STANDING COMMITTEE ON LEGISLATION

CRIMINAL INVESTIGATION BILL 2005
CRIMINAL INVESTIGATION (CONSEQUENTIAL PROVISIONS) BILL 2005
CRIMINAL AND FOUND PROPERTY DISPOSAL BILL 2005

TRANSCRIPT OF EVIDENCE TAKEN
AT PERTH
WEDNESDAY, 16 AUGUST 2006

Members
Hon Graham Giffard (Chair)
Hon Giz Watson (Deputy Chair)
Hon Peter Collier
Hon Sally Talbot

Hon George Cash
(substitute member for Hon Ken Baston)

Hearing commenced at 11.16 am

KING, MR BARRY
Senior Assistant State Counsel, State Solicitor's Office, examined:

TREMLETT, MR PATRICK
Assistant Parliamentary Counsel, Parliamentary Counsel's Office, examined:

SAMSON, MR MATTHEW
Acting Senior Legislation Officer, Western Australia Police, examined:

OSWALD, MR STEPHEN
Research and Legislation Officer, Western Australia Police, examined:

CHAIR: Thank you for attending this morning. You will have sighted a document entitled "Information for Witnesses". Have you read and understood that document?

The Witnesses: Yes.

CHAIR: Today's discussions are public. They are being recorded. A copy of the transcript will be provided to you. Please note that until such time as a transcript of your public evidence is finalised, the transcript should not be made public. I advise you that premature publication of the transcript or inaccurate disclosure of public evidence may constitute a contempt of Parliament and may mean that the material published or disclosed is not subject to parliamentary privilege. If you wish to make a confidential statement, you can ask the committee to consider taking your statement in private. If the committee agrees, the public will be asked to leave the room before we continue.

I would normally invite you to make an opening statement but you have been before the committee before so we will go straight to questions. If there are any matters that you wish to raise at the end, please indicate that to us and we will happy to take further comments. Thank you very much for the detailed response that you provided to us on the questions that Anne has forwarded to you. We have a number of matters arising from those questions. Clause 13 relates to the absence of rights for detained people who are in lawful custody. What does clause 13 do in the bill that clauses 44 and 65 do not or are not able to do?

Mr King: The purpose of clause 13 is to clarify the fact that persons who are detained, whether or not they have been detained under arrest, are in lawful custody, thereby giving rise to ramifications if a person were to abscond. The other clauses do not do that. The clauses that we referred to give a power to detain. The purpose of clause 13 is to ensure that a person is deemed to be in lawful custody.

CHAIR: We understand from the bill that in all other circumstances where persons are detained, they are under arrest. Clauses 44 and 65 relate to where a person is in custody but not under arrest.

Mr King: There are other clauses as well.

CHAIR: Is that where a person is not under arrest?

Mr King: There are also provisions where persons are detained but they are arrested and detained. We looked at this the last time we were here.

CHAIR: We understood that we narrowed it down to clauses 44 and 65. In other circumstances, a person is actually under arrest.

Mr King: That is right. Mr Tremlett reminds me that clause 65 provides that power where there is another power to do a search and identify those clauses in the answers. You are quite correct; they are the only two places where they have the power to detain without arrest.

CHAIR: Are you able to give us any further information on the second amendment that you flagged in relation to this question that talks about informing a person of relevant matters? You referred to a couple there. Are you able to give us any more information about what that amendment might contain?

Mr King: Is that the amendment to use an interpreter?

CHAIR: Yes.

Mr King: I thought we had provided the committee with copies of the latest proposed amendments.

CHAIR: The latest we have is numbered 116-2, dated 11 August. Would that be proposed clause 9A?

Mr King: Yes.

CHAIR: So you were not proposing it to be any broader than that?

Mr King: No. That really assisted us with the requirement to inform a person. If that requirement arises and the person is unable to understand English, certain things have to happen. We qualified that by making it "reasonably practical". If it is not reasonably practical, the requirement does not apply.

CHAIR: Still on clauses 44 and 65, being those particular provisions that refer to being in custody, we talked previously about what rights exist for those persons. I think you gave a good answer in relation to how they are distinguishable from other forms of custody under the bill. Can you advise the committee what the status would be of a person who made an admission during the exercise or the invoking of the provisions under clauses 44 or 65? What would be the status for a court of that admission if they made that admission whilst they were in custody, not under arrest or being searched?

Mr King: One of the things that applies to searches - I think I am correct in saying it applies to any search of that nature - is that the person is entitled not to be questioned. There is a prohibition on questioning.

CHAIR: Can you very quickly take us to that?

Mr King: That is clause 70(3)(f), which states -

> (3) If a basic search or a strip search is done of a person -
>
> . . .
>
> (f) the person must not be questioned . . .

By virtue of the application of clause 154, it would be inadmissible if any admission was made. However, if the person blurted out an admission in the course of a search while not being questioned, that would not apply.

Hon PETER COLLIER: Can you say that again.

Mr King: If a person was being searched in a basic search and said, "I did it" without being questioned to elicit that admission, the application of clause 154, which would make any evidence obtained following an illegal act, would not apply. There would be no prima facie inadmissibility to that statement. The statement would not be inadmissible subject to a court ruling otherwise.

Hon SALLY TALBOT: So the fact that they were being searched at the time would be totally irrelevant. They could have just walked in off the street and said, "I did it."

Mr King: Yes. Remember that the way clause 153 operates is if something is obtained improperly - if things were not done according to the requirements of the legislation - anything obtained would prima facie be inadmissible. The court could rule over that.

Hon GIZ WATSON: A person who would be detained to comply with a search would not be subject to a caution.

Mr King: Only if they have been arrested.

Hon GIZ WATSON: A person gets cautioned only when they are formally arrested.

Mr King: Yes.

Hon GIZ WATSON: So those who are being detained for the exercise of a search warrant or for a search of the person would not have received a caution.

Mr King: The way cautions work is that if a person is being questioned and if the questioner has formed the view that there is sufficient evidence to charge the person or that the officer is going to charge the person, the officer is obliged to issue a caution. If the caution is not administered, evidence obtained following that failure is generally considered inadmissible.

Hon GIZ WATSON: Is it the current circumstance that people are never detained for the purpose of answering questions without being formally charged? I realise that a person can assist with inquiries of their freewill but what if a person is being detained in the loose sense of the word - partly what we are trying to do with this bill is define that point and time in circumstance, which is not a bad idea - and is with a police officer and answering questions, having been cautioned?

Mr King: Without having been arrested.

Hon GIZ WATSON: That circumstance exists currently. Is that correct?

[11.30 am]

Mr King: If the person is so-called assisting the police with inquiries, yes.

Hon GIZ WATSON: Would the person not be cautioned until a charge was formally laid?

Mr King: I am told that, as a matter of practice, they are cautioned before questioning begins.

Hon GIZ WATSON: Always?

Mr King: Always. I refer to clause 137(2)(b) concerning an arrested suspect. To make this clear distinction between persons who are arrested and persons so-called assisting police with their inquiries, we inserted clause 28 to enable persons who are accompanying police but are not arrested to be told certain things. If a person has not been arrested, he must be told that he is not under arrest and does not have to go with the police officer and can leave at any time. This provision is to make it clear. It goes hand in hand with the other provision that gives power to the police to arrest and question. If police have people in their custody for questioning, their rights must be clear. People must know their rights; whereas to date, when people go along to help police, things are a little unclear. We have tried to put in prescriptions so that everybody knows their rights and police know what powers they have.

CHAIR: Someone in lawful custody but not under arrest still does not know his rights.

Mr King: The person can be detained only for the purposes of the searches and only for as long as is reasonably necessary.

CHAIR: What rights do persons who are detained in custody have in common law?

Mr King: Apart from civil rights?

Hon PETER COLLIER: The right to remain silent.

Mr King: Yes; there is a right to remain silent. It depends just what aspect of the common law rights we are talking about, I suppose. For example, a person has a right not to be locked up, to be

deprived of his liberty, unless there is a good reason for it; unless another power overrides his liberty. He could bring an action for false imprisonment as a tort. He would have a right that can be enforced in a civil court. He has a right to remain silent unless that is overridden in some way. Any disclosures he made would be inadmissible without any discretion. There is the involuntariness aspect of it. People have rights that can be enforced in civil courts and rights that will have an effect in the criminal court. We could say that they are both common law areas.

Hon PETER COLLIER: If the police take someone to assist police with their inquiries, can we not assume that a level of questioning would be involved?

Mr King: I would have thought so; yes.

Hon PETER COLLIER: In that instance, that person would be notified of his rights.

Mr Samson: He would be cautioned anyway. If he was not cautioned, anything he said would be thrown out in any event - at least, consideration would be given to throwing it out.

Hon PETER COLLIER: That happens every time.

Mr Samson: Yes; that happens as a matter of course.

Hon GIZ WATSON: You have said that this provision applies only to clauses 44 and 65. If that is the case, why is it placed in this position in the bill? It seems to me that it would sit more logically in clause 65.

Mr King: Do you mean clause 13?

Hon GIZ WATSON: Yes. It has raised quite a lot of concern with not only committee members but also witnesses. It is confusing because it seems to apply very broadly as it sits there. I believe that in the original form of the bill it was not placed in this area. It seems to have been moved. Why was it moved? Would you consider that it might be clearer if it was placed in relation to those specific areas?

Mr King: I am not sure that it is entirely correct that it was moved. It was placed in there; it was not there originally. Our recollection is that it was not at the back of the bill. It has been inserted to make clear the situation when someone is detained in custody. It is in the first part of the bill because it has general applicability of provisions for the whole bill. Rather than being specific to a particular part, it applies across the board. For example, clause 44 is in part 5, division 3 and clause 65 is in part 8, division 1. As a matter of, I suppose, drafting convention because it applies to different parts, it should be found in the preliminary part rather than some other part. It saves repetition.

Hon GIZ WATSON: Perhaps it could be put under specific parts?

Mr Tremlett: It could have been included in clauses 44 and 65. However, as a drafter, I thought that it was one of those things that needs to be generally understood from the outset by a person reading from front to back, so I made the judgment that it would be best included as clause 13 in the preliminary area. That was my call, as it were, and that is how I defend my call.

CHAIR: Did you give any consideration to saying, "a person who is detained under sections 44 and 65 of this Act"?

Mr Tremlett: No, because I did not think it was necessary given the language used. I try to use language consistently, and the reference to detaining is to be found only in certain sections, which we have identified to the committee. It is detained under this act when he or she is not under arrest. It is specific to a particular class of people. Clause 13 was amended in consideration in detail in the other place. Clause 13 could be amended to refer specifically to clauses 44(2)(g) and 65(2); it would not hurt. It is the same meaning. If the act is ever amended to include another detention power that does not involve arrest, we would have to remember to amend clause 13. As it is, I do not have to remember to amend it, although I should be aware of it if I were amending it.

CHAIR: We do not want to be inadvertently amending a clause that allows a person to be detained indefinitely in lawful custody without being arrested.

Mr Tremlett: As Mr King has pointed out, clause 13 does not say anything about how long a person can be detained. However, clause 44(2)(g)(iii) does and so does clause 65(2)(a), which states -

> stop and detain the person for a reasonable period;

The period of detention is conditioned by where the provisions are placed.

CHAIR: I refer to clause 27(2). In your response, you appear to the committee to have addressed more subclause (2)(b) than (2)(a). We wonder whether you can add anything to your answer that would apply more directly to paragraph (a) and the question.

Mr King: The answer is twofold. I was not involved with the insertion of that into the Police Act, it was earlier this year or late last year.

CHAIR: It was proclaimed last year.

Mr King: It is my understanding that one of the purposes for its inclusion is that it removes the need for police officers to arrest persons who are acting disorderly or loitering. It was seen to be preferable to get people to move on under compulsion than to arrest them. There remains a requirement that the person be asked to move a reasonable distance from the place. Rather than charging a person with disorderly conduct, loitering or whatever and having the person go through the criminal process and face a fine, persons are asked or ordered to move on. If they do not, they face the potential of a jail term. The potential is only that, of course. That is the second part. Simply because there is the potential for a jail term does not mean that a person who breaches a move-on notice will necessarily be sentenced to a jail term. It is a last-resort sentence.

The committee will recall that this provision, which was passed by Parliament last year, has been taken directly from the Police Act and simply been placed in the bill. It is mainly for loitering rather than disorderly conduct but it could apply either way.

CHAIR: As we have just discussed and as the ALS identified, a person might be given a move-on order because it is suspected that he might commit an offence that does not carry a jail sentence, and breach the move-on order, which does carry a jail sentence. That is one concern about the move-on order. The other concern is about the serious offence of taking samples. The committee understands that a person charged with a breach of a move-on order would potentially come under clause 73.

[12.45 pm]

Mr King: That would be clause 73 of the Criminal Investigation (Identifying People) Act.

CHAIR: You are right. I am talking about the interplay between that act and this bill.

Mr King: One of the things we tried to make clear is the real distinction between the two acts that empower authorities to do certain things. This act applies in relation to one thing and that act applies in relation to others.

CHAIR: In your answer you have alluded to that interplay that goes on. In terms of being able to obtain a DNA profile, would a person who is charged with a serious offence come under section 73 of that act? It is clear in your answer that that is true.

Mr Tremlett: With respect, you have got me puzzled. Section 73 of the Criminal Investigation (Identifying People) Act talks about how you use information. It has nothing to do with obtaining anything. The person who is charged with breaching a move-on order is charged with an offence that carries imprisonment. Under the Criminal Investigation (Identifying People) Act, because that carries imprisonment and the person is a charged suspect and has been charged with not obeying a move-on order, as it will be amended, the police will be able to obtain a DNA profile from that

person in order to identify that person. In other words, they will take a sample of their blood from their thumb or a buccal swab from inside them rather than on them in order to say that that person's DNA profile is X. They will put that on the database and see whether it matches up with any other offence. Part 9 of this bill allows forensic procedures to be done on the person. As it is just an offence for not obeying a move-on order, it is very hard to see how you would need to do anything under part 9 of the Criminal Investigation Bill in order to investigate the offence of failing to obey the move-on order. It is hard to see why you would need to take any samples from a person unless you were trying to prove that they were up against a lamppost in the wrong area and you wanted to compare the paint on the lamppost to the paint on their skin. That is what part 9 is used for, to obtain evidence from the surface of a person rather than from their veins. It is hard to see how part 9 would need to be used to get something relevant to the offence of failing to move on.

Hon GIZ WATSON: Is there anything that would prevent taking of forensic material to provide a DNA sample? It seems that it provides the powers for DNA evidence to be taken because they have been charged with something that carries a penalty of 12 months' imprisonment. Therefore, police would be within their powers to take a DNA sample in that circumstance.

Mr Tremlett: By which you mean a sample of their bodily fluid, whether it be their blood or saliva, in order to obtain their DNA. They would not use the bill; they would use the 2002 act.

Hon GIZ WATSON: I understand that these powers already exist. Nothing in this bill alters that. You do not disagree that that power is there at the moment?

Mr Tremlett: It is as it is under the law today. If you were charged today under section 50AA of the Police Act for disobeying a move-on order that you got last night, you would be committing an offence that carries 12 months' imprisonment and a fine of $12 000. They charge you and then they would use part 7 of the 2002 act, which begins at section 47. You are charged but not dealt with by a court for a serious offence, which in this particular case carries a penalty of imprisonment for 12 months or more and they could take a DNA profile from you. It has nothing to do with investigating whether you committed the offence today of not moving on but because they want to know your DNA profile to see whether you are wanted for anything else.

Hon GIZ WATSON: Is that the case even though the original misdemeanour might be disorderly conduct, which is a civil offence?

Mr Tremlett: You may have got your move-on order last night for being disorderly because they did not want to charge you with being disorderly. They thought they would try to diffuse the situation and send you away. Then again, you may have been hanging around looking suspicious. In the old days, you would have been charged with loitering. Section 50A of the Police Act is there because the Law Reform Commission said that loitering should not continue as an offence, and so it has not. Loitering is not an offence any more. That is why section 50A is there - principally, to give police powers to deal with loiterers.

Hon PETER COLLIER: When did that occur?

Mr Tremlett: The law changed on 31 May last year. That was when the Criminal Law Amendment (Simple Offences) Act 2004 was proclaimed.

CHAIR: I move to question 4 now, which concerns a discussion about the Aboriginal Legal Service submission. It has made reference to Victoria. You have given further information about that. Are you able to assist the committee in terms of the provisions of the Crimes Act in Victoria? Do you know whether that legislation allows for senior officers, public officers, to authorise these non-intimate searches?

Mr King: Is that public officers rather than police officers?

CHAIR: Yes.

Mr King: I did not bring it with me.

CHAIR: Ours provide for both.

Mr King: It is a senior police officer.

CHAIR: That is the reference in your answer.

Mr King: There are two sections. One refers to this one that I have with me. The other one says that there are three different means by which a non-intimate compulsory procedure can occur. For reasons of laziness, I only brought the one.

CHAIR: It is Victorian legislation; it is not yours.

Mr King: I tried to meet the suggestion by the ALS that the Victorian provision provided a certain procedure. I am saying that the ALS may have it wrong and it may have thought we were talking about more intimate things or taking DNA samples.

Mr Tremlett: There is one other aspect to this that is probably worth bearing in mind. The sort of material at which part 9 of the Criminal Investigation Bill is directed, which is forensic procedures, is very temporary material. A shower might wash it off. A person cleaning their fingernails might get rid of it. A scratch might heal up. The paint might be taken off by washing. It is all very temporary material. The ALS seems to be suggesting that this could be done having been arrested, having been through the process and appearing in court. It would then apply for the approval to do a forensic procedure under part 9 of the Criminal Investigation Bill in order to get this stuff. By that stage, one assumes people may well have showered so this evidence is gone. It is quite different from your own DNA which is with you until you die, and afterwards.

Mr King: Perhaps that is why the ALS may have misconceived its objection in the submission. It may have thought we were talking about DNA samples being taken. It can be taken through a court order at the same time as a person goes through the rest of the process. That would be fine with the DNA samples because that will not change. When you are trying to get to the evidence that may be on a person's body, it needs to be done in a hurry.

Hon GIZ WATSON: The current requirements under the Criminal Investigation (Identifying People) Act do not require a court order for DNA. A magistrate is not required for non-intimate procedures.

CHAIR: I will now take you to question 5. The committee is having a little difficulty with this aspect. Would you be able to expand on your answer? We are not sure how the ALS submission is misconceived.

Mr King: The way I understand the submission is that clauses 153 and 154 apply across the board to all questions of admissibility. They seem to be saying that all admissibility issues are confined to issues of public policy considerations. Public policy considerations are those that we see in subclauses 154(3) and (2), which states -

> The court may nevertheless decide to admit the evidence if it is satisfied that the desirability of admitting the evidence outweighs the undesirability of admitting the evidence.

This is the classic Bunning and Cross dicta where a court can override the admissibility of evidence that has been obtained unlawfully, illegally or improperly. This is something that I never quite grasped at law school. There are really two areas of this sort of inadmissibility. One of them relates to illegally obtained evidence where there is no proper power to obtain that evidence or where there is a requirement that is not complied with. If that is the reason for the inadmissibility, certain rules apply. Those rules are the rules that we see in clause 154. Those are the public policy considerations.

[12 noon]

The interests of bringing the person to justice are more important than protecting him from the illegal action of the police. Police have acted improperly; the evidence is inadmissible, but it can be

ruled admissible on this kind of balance. That is one area. The ALS is suggesting that that area applies to another area of admissibility generally referred to in the general tag of voluntariness or involuntariness. If a person is in police custody and is beaten and confesses, that confession is inadmissible and there is no question of balancing the public interest consideration. Clauses 153 and 154 do not apply to that scenario. That is why we think the ALS may have misconceived the nature of these provisions. It is made clear, firstly, under the heading "Evidence obtained improperly" in clause 153 and it all relates to the purported exercise of a power conferred by this legislation. Subclause (2) reads -

> If in the purported exercise of a power conferred by this Act or by an authorisation issued or purportedly issued in this Act -

Where the legislation provides power and that purported exercise is done improperly, anything that is relevant to the offence - if you recall that is very broad - is inadmissible unless a person does not object or it can be ruled admissible by a court. Clauses 153 or 154 contain a codification of the so-called Bunning v Cross principle for illegally obtained evidence. It has no bearing on this other area of admissibility relating to voluntariness.

I refer to the third paragraph under question 5 on page 6. Mr Tremlett told me it was unclear and I needed to fix it because nobody would understand it. I thought I had fixed it but, clearly, not sufficiently.

CHAIR: I refer to question 7, "Mere suspicion". The bill contains references to "reasonably suspect". You have given a good explanation to the committee on that. In addition, there are some references to "suspect" without the term "reasonably". Do you make any distinction when you talk about "suspect" as opposed to "reasonably suspect"?

Mr King: I think the confusion has arisen by reference to clause 138. It reads -

> **"arrested suspect"** means a person who is under arrest having been arrested under section 127, or under another written law on suspicion of having committed an offence . . .

The reference to clause 127, of course, is to the power to arrest someone who the police officer reasonably suspects has committed an offence. Likewise, if someone has been arrested under another written law - that person having been suspected of having committed an offence - there must be some power for how they can be arrested, or some qualifications to it. The point of clause 138(1) is to identify that we are dealing with arrested suspects, not with someone else who has been detained or is under arrest but not as a suspect. It is not to address the question of the power to arrest or how a person is arrested; it simply deals with an arrested suspect rather than someone who is merely arrested but not as a suspect.

Hon GIZ WATSON: Who would be "a person who has been arrested" but not as a suspect?

Mr Tremlett: It would be a person arrested under an arrest warrant issued by a court, or a person who is a witness who has not obeyed a summons. The court might want the person in court and will therefore issue an arrest warrant. A policeman arrests the witness, but the witness is not suspected of an offence. The court is seeking evidence from the person but he is not under suspicion.

Hon GIZ WATSON: Is there another example?

Mr Samson: Someone might be arrested according to forensic procedures because that person is a victim or a witness from whom the police want to get a sample.

Mr Tremlett: Arrest is used to obtain a body for various purposes to question him.

Mr King: There is a distinction between clauses 136 and 137. Clause 136 relates to arrested persons who are not suspects, and clause 137 relates to arrested persons who are suspects. Clause 137 provides additional rights.

Hon GIZ WATSON: Does a person who is under arrest as a witness and who is required to attend court or answer questions have fewer rights than a person who is actually a suspect?

Mr King: The rights applying to a person who is a suspect relate to things that will entail investigation of a suspect or, for example, the right to be cautioned.

Hon GIZ WATSON: Would a witness not fall into that category - in requiring a caution? The police might think the person is a witness but on questioning discover that he is an accomplice.

Mr Samson: Then the person would be an arrested suspect. Although the person was arrested under the warrant, he would then be under arrest for another offence.

Hon GIZ WATSON: He is arrested as a witness to assist with questioning, and in the course of that questioning, information comes to light that leads the police to charge him.

Mr Samson: It is probably better to consider it from the other aspect. A person might be arrested after a car chase and then the police find that a warrant has been issued for his arrest because he is needed as a witness. However, he has been arrested for an offence, which makes him a suspect. If he was arrested only on the basis of a warrant as a witness, he would not be a suspect; albeit he would be then taken to the court in accordance with the warrant. The police would deal with the offence for which he had been arrested in the first place and then he would be afforded those rights as a suspect. It works both ways.

Hon GIZ WATSON: I am concerned that there is a circumstance in which someone who is not a suspect will have less cautioning than someone who is the suspect.

Mr Tremlett: A person arrested on a warrant issued by a court because the court wants him to be a witness will not be questioned by the police except perhaps to clarify his identify and advise that there is a warrant to arrest him to take him to the Supreme Court to be a witness or whatever. There is no questioning of the person beyond what is needed.

Mr Samson: There is now an offence in criminal procedure. Perhaps "witness" is not a great example because the person will have committed an offence of disobeying a witness summons. Notionally they could be questioned about the offence but they would be arrested for an offence in accordance with clause 138.

Hon GIZ WATSON: Can I take it that a circumstance would not arise in which a person was arrested who was not a suspect and subject to questioning by the police without a caution?

Mr King: Is that for an offence?

Hon GIZ WATSON: For suspicion of an offence but not enough to charge the person.

Mr Samson: If a person is arrested on suspicion of an offence, he will be cautioned and afforded those rights. If he is arrested for any other purpose the police will not question him because there is no reason to do so. He will be taken to court and the police do not need evidence to take to him to court for the court to deal with him.

Hon GIZ WATSON: Is the category of "arrested person" being used in this respect only to take a person to court?

Mr Samson: The bill provides specifically that a person arrested for a forensic procedure cannot be questioned. If a victim of an offence is arrested, logically, the person will not be questioned anyway.

Hon GIZ WATSON: Could the police question the person?

Mr Samson: The person would be asked questions that relate to the forensic procedure. The police would not rely on that evidence in court. The caution is not relevant because we do not need to know that the information the person provides is voluntary. That is the notion. If the sample were taken at a later time and, as a result, the police thought they had the offender not the victim, they

would have to notionally arrest him again for an offence, even though he was already in custody, and then they would caution him and question him. Regardless of the first reason for the person's arrest, if he then becomes a suspect on a basis that is not relevant to that arrest, he would be afforded those rights because he would be then arrested on an offence.

Hon GIZ WATSON: Would it make the bill clear to include a provision that said "a person under arrest but not charged cannot be questioned other than in relation to . . ."?

Mr Samson: I do not think the charging is relevant. The caution in particular is about getting the evidence into the court. We have always done that even though the act says we must do it. We do it so that our evidence obtained during questioning becomes admissible. There are more issues than denying a person that right that would make that evidence inadmissible; for example, by virtue of the police inducing it from the person or threatening him in some way. The caution is framed around that. A caution states that the person is not obliged to say anything unless he wishes to do so. We also go on to ask things such as, "Do you agree that you haven't been threatened here today; do you agree that you have given this of your own free will; and do you agree that you could have left here at any time?" Those questions have evolved when courts have made decisions adverse to the police. This bill provides a minimum, but the police always go much further than that to safeguard their evidence.

Hon GIZ WATSON: Does clause 154, which deals with inadmissibility, cover this circumstance?

Mr Samson: No, it does not. It is the current common law. There are various cases and I think, Mallard is one that has come out of it. The Mallard precedent requires that everything should be on video. Even if a person has been cautioned, it should be all on video. Another precedent, which I think is Pell v The Queen refers to the issue of voluntariness and whether a person has been threatened and all those kinds of things.

Hon GIZ WATSON: Was consideration given to making that explicit in that clause? If it is the current practice and this bill is also about codifying current practices, would it not be worth considering including this circumstance?

Mr Samson: We have not codified procedures for questioning in the bill at all, except to require the minimum standard of cautioning.

Mr King: Videoing.

Hon GIZ WATSON: The videoing does not include exercising search warrants does it?

Mr King: No.

Hon GIZ WATSON: That area does not follow the Kennedy recommendations?

Mr King: That is right.

Mr Samson: If the police are executing a search warrant and questioning the person while conducting the search warrant, that must be done as a video interview for purposes of the Criminal Code and, therefore, it is dealt with in the same manner as a video interview. It is dealt with under the Criminal Code in terms of the security of the video. In addition, the person would be cautioned before those questions were asked.

Hon GIZ WATSON: If a questioning event occurred during a search, that would be videoed, but not necessarily the search itself.

Mr Samson: The entire search might be videoed.

Hon GIZ WATSON: But under this bill, it is not required to be videoed.

Mr Samson: No; sorry, that is a different issue.

CHAIR: A matter raised with the committee concerns clause 94(2) on page 82 of the bill. It has been put to us that there should be a requirement in clause 94(2)(b) that both the child suspect and

the responsible person be required to give consent to various forensic procedures. It has been pointed out that there may be circumstances in which a child is estranged from the family and therefore it is inappropriate for the responsible person to give consent alone in the absence of the child's consent.

[12.15 pm]

Mr Tremlett: Subclause 94(2) requires the consent from both the child and the responsible person if the child is over 10 years and only from the responsible person if the child is under 10.

CHAIR: The Department for Community Development submission referred to articles 12 and 14 of the United Nations Convention on the Rights of the Child and rule 10 of the United Nations Standard Minimum Rules for the Administration of Juvenile Justice. Do you have any further comment on the proposition that in circumstances of estrangement, consent from the child and the responsible parent should be sought?

Mr King: I am reminded that the reason that this provision is in the bill is because of submissions from DCD. It took some doing to get it in but I thought we had it nailed. I think we have been through the definition of responsible person before. We felt it sufficient to disclose the intention that it was the person who had a day-to-day responsibility for the child and not somebody who may have some genetic connection. The age of 10 was chosen in consultation with DCD to reflect Marion's case where as children age and develop, they become more and more responsible for their own welfare. Parents become correspondingly less responsible and are also less able to dictate to the child matters relevant to that welfare. Under the age of 10, which accords with the age of criminal responsibility, we decided that the consent question is to be determined by the responsible person rather than the child. If it was going to be left up to the responsible child, the presumption was that a child under that age would not be able to understand sufficiently all the relevant issues that need to be taken into account in order to make an informed consent. That is the reason for it.

CHAIR: The final question relates to clause 51 of the bill. The Law Society has referred in its evidence to us to a process regarding the seizure of privileged material between police and the Law Society. As it was explained to us, apparently there is an understood process. Does clause 51 give effect to that process or does it amend or dismantle that understanding at all? What happens to this material under clause 51 that is ordered to be produced?

Mr King: If a privilege is raised in relation to it, subclause 56(3) would apply. My recollection of the Law Society procedure is that this is fairly similar to it.

CHAIR: We do not have any further questions for you. Is there anything you would like to add?

Mr King: In case the committee has not considered these proposed amendments, I bring to your attention the amendments to the Criminal and Found Property Disposal Bill, AIC2-02. I am looking at new clause 29A. This is something that may not have been considered by the committee before. It is a means by which agencies, including the police, will be able to go to a court in order to seek an order to deal with property that is in their possession. For example, police execute a search warrant and they discover a drug laboratory that is full of noxious chemicals. They take these chemicals but they do not need to retain all of them as they want to dispose of some, perhaps keeping some samples. The way the bill is currently framed without the amendment, they would have to hold on to those chemicals until the end of the criminal process. This would give the police the opportunity to go to a court and seek an order to deal with the property in a way that the court sees fit. The reason I bring that to your attention and also the other amendments to the Criminal Investigation Bill is to respectfully suggest that it may be considered appropriate by the committee to make some recommendation in relation to those proposed amendments.

CHAIR: Thank you very much for the prolonged assistance that you have given the committee in its deliberations. We have a particularly short time frame to deal with these bills. Your assistance has been particularly valuable in allowing us to get close to meeting that timetable.

Hearing concluded at 12.23pm