, it should not be. It allows the database mechanism to be tested against a sample of an innocent person who is not a volunteer, even if they gave their consent originally to having a sample taken. They did not consent to have it on the database as a volunteer and we regard that as inappropriate.

Mr RICHARDSON: It gets back to the privacy debate about de-identification of records. The difference here is we are talking about forensic material as opposed to information that is contained in government departments or government records. The whole debate about the census—and I got my form yesterday so I will fill it in as I am required to do so—and de-identification of census records is an interesting debate because the Australian Bureau of Statistics quite rightly under its legislation guarantees de-identification. It makes the records anonymous but there is a huge debate on the other side, particularly from persons involved in genealogy and genetics and research in those areas that de-identification of census records depletes the base of knowledge available to them to pursue their appropriate scientific investigations into reasons why certain diseases are passed down from one generation to the next. There are valid arguments both ways.

The problem with de-identification of records and de-identification material is that unless the material itself is destroyed it could be the case that the material could be re-identified at a future time for a future purpose and that is where the cynicism enters into the argument. That is why the Australian Bureau of Statistics would tell you that it is adamant in adhering to its procedures to properly de-identify material and get rid of all information that could be used in the future to identify the person to whom that census return relates. Just taking away the name and address may not necessarily be the end of the story. It is a question of what other information they collect that could usefully in the future be used to identify the particular forensic material. I do not know what they collect—you may know—but if they properly de-identify the material, why do they need to retain the material?

The Hon. JOHN RYAN: The only other question they might reasonably ask: if you say the material can be re-identified, surely it would have limitations on how it could be ultimately used in court.

Mr RICHARDSON: One would think so.

The Hon. JOHN RYAN: Therefore, is that not a sufficient safeguard?

Mr RICHARDSON: Possibly, but I think the levels of comfort in the community we live in mean that people would be much more assured if they knew that the material itself had been disposed of so that there was no possibility that it could be used in the future. You are right, in years to come there may be some problem using the evidence to establish that a person was the offender, but the fact is that problems are not certainties. It is a problem but it could well be the case that it is used successfully to establish a connection and that is the fear people will have.

The Hon. JANELLE SAFFIN: Do you have any comment to make or do you wish to make a further submission about the provision that the Minister has to establish a list of friends for interviews of Aboriginal and Torres Strait Islander people?

Ms CURRIE: Are you referring to interview friends?

The Hon. JANELLE SAFFIN: Yes.

Ms CURRIE: No.

The Hon. JANELLE SAFFIN: Perhaps you could include that in a future submission?

Ms CURRIE: Yes.

The Hon. JOHN RYAN: There is a question about that in the list of issues relating to police. The police have suggested a change to that procedure. So that would give you an opportunity to comment.

Ms CURRIE: Yes.

The Hon. JANELLE SAFFIN: It would be helpful to us to have some comment.

The Hon. PETER BREEN: On the question of retaining records, since about the 1960s a record has been kept on some kind of litmus paper of the blood of every baby born in Australia. As I understand it, that record, which is stored in all hospitals, is sacrosanct. To my knowledge there has never been any attempt to try to use that record to identify, for example, suspects in crime. Do you think that the existence of that record in any way diminishes your arguments about retaining records on the forensic database?

Mr RICHARDSON: Is it a blood sample? I am aware of something like that happening.

The Hon. PETER BREEN: They do a pinprick on a child's foot.

The Hon. JANELLE SAFFIN: It is called a PKU test.

The Hon. PETER BREEN: I think in one case a hospital destroyed the records rather than hand them over to police.

Mr RICHARDSON: That is because the purpose for which it is collected is not a forensic purpose, one would assume, which gets back to the whole fear that people have about databases and their utilisation. So long as you have responses such as that in place, your point is valid. I am not sure of the legislation or regulations that underpin that process that has been in place for so long. I just do not know enough about it to comment. But one would hope that strong statutorily based provisions are in place that would preclude utilisation of those samples, for example, by the police to try to identify from within those samples a matched DNA.

The Hon. PETER BREEN: If the forensic database is limited to convicted serious indictable offenders, do you think that that database is in any way a threat to privacy generally?

Mr RICHARDSON: No, providing that the informed consent provisions have been adhered to. That is the plank that I do not see necessarily existing in the process. If that is there you can assume that proper consent has been given by the prisoner which would stand up to analysis in future years by a court, for example. I gave the example of the prisoner who said, "That was forced upon me." If it is done in that way and if the use is confined, as you say, to that limited purpose, the objection of the Law Society becomes weaker.

The Hon. PETER BREEN: There is certainly a question in my mind about an accused person who might not have the means to be able to pay for an independent test if that person is accused of a crime and if part of the Crown's case is that the person's DNA matches certain DNA that was obtained at the crime scene. To my mind there ought to be in place some system whereby the accused is entitled to funding for independent DNA testing. Would you support that?

Mr RICHARDSON: Yes, definitely. I have not given it much thought but, intuitively, yes.

The Hon. PETER BREEN: I am not suggesting that funding should be available generally for every accused person, bearing in mind that this evidence is only one aspect of the Crown's case. But when it becomes a critical aspect of the Crown's case would you support the proposition that independent funding ought to be available for forensic testing of the accused to make sure that his or her DNA matches the evidence?

Mr RICHARDSON: Yes.

CHAIR: Thank you Mr Richardson and Ms Currie for your assistance to the Committee this morning. It is much appreciated.

Mr RICHARDSON: I must apologise for not being prepared to answer these questions. But we will get back to you in writing.

CHAIR: That is understandable. The questions were not communicated directly to you. We are happy for you to take them on notice and for you to respond when you are in a position to do so.

(The witnesses withdrew)

JEREMY GANS, Lecturer, Faculty of Law, University of New South Wales, affirmed and examined:

CHAIR: Dr Gans, in what capacity are you appearing before the Committee?

Dr GANS: As a legal academic.

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

Dr GANS: Yes.

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

Dr GANS: Yes.

CHAIR: Do you wish your submission to be included as part of your sworn evidence?

Dr GANS: Yes.

CHAIR: I indicate to you that if 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 now invite you to make a brief oral statement in support of your submission.

Dr GANS: Thank you for having me here. In my opening remarks I will cover just three points. The first is a general statement of my view about the Act and what I think should be done. The second is to outline some practical issues that have already arisen about the Act and to bring them to your attention. The third is to comment a little about some specific issues that I addressed in my submission although, of course, I will not be talking about all of them.

It should be obvious from my submission that I am a critic of the Act, but I would not want it to be thought that I am a critic of the use of DNA in investigation. To underline that, I think I was the only speaker amongst those at the Sydney Institute of Criminology Forum on DNA who made an explicit call for an increase in police powers—something about which I would be happy to explain my reasons, if you want to ask about them. I am certainly not an opponent of the use of DNA.

My position on this Act comes from a concern that it does not provide a stable or useful basis for the efficient and safe use of DNA by the police. In fact, it dramatically hampers the efficient use of DNA in investigations. We have no reward, for example, some sort of balance against suspects or offenders rights. As I outlined in my earlier remarks, I am concerned about the drafting of the Act. I am not here to comment directly on great issues of policy that are raised by the Act and that have been raised over the last 10 years, although obviously there is always an overlap between concerns of drafting and concerns of policy.

I have erred on the side of commenting on matters that are within that overlap. I think that you have three options in relation to this Act. I recommend the third of the options that I am about to list. The first is to leave it relatively untouched. The second is to make a massive number of amendments. That would come close to making this Act workable. The third is to start again. Ordinarily, I would just be recommending the amendments but, unfortunately, the drafting problems of this Act are not due just to typographical errors or things that can easily be fixed; they are also due to structural features of the Act.

I fear that making the necessary amendments to the Act would, unfortunately, increase its complexity even further. On other hand, a fresh go at writing a new Act would reduce its complexity and, I believe, result in a shorter and an easier to understand Act than you presently have. Unfortunately, the New South Wales Government chose to follow the model forensic procedures bill produced by the Model Criminal Code Officers Committee in drafting this Act. It followed that fairly closely, although not entirely.

Unfortunately, most of the problems in this Act derive from the model forensic procedures bill which was drafted with inadequate attention to questions of plain English, consistent drafting and policy issues that were neglected in the rush to consider the bigger questions of whether the procedure should or should not be allowed. I comment on the practical issues that you should be aware of that I believe have already affected the operation of the Act and that are reasons for urgent attention.

The first concerns part 8 of the Act, which you may be aware has not yet been proclaimed, and which covers volunteers. The fact that that part has not been proclaimed is in itself a problem. As near as I can tell, the question of the legality of procedures done on non-suspects and non-offenders is in doubt at the moment because of the passage of this Act. The failure to proclaim part 8 raises a question about whether those procedure are currently legal. They were, of course, legal with consent before the passage of the Act.

But the failure to proclaim that part also indicates that the Attorney General's Department is concerned about the effect of part 8 if it was proclaimed. I have numerous concerns with that part but, as I understand it, the chief concern of the Attorney General's Department is that its terms appear to cover the victims of crime. So if that part was proclaimed the police would suddenly be burdened with complex and inappropriate procedures whenever they attempt to carry out any sort of reasonable procedure on a victim. I think that is why the Attorney General's Department is scared to proclaim part 8 of the Act. But obviously something needs to be done.

CHAIR: Why do you say they are scared to proclaim it?

Dr GANS: If they need to perform a procedure on a victim—which they currently do, I am sure—they would be worried about having to read victims their rights, as if the victim was a suspect, which is what part 8 of the Act requires, so that the evidence could be used in court and the like. They are also concerned about provisions such as the definition of "forensic procedure", which specifically excludes cavity-style searches, which is a problem for victims of say sexual assault who are given that sort of procedure with consent, and quite properly. But if part 8 were proclaimed there would be doubts about whether those procedures would be legal—not for any good reason, but simply because the drafters of the Act did not realise that the definition of volunteers includes victims.

The Hon. JANELLE SAFFIN: It includes part 6 requirements, which I have just had a quick look at. So they would have to comply with part 6.

Dr GANS: That as well. It may well be that those part 6 requirements are, in part, appropriate. I could not comment specifically on whether all of those parts are appropriate, but I would have my doubts, given that the drafters did not turn their minds to victims and were thinking in terms of potential suspects and addressing concerns about destroying evidence, and the like.

The Hon. JOHN RYAN: Section 66 (3), which refers to the use of forensic procedures on serious indictable offenders, says that "a forensic procedure may be carried out on a serious indictable offender who is a volunteer only if authorised by and in accordance with part 8. It is my understanding that the bulk of procedures on those people are actually voluntary. What is their legal status if part 8 has not been proclaimed?

Dr GANS: I was asked that question by one of my students when I was teaching this material. My answer is: I do not know, and I have my doubts about the legality of those procedures. I will outline the legal issues that arise. One is that, because the definition of volunteer is so broad—anyone who volunteers, I believe, is the definition—it is unclear whether it covers people who consent after being asked, say, as offenders in prison. On its terms, it does, but I think there is room for interpretation that it would not. The second question then is: What is the status with the non-proclamation of part 8? What happens to people if they cannot be dealt with under part 8 but where section 66 stops them from being dealt with under part 7? There is in the Act ambiguity about the extent to which the common law of consent survives the passage of this Act. That is just unclear, although my guess, based on my reading, is that it does survive. So perhaps those procedures would be legal under common law. The problem, though, is that there will be a problem with putting DNA information gathered by those procedures on the database, because the database does not provide for the placement of material gathered by common law procedures on the database.

In short, it is a mess. Part of the problem is not just the non-proclamation of part 8; it is the non-necessity of section 66, a thoroughly stupid section that simply should not be there. I have no objection to offenders being sampled. I do not understand why the fact that an offender volunteers should mean that suddenly we should use different provisions. Not that I have direct contact with prisoners, but my advice to prisoners at the moment is that they should all volunteer; that they should run up, before they are asked, and volunteer. For a start, that will create legal uncertainty about any procedure done on them because of the non-proclamation of part 8. But, better still, even if the procedure is done under some proclaimed version of part 8, they will then have the right at any time to ask for their DNA to be removed from the database—a right they would not have if they were treated as offenders. Why the fact of volunteering makes any difference to their rights, or why it should make that dramatic difference to their rights, is completely beyond me. I have no doubt that, given that it is so illogical, it was just an error that it is in the Act at all, although I note that it is in the model forensic procedures bill as well.

I go now to the third practical problem. I want to draw the attention of the Committee—and I am happy to talk about it further—to a decision last Friday handed down in the New South Wales Supreme Court. I understand this to be the first New South Wales decision under this Act. Unfortunately, the decision was somewhat inconclusive in that it did not resolve the rights of the parties. The judge simply declined to pursue the matter at this stage. The facts of the decision are disturbing enough, in terms of the practical operation of the Act. It involves a murder suspect, and it involves procedures that would have been perfectly legal if done last year but puts the validity of the procedures in severe doubt because of the failure of the police—although, in my view, understandable failure—to properly follow the procedures of the Act. In particular, the facts raise the difficult problem of the interaction between the order provisions of the Act and the consent provisions of the Act, and the order in which those two procedures are meant to be followed.

In this case, the police sought an interim order, then they asked for consent. I will read to the Committee an extraordinary passage from their request for consent. They read the suspect his rights. He then asked about the interim order, and he was told, "That's an order made by a magistrate that if you don't consent to the procedure carried out, it will be carried out anyway." He said, "Well, in that case then, I consent." The police had the gall to argue—although perhaps they were desperate—that that was a valid consent, even though there are doubts about the very legality of that interim order. It is an impossible argument to sustain. But, at the moment, there are real problems in working out how they will ever validly perform a procedure on this suspect. I noted a question before that if there is a problem with legality, can't they just repeat the procedure? I should point out here that these procedures were not just DNA procedures; they were procedures done to recover swabs from someone's body. There is now no opportunity to repeat those procedures. If the order is declared invalid, and there is a requirement to destroy the material, that is the end of it: that material cannot be recovered.

CHAIR: I am sorry to interrupt. Are you in a position to table the document to which you referred?

Dr GANS: It is a document on the New South Wales Supreme Court web site, but I can give the Committee my copy.

The Hon. JOHN RYAN: It would be helpful if you could give the document a title.

Dr GANS: It is called *Kerr v Commissioner of Police*, 2001 NSWSC, 637. Were it not for the fact that too much comment on this case would be sub judice, this would be something in respect of which the media could justly say that the New South Wales Act has damaged severely a murder investigation. That is, of course, the worst case scenario—and here it has already come about, I suspect.

I want also to comment very briefly on a couple of things I brought out in my general remarks in the paper. As I said, I think there are all sorts of problems, at every level, with the drafting of the Act—from typographicals, to internal inconsistencies, to complexity. But perhaps the worst feature of the drafting is that inadequate attention was given to issues that needed attention if issues were not to be confused by the use of imprecise terminology. Although I am sure the Model Criminal

Code Officers Committee considered lots of issues, my feeling is that they did not consider enough issues. I will outline very briefly those issues.

The first is the question of getting forensic material from a person other than by a forensic procedure. I noted while I was listening to proceedings before this Committee that there was comment about concern that materials gained from offenders might be misused by the police, and say planted. I think that is a risk, but I think there is a misconception that that is the only way that police could get material from offenders. The truth is that it is easy to get forensic material from people lawfully, without using a forensic procedure. If I had the money, a private investigator and the laboratory to do the DNA analysis, I could have the DNA profile of every person in this room within a week. Police overseas routinely do this. Where procedures are not available to them, they raid rubbish cans, get people's cigarette butts, and wait for people to spit. Those are not procedures, but they allow the lawful obtaining of someone's bodily sample, which can then be lawfully analysed. That is one problem. I will not say anything further right now about that.

The second is my general concern with the consent provisions of the Act. While there has been a lot of controversy about the orders, I think the consent provisions for both suspects and offenders and all the volunteer provisions, are the biggest problem with the Act. You can see that in practice—and this is the third practical point I was going to raise—with the very disturbing evidence heard by the Committee earlier that the vast majority—all but five, it was said—of prisoners in New South Wales gave their DNA under consent, rather than under an order. My understanding of that is that that means all but five prisoners now have a wonderful argument to make, if they are ever brought to trial, about the legality of those procedures. I should point out that the questions of legality go further than the matters raised by the Law Society. It is not just a problem of inadequacy of the informed consent procedures, or of the non-provision of legal advice. The greater problem is that consent in those situations is given under pressure. Any law student can tell you that consent under pressure is not consent. There is always a question of how much pressure is enough to raise that consequence, but I think there is a good legal argument that the kinds of pressures put on offenders, regarding classification, being told—perhaps even rightly told—that an order will be obtained anyway if they do not consent, is exactly the kind of pressure that will allow the courts to have much concern about those procedures.

That is not to say that the sky will fall, and all those people will go free in a trial. I am sure that Committee members would be aware that there are ways to save illegal procedures, and that even if these procedures are tainted by illegality a court may well admit the evidence anyway. So it will not necessarily be a recipe for freeing prisoners, but it will be a recipe for a lot of legal confusion. The way that these things operate in the United States of America, it will be a recipe for very effective plea bargaining by people charged with offences. The police or prosecution will be desperate to keep these cases out of a contested trial because of the question mark over the validity of that testing. For example, our murder suspect in *Kerr v. Commissioner of Police* would succeed, I am sure, if he offered to plead guilty to manslaughter, because the police would not want to go to trial on this case.

The problems are not just with consent given by suspects and offenders. They are also with consent given by volunteers where similar problems of pressure arise. Although the volunteer problem is a tricky problem, the problem with suspects and offenders should not be tricky. There should not be a need to ask for the consent of any of those people. Instead, there should simply be an order obtained, and they should be given the opportunity to comply with that order or not. 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 a 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. In fact, these procedures are very similar. That committee did not give attention to whether there needed to be consent procedures at all for suspects and offenders.

CHAIR: Would it not be cumbersome though to request an order in each case?

Dr GANS: I agree it would be a problem if there was a need to go to court, but, in terms of gathering DNA—which is not, of course, the only procedure done—there is no need for a court order for suspects in custody or for offenders.

So, no, I do not believe it would be cumbersome for that reason. In fact, the suspect provisions place the same kind of test on the request for consent as on making of an order to undertake procedures, so it would be the same test applied in each case. The police officer would still have to go through the grounds, even under the consensual procedures, for no gain and in fact for some loss.

The third point concerns buccal swabs—a very practical issue under this Act. Unfortunately, the Act makes no distinction between self-administered swabs and swabs administered by others. I think it should be obvious that there is no procedure less intrusive than a self-administered buccal swab and there is no procedure more intrusive or offensive than a forceful buccal swab on someone who has his or her mouth clamped shut. The problem with this Act is that it treats all buccal swabs the same. Although the Act puts them in a sort of sui generis category, they are intimate procedures under this Act and they have the same rules as intimate procedures with only one slight exception.

I think that this Act could be greatly improved if the two procedures were separated so that the police were able to order—which they currently cannot do—a buccal swab but be forbidden from forcing the suspect to comply with that swab. My feeling is that although of course anyone can consent to a buccal swab, there will be some people who will not be willing to consent until the order has been obtained. In fact, if people get legal advice, that is undoubtedly the course they would take. The problem with this Act is that to get an order for a buccal swab the police would have to go to court so they would instead choose to get an order or make their own order for hair sampling. That is a worse procedure—a nastier procedure—than a self-administered buccal swab. If the police were allowed to order someone to do a self-administered buccal swab with the penalty, if one wants to call it a penalty, that there will be a hair sample taken otherwise, that would be a much more satisfactory approach to getting these procedures done. I personally cannot see any reason why self-administered buccal swabs should not be the preferred method, whether consensually or whether the suspect waits for an order.

The fourth point I have already briefly discussed. It concerns victims and I do not think I will say anything further about that, although I will in one other sense. This issue is not just about the procedures being done on victims; it is also about what is done with the material that comes from victims. One of the unfortunate features of the Act is that it does not really deal with how victims' DNA profiles, say, should be dealt with on the database. The disturbing possibility is that they will be put on the crime scene database which means that they can then be compared with every other crime scene in Australia or that the database reaches to. That will be a problem for some victims who may well not want to undergo that kind of outcome. Some of them might have something to hide.

The Committee might consider it serendipitous that we catch these victims out, but I am sure you can see that there is a problem with getting victim co-operation with the police, if that is a consequence. Victims should be separately dealt with and their DNA profiles should be separately dealt with. They should not be classed as either volunteers, who are of course potential suspects, or as, worst of all, crime scenes. I will skip over my fifth point on the different types of forensic analysis. I am happy to comment on that. I will just mention what I think is the other major loophole in the Act, which is that the Act provides for the use of DNA profiles and the matching of DNA profiles on the database but does not provide or discuss the use of DNA profiles off the database. It is just a massive loophole. One does not need a database to do forensic comparison: One can ask a lab to do a forensic comparison.

There is nothing in the Act which stops that from happening, which means that all those constraints, garbled as they are in section 90 of the Act, on what can be done on the database just will not apply unless the police put the profile on the database. And if the police keep a copy, they can still do matching. I do not understand why the Committee would not want to regulate off-database procedures. Frankly I think the solution should be simply that matching off the database should not be permitted. I realise that there is a regulatory problem of regulating off-database procedures, but that is no excuse for giving the police carte blanche. That concludes my opening remarks

CHAIR: Dr Gans, I am startled, to say the least, to hear you tell the Committee that part 8 of the legislation has not been proclaimed to commence. Are there any other parts of the legislation that have not yet commenced?

Dr GANS: No. As I understand it, the rest of the Act has commenced.

CHAIR: So that is the only exception—part 8?

Dr GANS: That is right.

The Hon. JOHN RYAN: And the whole lot of part 8?

Dr GANS: That is right.

CHAIR: Have you perhaps sought any explanation from the Attorney General's office as to why that is so?

Dr GANS: Informally I have talked with a person from Attorney General's who indicated that was the concern about victims that I had in fact raised and I am sure that others had raised concerns about this. Like I said, there are a lot of things wrong with the volunteer provisions but I think that particular concern is a very practical one. I should also say that, as I understand it, there are already amendments that are being planned. I have no idea what stage they are at or the content about victims.

CHAIR: You may rest assured that we will make our own inquiries regarding that. Could I ask you about what I might term is your philosophy regarding DNA legislation? I understood you to say during the early part of your opening remarks that you are a supporter of DNA testing but you are not really a supporter of the current regime to do it. Is that correct?

Dr GANS: A supporter of this Act and of the model forensic procedures bill. There are aspects of the regime that I am a supporter of but the actual Act and most of its provisions raise great problems for me. I will tell the Committee my general philosophy on that and discuss that. My feeling is that much as a lot of people are concerned about their DNA being given to police, I feel it is pointless at this point of development of DNA technology to try and meaningfully stop the police from getting DNA from certain people. The reason I gave was about the ease with which DNA can be obtained informally. I think it would be better to bring those procedures within the system. I think that the constraints on procedures for suspect and offenders in this Act, which are difficult to read but also are so broad that they are barely constraints, mean that the police, if they wanted to get DNA from a person using this procedure, could. The provisions are so wide that there is no point in having them at all and the procedures should be changed to have a more meaningful rule.

For example, in the case of offenders, it is crystal clear that despite the tests in this legislation the idea is that DNA can be taken from all offenders who fall within the definition of "offender" in this Act. I think that all the bizarre rigmarole of going through orders and asking for consent is a bit of a sham. Likewise, with suspects, I have my doubts about whether any person who becomes a suspect for a crime can have any real argument that they do not come within the suspects provisions of this Act, broadly drafted as they are. And even if there was an attempt to narrow those suspects provisions, then one would get into another very difficult argument about what the meaning of "reasonable grounds for suspicion" is. Again, I do not think it is a useful way of trying to restrict the police.

Finally, with volunteers, I have great concerns about these blanket questions to non-suspects. I think that they are under enormous pressure to say "Yes". I can give lots of instances from overseas where the police have had a lot of success getting DNA without any powers, but merely by asking. Again, I think that that needs to be brought within the system and provision made for appropriate controls that are different controls from the ones in the Act. But that being said, while I am mostly of the feeling that it is too late to stop the police getting DNA from whomever they want, that is not to say that there should not be controls on the formal procedures or particularly on the DNA database where there is a lot of room to regulate.

One of the greatest weaknesses in this Act are the provisions about suspects. The police can get DNA if they suspect someone of a crime and the DNA will be useful for investigating that crime, but the Act allows that DNA then to be placed on the database and matched against any crime scene for the following 12 months, even if that person is immediately cleared of being a suspect. That is the problem; that is why the police have every incentive to stretch the definition of "suspect" or to catch as many people as possible on some sort of charge and get their DNA from them. The DNA database

provisions provide too much of an incentive to the police to get DNA. To control the police from getting DNA from too many people, the control should be at the database end. The police should be restricted from looking for cold hits except in very carefully defined categories of people—basically, offenders. I think that is as far as I want to go.

CHAIR: Returning to the question of your philosophy regarding DNA legislation and testing, I will cite a short passage from your paper which was delivered to the Institute of Criminology seminar in April this year. You said:

> I argue that a DNA request compels self-incrimination of individuals' guilty minds, because guilty recipients of a request for consent to DNA sampling must either reveal their fear of surveillance or agree to surveillance, thus surrendering their legal right to refuse consent to a forensic procedure.

Could you explain your concern there?

Dr GANS: The problem again arises with the request for consent and the Act's reliance on consensual procedures with all classes of person. My feeling is that situations like Wee Waa, the first-ever use of DNA in the UK, and the use of mass DNA screenings all over the United States mean that the police are using the request for DNA as a way of gathering an initial identification or targeting of people for further investigation. I argued that that is a breach of the privilege against self-incrimination which is designed to stop any kind of pressure—albeit that there will be issues of the definition of the word "pressure"—on non-suspects. The privilege against self-incrimination is most commonly known as a way to stop people being pressured to speak when they are in the interrogation room, but it equally applies to people outside the interrogation room—if not more so—because they are not suspected of any crime.

My concern is that the question itself becomes a sweep because, although in the case of Wee Waa the defendant did go and confess straight afterwards, the first-ever successful use of DNA to catch someone in the UK came as a result of a sweep and questions. That person outed himself by his actions to avoid having to give up his DNA or revealing his fear of giving up his DNA. My particular concern, I must confess, is with the guilty people. I think that innocent people will just give their DNA but I am unhappy about being in a society where the police can expose the difference between guilty and innocent people without any prior evidence. That is the essence of what the privilege against self-incrimination is about.

I should say, though, that I am absolutely sure that lots of innocent people would equally feel uncomfortable with being told, for example, "We have a procedure to work out whether you are guilty of any crime on our database. Do you consent or not?" If they say "Yes", then they will undergo the procedure. If they say "No", then they are revealing that they do not want to undergo that procedure. There are, of course, innocent reasons not to undergo the procedure but I am unconvinced that there are enough innocent reasons for saying, "No, it will not be useful intelligence for the police."

CHAIR: At page 39 of this copy of your remarks to the Institute Criminology seminar, you say in part:

> I argue that there is a simpler, more elegant solution to the problem of DNA request self-incrimination: completely abolish the police's right to ask for DNA.

Dr GANS: That is right.

CHAIR: I take it that your approach is that you want DNA testing to be had as a result of a court order in every case.

Dr GANS: A court order or, in the case of people in custody, I imagine that a police order would suffice. The reason I recommend abolishing the right to ask is because of this concern about self-incrimination and I think it is unavoidable, no matter what safeguards you add—lawyers, or whatever. The reason I then suggested that we need orders instead is because in practice you cannot stop the police asking. If the police are given limited powers to get an order, then they will ask the people for whom they do not have the power, even informally. I think it would be better if these requests were brought within the system and instead of having a request directed and decided at the decision of each police officer on a person-by-person basis, it should go to some sort of authority. In

the case of all non-suspects, it should go to some sort of court, justice or whatever, to make a determination that the request is necessary.

The Hon. JOHN RYAN: That will completely eliminate, for practical purposes, a mass screening, will it not?

Dr GANS: No. My proposal, as I said, was to increase police powers to get orders. I think the cost of getting rid of this potential for self-incrimination is to allow an order to be obtained in those mass screening situations.

The Hon. JOHN RYAN: You would have a mass screening order by a court that would allow all the residents of Wee Waa to be screened?

Dr GANS: As a minimum, I would at least argue that the mass screening request should itself be contingent on an order, but I would probably go further and say that it would be better if the court was given the power to make the order, or no request can be made at all.

My reason for that is if you only give the court the power to authorise a request, the court will say yes in every case because what is wrong with a request. If you give the court the power to only authorise an order or nothing at all, then the court will be much more cautious about when it does it. I can elaborate on this. Part of my problem with Wee Waa, for example, is that it is clear from newspaper articles discussing the police investigation in that case that police had a small number of suspects in mind when they made the request. They did not suspect the entire town of Wee Waa. Yet they made the request of the entire town of Wee Waa because that put maximum pressure on the small number of suspects. I do not see why the entire town of Wee Waa had to be brought into this investigation in that way. If the police had the power to go to a court and say, "We have concerns about 12 people" and were able to establish some minimal standard for those 12 people, that would have been 12 people, rather than 500, bothered by the police. It is a question of numbers and of avoiding the problem that some of those 500 might be guilty people who were exposed only because of a police tactic.

CHAIR: Would it be unlikely for a court to make an order for mass screening of the whole population of a town, such as occurred at Wee Waa?

Dr GANS: Without a doubt. The court would say, "Start with your targets and only, if necessary, go beyond that." I imagine the criteria would be something of the order that the police would have to be able to show on the balance of probabilities that the criminal is likely to be part of a specific group and the group should be a number. It should be put on the numbers of that group who can be asked. I am not making this suggestion with any expectation that it will be taken up. It is just the logical conclusion of my concerns about self-incrimination. It would be better if people, even non-suspects, were subjected to forced taking of DNA than to forced revealing of their minds. It is worse to be forced to show your guilty conscience than to provide DNA. That is particularly in light of the fact that you can get DNA from people anyway without an order.

CHAIR: Is this your approach, in essence, regarding DNA testing: You feel it should be narrowly targeted on prospective subjects and that rather than volunteers being called for there should be compulsory sampling of appropriate persons within a targeted group as a result of a court order or an order of a senior police officer?

Dr GANS: In the case of non-suspects it would have to be a court order. It is obviously an extraordinary power I am suggesting here. There is no way you would ever give that kind of power to anyone other than a court. I am sure that this is sounding radical, but bear in mind the distinction between suspects and non-suspects is not the strongest and clearest distinction in our society. Just about anyone can become a suspect if he or she is in the wrong place at the wrong time. A comment was made earlier when you were talking with the Law Society about how offenders will end up on the database but ordinary people will not. If you are in the wrong place for a murder investigation and the police then have the power to get your DNA from you—even if you are instantly cleared, as I am sure you all would be in any such investigation—you will still have your DNA on the database for 12 months to be compared to every crime scene in Australia. What I am proposing does not actually, in

practice, go much beyond what the Act already allows, although I agree in form it is an extraordinary new power I am proposing.

CHAIR: When I was reading your submission last night I formed, I believe, the not unreasonable view that you are not an admirer of the drafting of either the model bill or of the State legislation. Would you tell us in substance why that is so?

Dr GANS: In substance it because I identified all sorts of errors in the Act. I list 125 here. Every time I open the Act I see something new that is a problem, although I have not noticed anything that is as serious as some of the problems I raise here. Some of them come up from students in my class who are baffled by the Act. They see these problems. I wonder at times as to how these problems arose. I do not have enough information about how the Act was drafted and the like to say too much, but I believe that this Act suffers from the faults of a committee, from the faults of over-amendments in a short space of time at the drafting stage, from having a short space of time for consideration, from it never having someone step back and look at the Act again to try to tidy it up, from political interference with the Model Criminal Code Officers Committee [MCCOC]—which is in no way immune to that kind of interference—and from the problem that some of the main provisions of the Act were taken from other legislation that was not drafted with the modern issue of Australian DNA in mind, for example, the Victorian legislation from 1987 or legislation in other jurisdictions with completely different surrounding law of criminal procedure.

CHAIR: You say on the very first page of your submission, "The Act is a drafting disaster." You go on to say, "The Act is riddled with confusing, lengthy, inconsistent and arbitrary legal rules needlessly disadvantaging citizens and police alike." Do you adhere to that?

Dr GANS: Yes. It is one of the remarkable things about this Act. I know that a lot of people line up as either for suspects or for the police. I have heard conspiracy theories from both sides on why this Act is so bad. I sat and listened to a couple of police officers on one occasion sitting behind me speculate openly that this Act was drafted by some kind of Franca Arena-style conspiracy of parliamentarians to free prisoners. I have also heard civil libertarians speculating in the other direction. The truth is that I do not believe there is any conspiracy here. Without pointing to any particular person, it is just the incompetence of a system of producing this legislation.

CHAIR: On that matter, at page 2 of your submission you say, "The ultimate cause of the Act's problems is the drafting and parliamentary process, which appears to have emphasised policy controversies but neglected practical issues of implementation." Is that your view?

Dr GANS: Yes. As I understand it, the main concerns of the committee when drafting and, as I read it, the New South Wales parliamentary debate were should there be coercive procedures, who should they apply to and should there be a database. Those are important issues—although I believe the decisions about them were a foregone conclusion at every stage in that process—but they are not the only issues in this area. Unfortunately, one of the myths about DNA is that beyond the issues of getting it and sticking it on a database, otherwise its use is straightforward. However, absolutely no confession, identification or any other sort of evidence you can think of that is of relevance in a criminal trial is straightforward. It is always extremely complex. Unfortunately, I believe that the drafters or the people who were pushing those policy decisions felt it necessary to paper over some of the complexity. I am sure that they had profound political reasons or whatever to do that, but the consequence is that the Act does not deal sufficiently with all the issues that it needs to deal with.

CHAIR: I note near the bottom of page 2 you say, "The flaws of the Act are so severe, what is really needed is a fresh start rather than a lengthy and complex set of amendments. The Western Australian bill would provide an excellent starting point for a new bill as its drafting is, by comparison at least, exemplary."

Dr GANS: While I certainly do not support every provision of the Western Australian bill, it shows what you can achieve in terms of simplicity. I know that members of the Model Criminal Code Officers Committee on hearing my kind of objections to the Act have said that what I am really arguing for is a 300 or 1,000 section Act. In fact, I am not. The distinctions I have made will simplify the Act in the long run. The Western Australian bill draws many of the distinctions that should be drawn, yet it is shorter than both the New South Wales Act and the model forensic procedures bill. It

clearly has benefited from someone sitting down and cleaning it up. It is clearly based on the model forensic procedures bill but has been cleaned up. Although I do not have any personal knowledge of what went on in Western Australia, I know that there was a lengthy hearing by a committee of the Western Australian Parliament. The Donaldson committee produced a very lengthy report that should be required reading on this issue. It is very well written. The committee did it at the same time as MCCOC was doing its deliberations. Obviously the West Australian bill benefited from the extra thought they gave to it.

The sad thing here is, as I understand it, this is the first time any group of people other than MCCOC have spent any length of time puzzling over what the best Act is for the purpose of DNA identification in New South Wales. It is a pity that something did not happen earlier, but this is the first opportunity to fix it. As I understand it, when this Act went through New South Wales Parliament there was not an opportunity for careful reflection of each of the sections of the Act. The call for haste there was presumably so that offenders could be sampled as soon as possible. Frankly, it would have been better to pass the offenders provisions in maybe three sections as an amendment to the Crimes Act rather than passing this thing in a hurry. I know it is very unlikely that you will start again on this Act. But I should say a couple of things about uniformity with the MCCOC model.

As you have already heard, this Act is not that uniform with the MCCOC model. In fact, no jurisdiction has passed the MCCOC model, including the Commonwealth. While uniformity is desirable, there is no point having uniform rubbish. Unfortunately, the model forensic procedures bill is that bad. I am not convinced that the Commonwealth database is unworkable, unless all the legislation is the same. In any case, we have already reached that point. It would be better to start again and hopefully provide a model for other jurisdictions who are yet to pass the legislation to take up the New South Wales model rather than the Commonwealth model.

CHAIR: As you will appreciate, your submission is highly detailed. In a hearing such as this, it is not possible to go through all of the very detailed matters one by one. However, I assure you that we will give due consideration to the matters that you have raised.

Dr GANS: I would like to point out I have tried to keep out of those suggestions my broader view about how DNA should be done. I just outlined for you now abolishing consent altogether, although I am sure my hostility for consent provisions comes through a bit in my suggestions about those provisions. The amendments I have suggested are not a recipe for my idiosyncratic view of how DNA should be got in New South Wales. They are trying to follow what I perceive to be the policy views of the New South Wales Government.

CHAIR: I would like to raise a matter of some importance with you. Regarding the definition of forensic procedure in section 3, you say that the Act should distinguish between a self-administered buccal swab and a buccal swab performed by another person. You describe the former as a very mild procedure. You say that should be treated as a non-intimate forensic procedure and the preferred method for gathering DNA, whether by consent or by order. You go on to say that the latter is a highly intrusive procedure and should be treated as an intimate forensic procedure if it is to be permitted at all. Would you like to say something about that?

Dr GANS: On the latter point, I find it hard to conceive of any situation where it would be justified for police to try to rip open someone's mouth if it is clamped shut. It is obviously an enormous health risk and it is difficult for me to think of a situation where it would be necessary. The only one I can think of is where someone has swallowed some evidence, although it is not clear that it would still be in the mouth at that point. The drug Acts that were recently passed in New South Wales and the customs Acts already deal with that situation, and not by forcing someone's mouth open but by other methods of getting things out of a person's body. I find it difficult to think when the police would order a buccal swab on someone who intends to resist.

On the other hand, it is desirable for the police to have the power to order a buccal swab on someone who, while not planning to resist, is not willing to consent until an order has been obtained. Any lawyer would give a person the advice that he or she should not consent because police should be made to show their evidence to a justice or at least the person could be sure that they have that evidence. Consenting to something, if the consent is genuine, removes any objection that could have been made to the order. I will just outline the procedure. As you know, I do not think the request for

consent should be made at all, but if it is necessary it could be. In any case, if the request for consent is refused, the police should make an order for a self-administered buccal swap. A defendant should be told, "You must comply with this order." I would have not have any problem with inferences being drawn against defendants who refused to comply. Of course, I would have a problem with forcing them to comply because then it would not be a self-administered buccal swab.

The chief consequence of someone's refusal to comply with a legal order for a self-administered buccal swab is that then a hair sampling should be permitted. That strikes me as a sensible procedure that would ensure that the least intrusive procedure is used, whether a person is willing to consent before there is an order or whether a person is simply willing to agree after there is an order. I find it unfortunate that people who stand on their rights will now get their hair ripped out in New South Wales unnecessarily.

CHAIR: When I was reading your submission last night I noted that it is replete with expressions such as "drafting disaster" and alternatively "bizarre drafting". Are your views regarding the drafting of the legislation shared by others in the academic and legal community?

Dr GANS: I cannot speak about the academic community. I have detailed these problems in classes and seminars at the law faculty and no-one stands up and says that it is nonsense. So far as I know I am the only Australian legal academic who is doing any research on DNA. I have never met any other legal academic who is doing research in this area. I cannot otherwise speak to whether others agree with these views but my feeling is that they speak for themselves. Part of the reason I think that they have not perhaps been put to use strongly by others, but I do not know, is because when you first read the Act, it is long and complex but it seems to cover the bases. You tick off various procedures you think should be there and they happen to be there. The problem comes when you read the Act 20 times or so, as I have, and when you have a fact situation in mind. I think the police have felt that. I do not know the evidence the committee has heard from the police but if you talk to police at the coalface, assuming they are free to say these kinds of things, they will say they have had trouble. I am sure they will because some of the provisions they have to personally apply I do not understand what they mean. They are long, complex and their meaning is hopeless.

The Hon. PETER BREEN: Could that be said about all legislation if the same sort of scrutiny is applied that you have applied to this legislation? One could say it is bizarre, it is a drafting disaster and so on?

Dr GANS: I hope not. I certainly have applied this kind of scrutiny to other legislation, for example, the Commonwealth Evidence Act about which I teach my students. It has got its faults, but this is in another world. An important thing to remember about this legislation is that it is not just for lawyers. Some of the problems in this Act, some of its peculiar drafting, might be cleared up one day by the High Court, puzzling its way through as I have done, undoubtedly saying nasty things about the New South Wales Parliament in the process, but nonetheless sorting out some of the confusions in the Act but that will be years down the track. Police officers have to apply this legislation right now. They have to explain it to suspects right now. They cannot wait for a High Court decision on these matters and I do not see how they can do it with some of these provisions.

The Hon. JANELLE SAFFIN: Do you think a scrutiny of bills committee or some sort of oversight of Parliament like that would help?

Dr GANS: Yes, certainly, staffed by legal academics, I am sure. What is most necessary is time to go through it provision by provision. It is not just the New South Wales Parliament that was not given the time. I am sure the Attorney General's Department, or whoever drafted the Act, had to do it in a hurry. After all, the MCCOC draft came out in February 2000 and this Act was before Parliament in May and that is not really long enough to do that kind of scrutiny. The MCCOC draft in February 2000 itself was a modification of an earlier draft in May 1999. One of the unfortunate features of the MCCOC 2000 draft that this Act embodies is at that it does not have an explanation of the changes from the previous draft. It makes it very hard to know what decisions were made. Some of the things in the February 2000 draft are contrary to explicit policy decisions in May 1999, without explanation. That indeed points to political interference, I cannot think of any other explanation.

The Hon. JANELLE SAFFIN: You referred to the Western Australian process, what process did they go through?

Dr GANS: I have only got this from reading their Internet site, but analogous to New South Wales, they had concerns about their existing antiquated medical examination procedures in around 1995 when Fernando was decided. They considered, in fact, passing very hurried amendments to fix the problem. That is what happened in New South Wales and I do not necessarily oppose those amendments, you need to hurriedly fix something. Then they sat down and organised the Donaldson committee that toured the world and were obviously extremely competent and have an excellent document with an excellent understanding of DNA. It is what you need in this area.

The Hon. JANELLE SAFFIN: A world tour!

Dr GANS: The Internet these days means that that is not necessary but a lot needs to come up to speed here and part of the problem is that things keep changing every year, every month in this area and someone needs to be on top of it. The only people—maybe apart from me, I do not know—who are really on top of this legislation are members of MCCOC, of the Standing Committee of Attorneys General [SCAG] who know about the problems, but the problem is that they have signed on to and are committed to this bill. They have obviously got reasons not to pour the bucket or whatever onto the political interference that occurred with them. I do not think that they should be given the last word on this legislation.

CHAIR: When I read the legislation in conjunction with your submission I thought one of the clearest examples in the draft is probably section 12 which is very repetitive and contains an extraordinary amount of, in my view, redundant material. Do you agree with that?

Dr GANS: Definitely. Occasionally I have tried to track where this section came from and why it is in the form it is and the answer appears to be that some of the terminology came from an earlier provision where the Model Criminal Code Officers Committee had in mind a much narrower power for the police to gather DNA from suspects and a much narrower use of that DNA on a database. Then changes were made, for reasons we do not know and we came up with these provisions but I think they must have been made in a hurry and, accordingly, it has still got leftovers. The three-tiered bit that keeps appearing in section 12 and other sections—offence, another offence, still another offence—obviously is meaningless now and is also, I might add, different to sections 20 and 25 where it should be the same. Originally it came from the idea that the police would be limited to comparing DNA taken from a suspect to DNA taken from a crime scene from the offence for which the person is suspected and another offence arising in the same circumstances.

Later on the Model Criminal Code Officers Committee had its mind-change on that point but we have retained the three-tiered structure it created for that purpose. I am not convinced even the original structure it created was that intelligible, but this is a leftover of that.

CHAIR: Would it not have been sufficient to provide that the suspect had committed simply an indictable or a summary offence because all the other formulations really fall within that?

Dr GANS: I think that is correct. Although I think those provisions are problematic, you are right there, they may well be the worst thing in the Act but there are lots of other contenders. Even if you go to a provision, say section 12 which looks well drafted, for example, the extra requirement that always appears for everything except offender orders, that the request for consent to forensic procedure is justified in all the circumstances, that at least is written in English. I find it difficult to think of how the police are meant to apply that test either because there is no guidance as to when a request is not justified in all the circumstances. In fact, one suspicion I have is that part of the purpose of the original request for consent is if someone says "yes" or "no" then that person has a burden on them to say why they are saying no, something which of course could be self incriminatory. But they would then give a reason, lame as it might be "I don't like needles", "I don't like things put in my mouth" or "I have a religious objection to this kind of procedure" but I find it hard to think of one. Then that officer will consider those reasons, reject them because they are probably lame reasons and that is what "justified in all the circumstances" means. I do not think that is good enough and I think that should be deleted if it is not intended to have any real effect.

In some bits of the MCCOC draft I read about its concern about people having religious or spiritual objections to DNA procedure. At one point someone mentioned the Jehovah's Witnesses. I checked their web site and, as I understand it, they have an objection to things being put into their body, not necessarily things being taken out. I wonder how many people have any reason for rejecting a request if they are the suspect for an investigation. The police often argue, quite correctly, that if you are innocent you will have every reason to say "yes" and the only other reason you would have to say "no" is if you are guilty which presumably is not the kind of reason that would make the request not justified in the circumstances. Even though there other provisions which are very technical and hard to follow, even the ones which are not technical, I do not see the purpose of them. When you look in the papers that preceded this Act, that purpose was never outlined properly. It would be bad if it took the High Court in five years time to have to define what that test meant because that would be five years of questionable orders preceding that.

The Hon. JOHN RYAN: While on the subject of section 12, the Law Society raised objection to a divergence from the model criminal code with regard to the use of the expression "might produce evidence". It suggested a rewording that it might be something in the order of "satisfaction on the balance of probabilities that the procedure is likely to produce such evidence" or some qualification of that nature. Do you agree with that comment?

Dr GANS: Broadly yes, but I think there are some complications. One is, I think it is wrong to suggest that these matters do not have to be shown by the police on the balance of probabilities as well, they do, and there are other provisions of the Act that point that out. The problem, as it rightly points out, is the phrase "reasonable grounds to believe that the forensic procedure might provide evidence tending to confirm or disprove that the suspect committed an offence". That applies to anyone. If the police had DNA from a crime scene then a procedure done on me would, in fact, confirm or disapprove my involvement in the crime. Certainly it would have reasonable grounds to do that. It is an empty test. The poor police have to go through it but they will never get anything but "yes" as the answer to that test. That being said, as you know I am not a fan of the model forensic procedures bill either, although that test is more tightly built, it still has this requirement of reasonable grounds for suspicion which is a very low standard. It has to be a low standard. You can not require proof of someone's guilt before you get the evidence that proves their guilt. But because of such a low standard, that is why I believe that there is no real way to draw a firmer line between suspects and others at the procedure stage.

The crucial thing with section 12 is to basically delete those sections, make it possible for police to get DNA from someone who is a suspect of a crime, but then restrict them to using that DNA profile only for the investigation of that crime, or another crime arising out of those circumstances, but not given carte blanche. That will constrain the police because they will not bother getting a DNA profile from someone unless they actually have genuine grounds for suspicion. The problem with the generous database approach in this Act, and the model bill, is that it gives the police every incentive to stretch these provisions as far as they will go because even if they do not really think someone is guilty of a particular crime, they then get them on the data base for all purposes for a year.

The Hon. JOHN RYAN: You may have already answered this question to some extent, but you have drawn attention to the fact that the provisions relating to charged and uncharged suspects are currently the same. Your submission suggests consideration should be given to formulating different rules about the retention and use of the forensic material for these two categories. Would you distinguish what the different rules should be for the two sets of categories?

Dr GANS: I alluded to the fact that the Western Australian bill draws a distinction between charged and uncharged suspects, as it does between victims and other non-suspects but I do not necessarily agree with how they use that formulation. While they make the distinction, there is not a big difference in how those categories are treated. To my mind, even the haziness of the concept of reasonable suspicion as in the mind of a police officer which is the test in this Act and at common law for whether someone is a suspect, I think the police should be allowed, as I have already suggested, to get DNA from those suspects and test them against the crime suspected. But if you are going to take the view, as this Act does, that there should be an ability to put DNA just from suspects who do not have a crime proved against them on the data base, then I think the line should be drawn between charged and uncharged suspects. Suspects' DNA should either not be placed on the DNA database or should be given a very limited range of matches. But if the view is that some suspects should be put

on the database for all purposes it should be the charged suspects. At least the charged suspects have gone before a magistrate so it stops a little bit of abuse and it is a little bit of trouble. At least put a roadblock or a slight hump in the path of the police just gathering DNA from whoever they want.

The Hon. JOHN RYAN: Currently in relation to the testing of suspects, an intimate forensic procedure or buccal only may be performed on people suspected of a prescribed offence. A prescribed offence is a serious indictable offence or an offence prescribed by the regulations. At this stage no offences have been prescribed by regulation. Would you consider it beneficial for offences, rather than serious indictable offences, to be prescribed?

Dr GANS: I have really got no view on this one because I think the problem is the definition of "suspect". I do not think this makes a practical difference so I cannot state any view on it. Like I said, I do not have any problem with the police using DNA to investigate any crime. I imagine that restriction was put in as some kind of obstacle for the police just to take DNA from whoever walks into the station but I do not think it is an effective obstacle. There are other changes that would achieve that more effectively.

The Hon. JOHN RYAN: Should people suspected of summary offences and indictable offences be required to undergo non intimate procedures, as is currently the case under the New South Wales statute?

Dr GANS: Again I do not have any particular view on that. I do not have a problem with it, subject to all these other problems being cleared up.

The Hon. JOHN RYAN: Do you believe that the rules relating to the inadmissibility of evidence are adequate?

Dr GANS: No. The Act makes use, except in one case, of the very traditional common law approach in Australia, and in Australia alone, of leaving the question of inadmissibility up to a trial judge, who weighs up serious consideration. I have never been a big fan of that balancing approach but I think it is particularly in apposite in the kinds of matters being considered for the use of DNA evidence. The way the balancing test goes is that trial judges have every reason to include evidence, not exclude it even if it is illegally obtained, if the crime being charged, investigated or prosecuted is a serious crime and the evidence is crucial. My concern is that DNA will satisfy those requirements in a lot of cases. That is not to say that all trial judges will include that evidence but they will be under enormous pressure to do so because they will have the choice of affirming the rule of law and the importance of following the rules under this Act. But if they take that choice they will be letting a potentially very serious criminal go free.

Usually, the discretionary decision that the trial judge must make is made in situations which are much less certain, when the evidence is less compelling evidence of guilt and when the crimes are less serious. In that case I am sure a balancing test is appropriate. However, I think a tougher test is needed here because I think trial judges are put in an impossible position. One distinction that I think needs to be drawn, and is drawn in other jurisdictions, is the difference between a mere failure to follow a procedure which, if the police had put their attention to it they would have followed it—that can be proved as a question of fact—or a situation where the police should not have done the forensic procedure at all but have got it and have now serendipitously got a cold hit. In those situations the evidence should be excluded, otherwise the police have every incentive to be less cautious with procedures if they feel that the procedure will go against them. They always have the hope at least in trial of getting a trial judge who is unwilling to let a mass murderer or whatever go free—as if a trial judge would. But because of that it means that the police have no reason to follow this Act. That is the first point on inadmissibility.

The second point is that the reliance of this Act on inadmissibility as its main sanction for deterring police misconduct—I realise that there are criminal provisions, though no police officer will ever be charged with them—is flawed because one of the main uses of DNA, or perhaps the main use of DNA, is that in the early stages of investigation, if the police have worked out who their man is, if the police do something illegal but gather evidence against someone they can do the procedure legally later. It may be difficult then to argue at court that there are any grounds for exclusion. There could be grounds but it is more difficult. For example, the concerns I have about the police wrongly forcing

people to reveal their minds by asking them whether they are willing to undergo a DNA procedure cannot be dealt with by an inadmissibility provision, because the police will not be giving evidence of that refusal to consent anyway. They will be giving evidence of the later DNA procedure they did lawfully. So part of the problem with relying on inadmissibility is that it does not regulate the earlier stages of the investigation, which is exactly when DNA is important.

The Hon. JOHN RYAN: Are you aware that the Act contains provisions for the removal of identifying information under some circumstances, for example, when a suspect is cleared? Is the removal of identifying information adequate as a destruction of the sample or its analysis?

Dr GANS: There are a couple of things to say. First, I make the point in the materials that the word "destruction" needs to go, if that is the definition of "destruction", because it is nothing to do with destruction; it is the de-identification. I also have a concern about exactly what "identifying particulars" means. In fact, there are two different provisions with slightly different turns of phrase on that issue. For example, if they leave the date the sample was obtained but otherwise remove the details of where it was obtained and who it was from then it would be possible, as the Law Society indicated, to re-identify that material if it later matched something on the database. I am thinking there of a cold hit being discovered between the statistical database of DNA profiles and a crime scene sample.

My third problem is that I have never found anywhere an adequate explanation of why these profiles are not simply destroyed and the material which they come from is not simply destroyed. The only best guess I have heard of why the profile is not destroyed is so that it can be used on the statistical database. That is not a big worry of mine but I know many privacy people would think that you need a better reason than just retention on the statistical database to retain a profile from someone which was taken coercively. As for the material, it is an incredibly bad idea to retain the material lying around for all sorts of reasons. I cannot understand why you would want material lying around in a laboratory. It is a danger; it will cause contamination. Why would you not destroy it? Personally, I do not care if they have my blood lying around but I do not understand why, if the Act anticipates destruction of the material in some circumstances, it would not then be destroyed. Why would you want a beaker without a label sitting around in a laboratory? What purpose does it have?

The Hon. JOHN RYAN: Did you receive a set of questions from the Committee?

Dr GANS: Yes.

The Hon. JOHN RYAN: A rather large series of questions relate to the submission from the New South Wales Police Service. I do not know whether you have had a chance to look at them, but would you care to comment on any of the remarks contained there?

CHAIR: Before you respond, can I say that it may not be possible for you to respond comprehensively, but if you wish to take it on notice and make any detailed comments subsequently, that is certainly satisfactory.

Dr GANS: That may be the best idea. I must admit that I looked down the list and for the most part, assuming there are reasons for these suggestions—I think you would want reasons from the police for why there is a practical need—most of them are all right. Some of the arguments are a little spurious, for example, the need for consistency between the criteria for a suspect and the criteria for offenders. Those are two quite different categories. I assume that offenders are being identified on the basis of suspected recidivism. Suspects are not identified on that basis so there is no need for consistency in those definitions. There is a lot of need for consistency in the Act but this would be a an unnecessary consistency. There may well be another argument for changing those definitions but consistency is not a compelling argument.

The only other one which alarms me is the possibility that an Aboriginal or Torres Strait Islander could have a request for consent without an interview friend. As you know, I have problems with requests for consent. There is a case I refer to in my materials called Braedon from the Northern Territory from last year. It was not under our legislation; indeed, it was under the common law. That case perfectly illustrates the enormous dangers of consent from Aboriginals and Torres Strait Islanders without adequate advice. In that case there was some sort of friend present but there was confusion,

there was no record and there was a debate about exactly what that friend's role was. The idea that some other grounds of practicality mean you dispense with that requirement is unconvincing to me, though I would have to defer to them if they somehow were able to point to enormous practical difficulties that made compliance impossible.

The Hon. JOHN RYAN: I will make a general comment about your submission generally and ask for your response. There is a sense that some of your submissions are somewhat esoteric. They do not line up comfortably on either the civil libertarian approach or the law enforcement approach. One possible outcome of accepting your recommendations is that we will wind up with a bill that appears more draconian to civil libertarians than they would have liked because to some extent the current bill seems to at least tick off some of their concerns. So it is difficult to implement your suggestions in that you will probably find the very people that I imagine you would have thought to be allies will immediately come out and attack your position or attack what you have produced and you wind up with what appears to be on the surface a very draconian, albeit simple, bill. That will be hard to produce so we will wind up with what we are left. Can you comment on how the Committee gets around that practical political problem?

Dr GANS: I teach this in my criminal law courses all the time: Good policy is a hard sell, in criminal law and in criminal procedural law. There is a split between the civil libertarian people and the police people—I am not sure whether anyone is in either category, but there is a view that you are either with one or the other. My argument is that the civil libertarian concerns, while entirely justified, have not been met by this Act and they perhaps cannot be met, and it would be better to acknowledge that. Likewise, the views of the police have not been met and perhaps cannot be met in an Act.

There is something utopian about the civil liberty views and the police views but you could somehow come up with the Act that could accommodate either of them, let alone both of them. I think the limits of legislation, the limits of control on the police, need to be acknowledged and then reasonable policy decisions made within those limits. Like I said, I do not see the point of trying to limit the procedures. I see lots of points in limiting requests for consent and in limiting the use of a database. While my suggestions on procedures are often described as draconian—I realise that—they are balanced by other limits. I do not think this Act, despite having non-draconian elements, does anything because those elements are not fulfilled. But it is a hard sell.

I have given lectures to sceptical members of the law faculty who are alarmed to see me arguing something which is not entirely against the police, but I have some people agreeing with me at the end. It is possible to argue these points. I suppose there is a difference between making the argument here or at a seminar at my faculty and trying to make it in the media. That is why I do not necessarily come here expecting you to do all these things. I think I am in a lucky position in that I am not within either camp and I am not beholden to either camp. I am not raising myself up in that way; I simply happen to be interested in the issue as a researcher, and I am knowledgeable enough about it to say something. But that is my luxury. Unfortunately, you probably do not have the luxury of saying that you are not concerned about the politics.

CHAIR: No, we do not have that luxury.

The Hon. PETER BREEN: The Independents do.

The Hon. JOHN RYAN: You may have dealt with this earlier but you have made reference to the fact that police can, if they have the right resources or money or just plain luck, obtain DNA samples fortuitously. Are you aware of anything within the Act that adequately regulates that?

Dr GANS: No, but I am aware of things that do not adequately regulate it.

The Hon. JOHN RYAN: Do you think it should be regulated?

Dr GANS: Yes. One of my other reasons for pushing for an increased right for the police to get a DNA by formal forensic procedures is because that is the best way of stopping them otherwise doing it all informally. So my approach would be to make it clear that the database can only have DNA on it that is taken by a formal procedure, that scrabbling around in the trash cans, much as that might help the police, should be declared unlawful and in any case inadmissible on the database or

otherwise. Like I said, I do not think that in practice there is any way to ban the police from doing things informally. That is why I suggest giving them as many formal powers as you can cope with so that they do not feel the need to do that.

Again, I feel very uncomfortable, especially about guilty people. If someone out there is guilty, and if the police are not able to use their powers for some reason but they make it clear to that man that they are concerned about that person, that person would have to go to a lot of trouble for the rest of their life to avoid having their DNA gathered by the police. I do not like the idea of anyone having to worry about what they throw out in their rubbish, or smoking in the interview room or eating and using utensils while they are in detention. The idea that many prisoners will refuse to do those things worries me. It is all unnecessary if it is made clear that the police have the power to do those things formally.

The Hon. JOHN RYAN: One might ask why you are so worried about guilty people. If you were guilty of a serious crime would you not spend your life being concerned that one day you will be found out?

Dr GANS: There is an argument that way but my view is that the legislation could achieve that without police scrabbling in trash cans. The guilty person should be worried all the time that he will fall within the very generous provisions that should exist for the police to get a formal order. I do not worry about guilty people worrying about the lawful and regular formal use of police powers. They should worry about those things. However, I must admit that I worry about guilty persons having to worry about their trash cans. Bear in mind that a person who happens to be guilty of lots of crimes, is suspected by the police for the wrong crime, will be terrified if taken into custody. That person will be terrified to smoke or to use knives and forks. Such people should not be terrified. I do not see a need to instil that terror even on guilty people. Instead, the police, if they have any grounds to suspect that person, should be able to get the DNA formally.

As well as that, especially given that there are good concerns about the planting of forensic material, if the police have a habit of getting forensic material they need by informal mechanisms, there is an increased risk that they will get forensic material they do not need but want to plant, or do not need but want to put on the database or whatever by the informal procedures. Once you set the police down this path by putting roadblocks in their way to formality, they will become informal in what they do. It would be better to bring them in.

The Hon. PETER BREEN: But is it not ultimately the case that if someone suspects that their DNA has been inappropriately used they only have to provide another sample and say, "This is my sample. I am not that person."?

Dr GANS: That is true. They can always prove that the suspect sample is not theirs. What they cannot prove is that what appears to be a crime scene sample was actually a sample from them left at a crime or introduced. That cannot be fixed. Once the crime scene sample is contaminated that is the end of it. I have not spoken on this. I am concerned with drafting it. I am sure lots of other people have raised the difficult problem of the planting of evidence. I think there are some procedures you can take to try to fix that, for example, requiring that any sample taken from a suspect, offender or volunteer is itself contaminated with some sort of chemical instantly so that if it is later planted, the fact that it has been obtained in that way can be detected.

However, that only solves half the problem. There is nothing to stop a criminal or a police officer raiding someone's trash can, leaving the cigarette butt at a crime scene and then that person has a very difficult explanation to make. That is not an argument not to use DNA evidence but it reveals the truth that DNA evidence is not a magic bullet for solving crimes, just like confessions, which are of course extremely useful in solving crimes but there is always room for reasonable doubt. DNA should never be good enough on its own and I am sure it will not be considered good enough on its own, but you have to be cautious about the other evidence that supplements the DNA—for example, the confession might have been prompted by false DNA evidence.

People have been falsely accused already, as I am sure you have already heard in submissions, so it can happen. I do not know how the planting can be detected. I am aware of one case where a person, who may well be a criminal and who was certainly convicted, planted someone else's

DNA in his own body and managed to manipulate the testing process so that that DNA was taken, not his. I know that sounds like science-fiction but it is in the Saskatchewan law reports and I can provide the reference.

The Hon. PETER BREEN: I am not entirely clear about your concern with regard to suspects being tested on the database. If there is a limited database for suspects, I do not see that the revenue and trouble involved in doing that are outweighed by the convenience of putting the suspect on the main database and seeing what comes up.

Dr GANS: There is no problem as long as you are of the view of say the National Party person from Queensland—and it may be even me because I am not totally decided on this—that anyone should be capable of having their DNA checked. The problem is that the difference between suspects and non-suspects is very vague and any lawful person can completely properly become a suspect in an investigation. If you believe that everybody should have their DNA tested, then you should have no problem with any suspect having their DNA tested. I have come close to that belief but I have not totally decided that but I note that the New South Wales Government does not believe that and, therefore, it needs to control carefully what is done with suspects' DNA.

As I think you pointed out to the Law Society, the purpose of the legislation is clear in that it seeks to create a database for permanent surveillance of offenders but it is not clear to me that there is any argument that this legislation was designed to create a database for the temporary but wide-ranging surveillance of people who happen to briefly be suspects. If you are a suspect and are cleared by the very DNA you provide, you still go on database for 12 months.

The Hon. PETER BREEN: You are suggesting that should be deleted from the legislation?

Dr GANS: That is right, the matching rules are badly written in any case. The matching rules should be modified so that suspect samples can only being matched against a very limited range of crime scene sample associated with a crime suspect. In Canada they do not allow suspect samples onto the database at all. They require a matching between the suspect sample and the crime scene sample to be done off the database. Although I have concerns about off database matching and that needs to be regulated, that is a practical limit on the police' ability to generate cold hits. You cannot generate cold hits without a database.

The Hon. JANELLE SAFFIN: Was that provision about leaving people on for 12 months lifted off the MCCOC stuff?

Dr GANS: Yes. It is one of the changes between the February 2000 and the May 1999 models because the May 1999 model, albeit clumsily, did try to do what I and many people have suggested and apart from the United Kingdom every other jurisdiction I know of has the limit that suspect samples can only be used for the investigation of the crime suspected.

The Hon. JOHN RYAN: I think you might have found a lead as to why the change was made.

Dr GANS: I am sure. Although even in the United Kingdom the rule, as I understand it, is that as soon as a person is cleared—although there is a real problem defining "cleared"—the DNA has to come off. While ever they are not cleared they can be tested against anyone but once they are cleared they come off. The requirement here is you have to be acquitted in court or have had proceedings discontinued against you. The problem is you might never have had proceedings started against you. It is a bizarre approach to dealing with this situation. There is a problem with defining the word "cleared". I think the better method is to just restrict the matching. That person's DNA can be matched forever but only against the crime suspected.

The Hon. PETER BREEN: One of the problems with restricting the matching, as you suggest, is consistent with evidence we heard last week from the Police Service, that is, that particular offences are often preceded by a certain pattern of crime and if they have this pattern of crime in a particular offence, then a match on the database against a particular suspect is likely to reveal that this person either committed previous offences or is in the category of persons that is likely to commit

those offences and by intervening at that point the likelihood of more serious offences can be stopped. Is that a reasonable argument?

Dr GANS: There are always reasonable arguments in favour of catching guilty people no matter what the means but there are reasonable arguments against it as well. In the case of police where there are past crimes on the database that might also have been committed by the suspect, those past crimes will also be detected because the crime scene samples can be matched against crime scene samples on the database. One of the little heralded but very useful features of DNA is you can identify links between crimes even if you do not have a suspect. If that link is established then the match by this suspect against the crime suspect will also establish a link with all the previous crimes.

The benefit the police argue for, and I understand it from what you describe, is where they suspect someone wrongly for a crime and that person turns out to be a mass serial criminal but they have no suspicion of that, they want that serendipitous discovery. That is one of the fantastic things about DNA. It can make that discovery. That argument can also be made about people who are never suspected of the crime because if that person is wrongly suspected of a crime, they are no different from you or me. There are good arguments to say that everyone should be susceptible to that kind of analysis but those arguments need to be made rather than the irrelevancy that somebody happens to be wrongly suspected. Being wrongly suspected reveals nothing about a person. Being rightly suspected might, although I think they should also be charged to be sure, but wrongly suspected proves nothing. I can be wrongly suspected.

The Hon. PETER BREEN: I was not clear whether you suggest we should abolish consent altogether. You said getting orders and asking for consent is a sham. You then seemed to be talking about that in the context of the privilege against self-incrimination. You said that applies to people outside the interrogation room. How does the question of consent detract from the privilege against self-incrimination?

Dr GANS: It is the request that detracts. My particular concern is of non-suspects who are being forced to either expose their guilt through DNA or expose their guilt by refusal for DNA. That is largely a problem of non-suspects and for that matter offenders who are also, of course, non-suspects. But even with suspects because the Act allows the revelation of cold hits, a person who is totally innocent of a crime but is wrongfully suspected will also be in that dilemma if they ask for consent. The request is my worry. If they got the order they would just have to reveal their DNA but would be under no impression that by saying no they would somehow achieve further rights.

If they reveal their fear of DNA surveillance in the face of an order, that is up to them; they can reveal that fear if they want. My problem with the request for consent is it gives people the impression they have something to gain by revealing their fear and something to lose by not revealing their fear. That is the pressure I am concerned about, which is self-incriminatory.

The Hon. PETER BREEN: And that diminishes the privilege against self-incrimination, in your view?

Dr GANS: That is right. It forces people who are not suspected of a crime, not necessarily the crime but other crimes that could be detected from the database of either revealing that they have reason to fear investigation of that crime or their only other option is to give up their DNA. Because the idea of the Act is that they are simply being asked, not being told, therefore, they should not be put in that position. If the purpose of Parliament—and I think it is—is to make sure police can get DNA forcefully from any person who says no anyway, the question should not be asked. That would protect the privilege against self-incrimination and will allow police to get their DNA.

I want to give some examples from the overseas press of some tactics police have used with this power of request for consent. There was a story in the *Los Angeles Times* a couple of months ago where a police station in Los Angeles decided to ask for DNA from everyone who walked in for any purpose and they proudly said no-one ever said no. They also commented that if anyone said no, they would investigate further. It was not even clear that they were doing any matching with the DNA they obtained from those people. They were using that request. Likewise they might well have a suspect for a particular crime with enough evidence against that suspect but they will ask for DNA, not

necessarily because they think they will really find a crime but if that person says no, that is a reason to look further. That is the kind of concern I have here.

The Hon. PETER BREEN: I am not convinced that getting a police order is any different from making a request.

Dr GANS: The difference between a police order and the request is that the police order will only get someone's DNA. The request, on the other hand, will also get any consciousness of guilt from that person's mind, and that is what the privilege of self-incrimination is all about. It is not a protection for people from police gathering evidence who cannot claim to be self-incriminated if police raid your house and find a dead body. That is not self-incrimination. Self-incrimination is all about protecting our minds from forced discovery. I have no problem with an order because it is not an order to reveal your mind; it is an order to comply with a procedure and the police are just getting evidence. It is like finding a dead body. It just happens to be in your body but at least they are not getting the person revealing, without even any other evidence, that they might be guilty of an offence that is on the database.

The Hon. PETER BREEN: So you are suggesting that an order from Commander Bloggs in College Street is better than a request for consent?

Dr GANS: From individual police officers walking down the street. This is allowed by the Act. A police officer walks down the street, sees a bunch of youths over the age of 18 years, does not like them and says, "I would like all of you to submit to a DNA examination." Five said yes and one said no. The police becomes interested in the one who said no. That is what the police did in the United States. I can point to another case in which a murder took place in an apartment block. The police asked everyone in the apartment block consensually and everyone in the apartment block said yes except for one person whom they then targeted, raided the trash can and they discovered that person was the killer. The problem is they did not have any grounds to suspect any of those people. They could have found that evidence against that person even if they had never recovered DNA from the body. They could use this technique even in the absence of DNA. It is an extra power and an unnecessary one.

The Hon. PETER BREEN: But how would going to Commander Bloggs in College Street and getting an order over the whole apartment block make any difference?

Dr GANS: With non-suspect I am not suggesting Commander Bloggs, I am suggesting Magistrate Bloggs. I do not think a magistrate would give that order over an entire apartment block unless the police could give more reason to be sure that it was someone in the apartment block. In that case the police had no reason to believe that the killer was local. They just asked everyone in the apartment block to see what would come up. It may well be that another person was guilty of another crime and would say no because they did not want to reveal their guilt in another crime. Because the police had absolutely no evidence against that person we should all be untroubled by a guilty person staying hidden because the police had no evidence. If the police have evidence they go and get DNA from that person. The problem is that this Act gives police the right to use a very coercive power, the request for consent, where there is no evidence whatsoever.

The Hon. PETER BREEN: Can you give us an example of a situation where a police order would be appropriate as opposed to a magistrate's order?

Dr GANS: This is the line that I would draw, because I see it as being quite simple. When someone is lawfully in custody, either as a suspect or otherwise, that is the right occasion for a police order. But in the case of anyone who is not lawfully in custody it is right for a court to be involved. Another thing that was mentioned is one criteria that the Act does not use in its formulation, which I know is used in Canada and which might be appropriate for the kind of idea I have. The police should at least be restricted from asking for DNA in relation to an offence unless they have already recovered from the crime scene DNA material in relation to that offence. One problem I have is that the request for consent can be made whether or not the police have any DNA to match. In that case they are not interested in doing any DNA matching as they have nothing to compare. They are interested in a request. They were interested in doing that survey at Wee Waa. I do not see why they should have that ability.

CHAIR: Thank you for your detailed submission and for submitting yourself to our questioning.

(The witness withdrew)

(The Committee adjourned at 1.15 p.m.)