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, 2 AUGUST 2006

SESSION ONE

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 11.03 am

EGGINGTON, MR DENNIS
Chief Executive Officer, Aboriginal Legal Service of WA,
7 Aberdeen Street,
Perth 6000, examined:

COLLINS, MR PETER
Director of Legal Services, Aboriginal Legal Service of WA,
7 Aberdeen Street,
Perth 6000, examined:

CHAIR: On behalf of the committee, welcome to today's meeting. Thank you for attending to assist the committee with its inquiries. I will briefly address a couple of formalities before our discussions commence. You will have signed 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 reported by Hansard and a copy of the transcript will be provided to you. Please note that until such time as the transcript of your public evidence is finalised, the transcript should not be made public. I advise you that the premature publication of the transcript or an accurate disclosure of public evidence may constitute a contempt of Parliament and may mean that 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.

In a moment I will invite you to make an opening statement to the committee. The committee has received your submission, which essentially comprises two components - namely, the submission itself and the attachment that begins with the letter to the Attorney General. The committee is considering how to treat the full submission; that is, whether it should be considered as public or private material. The general and normal rule is that submissions are made public. We have resolved to make the first half-dozen pages of your submission public. However, with regards to the letter to the Attorney General and the other attached information, should that information remain private? Are you happy for that information to be made public and, if so, would you place any particular conditions on it being made public? For example, would you consider striking off the names and addresses from the document before it becomes public?

Mr Eggington: Mr Chairman, I will ask Peter Collins, our principal legal person, to address that question.

Mr Collins: Mr Chairman, our position is that we are quite happy for the material that has gone to the Attorney General to be made public. However, we request that the names of individual clients referred to in that material remain private.

CHAIR: And likewise their addresses?

Mr Collins: Yes, thank you.

CHAIR: We will consider that at a later stage. Thank you very much.

I invite you to make an opening statement about the bills. I note that your submission relates to what you perceive to be major changes to the existing law that will impact on ALS clients. In your opening statement I ask you to particularly address the clauses in the bill that you want to highlight to the committee.

Mr Eggington: Once again, our director of legal services will relay our point of view to the committee. I will ask him to answer you directly.

Mr Collins: Mr Chairman and members of the committee, I will start by making a general observation. There is a real concern held by the ALS about the over-policing of the Western Australian Aboriginal community, particularly the over-policing of Aboriginal juveniles in regional areas. That dovetails into a concern about the over-representation of Aboriginal people in the criminal justice system. In turn, that leads to a grave concern about the over-representation of Aboriginal adults in the prison system and juveniles in juvenile detention centres. The committee is probably aware that the rates of imprisonment for Aboriginal adult and juveniles in this state are the highest in the country. The most recent statistics produced by the Mahoney report indicate that there has been an upward trend in the rates of imprisonment over the past three years. That, as I said, is of grave concern for the Aboriginal Legal Service. Turning to the bill, I confirm that our submission has been confined to the Criminal Investigation Bill. I understand that other bills might be the subject of comment; however, our submission has been confined to the Criminal Investigation Bill 2005.

In general terms, our concern is that the bill expands considerably the powers of the police and, in some instances, private citizens with respect to searches of a person and property, the powers of seizure of property and the detention of individuals. In the submission we have sought to identify how particular clauses of the bill may impact adversely on the liberty of individuals, the freedom of movement and association and the rights of privacy. In particular I will refer to search and seizure powers, which are referred to in the submission under the headings of "section 13", "section 15(3)", "section 24", "section 38" and "section 69". If it is convenient to the committee, I will refer to the clauses of the bill that relate to the powers of search, seizure and detention.

The submission outlines the detail of our concerns. On a broader level - this is my concern as the director of Aboriginal legal services - the practical effect of the changes will be that the Aboriginal community will have greater contact with the police and, therefore, greater conflict with the police. In turn, that will result in more charges being laid against Aboriginal people and more Aboriginal people going to jail and juvenile detention centres, with the rates of imprisonment rising even further. I say that because clause 15(3) gives private citizens the power to intervene and use force in disputes between individuals and the police. That could give rise to a situation - this example is referred to in the submission - in which a private citizen who observes an altercation between the police and an individual determines on his or her own volition that it is necessary to intervene and to use force to deal with the matter. The scope for that clause being used to justify unnecessary interventions by private citizens in all sorts of disputes, and the use of force in them, are manifest in my submission to the committee. The difficulty is compounded by the fact that clause 13 provides, in effect, that any person detained pursuant to the bill will be deemed to have been taken into custody lawfully. Anyone who purports to detain someone under the bill - be it the police or a private citizen - will be deemed to have done so lawfully. As indicated in the submission, that is an anathema to long-established principles in relation to the liberty of the subject and the expressed provision in the law that carefully confines the powers of the police generally, and of individual citizens at times, to restrict the liberty of others. Our submission claims that clause 13 is not only unnecessary, but also that it will justify arbitrary detention in circumstances in which that detention would otherwise be regarded as unlawful.

Mr Eggington: I would like to add to those comments. It is quite common for the ALS to receive complaints from Aboriginal people relating to this particular issue. The submission is not based on

what we think might happen; rather, it is based on factual evidence that has come before us. Aboriginal people often complain that they have been assaulted by members of the public during a melee or a disturbance between the police and Aboriginal community members.

[11.15 am]

One was as recently as six months ago from a town called Esperance. Therefore, we do say those things, knowing that we get a number of complaints on a regular basis about assaults by public members on the Aboriginal community in the presence of police while helping the police carry out their duties.

CHAIR: The complaint is that whatever force was used by those private citizens was excessive.

Mr Eggington: Absolutely, including kicking and punching, and those are never seen by the police as being assaults, and this power will in some way continue to justify what is happening on the streets.

Hon GEORGE CASH: Mr Eggington, you are referring, I think, in particular, to clause 15, which is headed "Assistance to exercise powers". How do you believe clause 15 should be amended to overcome the issues that you have raised, because, to my thinking, all clause 15 is doing at the moment is authorising a person who may exercise a power in the act to call upon or to authorise another person to assist him? Then it is qualified in that that assistance must be reasonably necessary in the circumstances. How would you see clause 15 being amended to take into account the issues that you have raised? If I might keep going, just to assist in some way, it seems to me that if someone used excessive power, which was referred to by the Chairman, that excessive power would not be provided for in clause 15 - that is to say, this clause provides for assistance; it does not provide for the use of excessive power. I will continue while you are still reading to say that I am sure the committee recognises the instances that you have related to it. However, that is not the intention of clause 15.

Mr Eggington: Yes. We are familiar with the intent of the legislation. It is just the policing of that intent that causes us concern.

CHAIR: I will also say that if there is anything that we put to you that you would prefer to take away and come back to us on, you are free to do that as well.

Mr Eggington: Yes. Thank you.

CHAIR: So, do not feel like you are under unreasonable pressure to come up with an answer right now.

Mr Collins: I am no draftsman, so I want to make that clear. I think one of the concerns with the clause is that it is silent on the use of reasonable force in circumstances of a private citizen intervening. I can understand clause 15(3) in the sense that there has to be a reasonable suspicion justifying the intervention. Although I have a problem with the clause generally to some extent, I have no difficulty with its wording. However, maybe as a safeguard to protect individuals from others going over the top, to use a colloquial expression, there might be something included that requires that whatever force is used in the circumstances be reasonable.

Hon GEORGE CASH: At the moment clause 15(2) states -

> A person so authorised may exercise the power or assist the other to exercise the power, -

Then it is qualified to the extent that it states -

> as the case requires.

Mr Collins: Yes. Perhaps it should go further than that and require a component of reasonableness to whatever is done to assist, because, to be very honest, the common law permits private citizens to arrest and to use force in making an arrest. What follows from that, of course, is that private citizens are entitled to intervene to assist the police in executing an arrest. The clause does not go

too far from established common law principle, but what we want, I suppose, are some safeguards to ensure that those who intervene to assist do so reasonably and do not act excessively, especially with the use of force.

CHAIR: Just on that point, do you think that clause 16 is inadequate in that respect?

Mr Collins: Probably not.

CHAIR: Essentially, clause 16 says that you have to act reasonably.

Mr Collins: That is right.

CHAIR: I took from your earlier remarks on clause 15 that you were talking about circumstances in which citizens would identify a need for them to intervene to assist a police officer.

Mr Collins: Yes.

CHAIR: Do those same comments apply in circumstances in which a police officer requests and authorises a private citizen to assist him? Of course, the intention of clause 15, as Hon George Cash has indicated, is for police to call on people to assist them, although I note clause 15(3).

Mr Eggington: No, they do not. However, once again, there is always a defined line of trying to work out the truth in the matter and whether or not there has been assistance called for if someone has felt it is time to jump in and give someone a good kicking, because that is what is happening.

CHAIR: I take you back to clause 13. Can you explain a little more to the committee about your objections to clause 13? Do you say that it simply should be removed altogether, or is there an alternative that you would have in place of clause 13?

Mr Collins: Our submission is that it should be removed altogether. Overall, the act is very specific in terms of when the police, if I can use them as the example, can request that somebody submit to a search, when the police can request someone to enter premises and when they can seize property. The act is very specific in relation to those sorts of issues. A catch-all section that makes the detention of anyone under any circumstances lawful is completely unnecessary and totally invidious in 2006. It simply means that if the police decide, for whatever reason, to take someone into custody, that decision becomes lawful. The ALS experience is, especially in the context of people who are suspects in the commission of criminal offences and the police wish to interview them in relation to them, that more often than not the person is taken into custody without him having been arrested. Now, he may be taken into custody - this happens quite often as well - when he is completely unaware of his rights; that is, he is completely unaware of the fact that he does not have to go with the police if he chooses not to, given the fact that he has not been arrested. This clause would make his detention lawful. I am very strongly of the view that that should not be the case, and that that, too, flies in the face of very long-established common law principle, and the High Court has made numerous pronouncements on that.

Hon GEORGE CASH: Could Mr Collins refer us to the High Court decisions to which he is referring? Also, is it your belief that a person should be able to be detained by the police and not be considered to be in lawful custody; that is, almost a situation of being detained but not arrested?

Mr Collins: The leading High Court authority is a decision in Williams. There are others. Of course, the names of the cases escape me. However, I can get back to the committee with those; there are many. As I say, it is well-established principle. If we use the liberty of the subject as the primary consideration, which I submit to the committee we ought, the police should not have a power to detain someone except lawfully, and that usually follows from an arrest. If you are arrested, you are in lawful custody, and the police can do what they have to do to deal with you. People should not be taken into the custody of the police and their detention deemed to be lawful under the act, because that just leaves vulnerable people wide open to abuses by the police. That would mean that if a rogue policeman found somebody on the street and wanted to take him out into

the bush to give him a hiding, this act would make that detention lawful. As I said earlier, that would be anathema in a civilised society, in my submission.

[11.30 am]

CHAIR: Can I take you to your submission in relation to proposed section 24?

Mr Collins: I am sorry to interrupt. I think there is a typographical error in the heading in our submission. It should refer to "section 26". Proposed section 24 is the first section under part 3 in relation to citizens' powers. The substantive submission we have made is in relation to proposed section 26.

CHAIR: Yes, it is under that heading. In commenting on proposed section 26, you state at the top of page 2 -

> . . . will only amplify the difficulties that many young Aboriginal and Torres Strait people already have with the public transport system. It will result in further conflict with both police and transit guards . . .

The committee is interested in hearing your advice on what are the current difficulties and how the police and transit guards deal with those conflicts.

Mr Collins: Your question harkens back to the point I sought to make at the start about over-policing issues. There is a huge issue so far as the ALS is concerned with the policing of our railways. I want to make it very clear that we acknowledge that from time to time there has been some poor behaviour by Aboriginal youths on the railway lines. In those circumstances where charges are laid and people are dealt with by the courts and sentences are imposed, we have no difficulty. Serious offending should be properly prosecuted and properly punished - that is unarguable. However, at the other end of the spectrum, what we have experienced is that Aboriginal youth in particular come to the attention of police and transit guards all the time for the most trivial infractions of the law - poor language, not having tickets, drinking on railway property and things of that nature. What follows from heavy-handedness is further criminal charges. I refer to when someone is arrested and not charged on summons; that is a huge issue and I will address the committee on that in a moment when I touch on the move-on laws. People are arrested for swearing on a railway station. If the person is intoxicated or affected by drugs, there may be an altercation. He is then charged with resisting arrest. If they push the police officer, they may be charged with assaulting the police. The vernacular we use is "hamburger with the lot". I am sure that some members of the committee will be familiar with that expression. A very minor issue becomes a very major issue. With young Aboriginal people, these incidents are not necessarily isolated ones. They may occur on a number of occasions as they get older. People accumulate very significant criminal records. The concern we have with clause 26 in particular is this: on one level there is no difficulty because it is in accordance with established principle that someone who reasonably suspects - usually the police although this power is conferred on private citizens - that someone has an object in a bag or whatever can be required to submit to a search. This power goes a step further than that by permitting bus drivers and people like that to require potential passengers to submit to searches. We say that if you think it through, it will require an element of crystal ball gazing by bus drivers. If someone gets on a bus and the driver does not like the look of him because he has a backpack, arguably this provision could be used to require the person to submit to a search. That is fine in principle but in practice, inevitably, if it is an Aboriginal kid, some slight might be taken and an incident then occurs. The usual consequences follow. As a community, we ought to be very cautious about conferring powers upon people in the community other than the police. This is not intended as any disrespect to bus drivers and train drivers and people like that because they perform a very important public service. These are very substantial powers and the consequences of them not being exercised properly, which might not be by virtue of any malice or improper intent, can be quite severe. That is the concern in a nutshell from my point of view about these sorts of powers.

Mr Eggington has just mentioned to me that, like it or not, there is prejudice out there; there is racism out there in the community. The scope for prejudicial and racist attitudes to come into play if these powers are conferred on private citizens is of very real concern to us.

I will move on to say something briefly about proposed section 27 and the power that enables police to order suspects to move on.

CHAIR: I have a question for you on clause 27. By all means, comment on that provision.

Mr Collins: Proposed section 27 is currently contained in section 50 of the Police Act. The description the section has come to have is the "move-on laws", which, as the expression suggests, enable police to order through notices that individuals move on from a specified area. The legislation under the Police Act has been in operation for a little over 12 months. ALS' concern is that, in terms of policing practice, the laws have been used as part of zero tolerance policing processes to target the most vulnerable in the community, many of whom are Aboriginal, who occupy public space. I am referring here to the homeless, the mentally ill and those with substance abuse issues. In addition to that - I am no expert - Aboriginal people, historically and culturally, occupy public space. That is where people gather together to meet, to converse and to socialise. At paragraph 9.26 on page 289 of the Mahoney report, it was noted that Aboriginal people in 2003 represented more than 50 per cent of all apprehensions in Western Australia for good order offences. This section will inevitably mean that those statistics will worsen. The vice with the legislation is this: very often the conduct justifies the issuing of a move-on order. The legislation permits a move-on order to be issued for a maximum of 24 hours, and our experience is that every single move-on order issued against a client of the ALS has been for the maximum 24-hour period. The legislation also permits broad police discretion in terms of the area prohibited. What I am getting to is that, for example, if someone is given a move-on notice in Forrest Place, it is completely at the discretion of the individual police officer as to the area he forbids the person from entering. We have experienced that if someone is misbehaving in Forrest Place, he will be prevented from entering the entire CBD area, extending down to the river and beyond Royal Perth Hospital and the railway station in Wellington Street and William Street. It is a huge area. I will come back to that in a moment. The point I seek to make is that very often the behaviour that justifies the issuing of the move-on order in the first place is conduct of a trivial nature - disorderly conduct, swearing, drinking in public and things of that nature. There are laws to deal with that sort of misconduct. Disorderly conduct is a criminal offence. Park or street drinking is a criminal offence. If someone is fighting, assault is obviously an offence. The problem is that a breach of a move-on order carries with it a maximum penalty of 12 months' imprisonment, whereas recently the legislature has abolished, for example, sentences of imprisonment for disorderly conduct. We say that if someone is being disorderly, the police should charge him with the offence attached to that conduct, which is disorderly conduct. That would not attract a jail sentence, whereas a breach of a move-on order will. The other difficulty with move-on laws is that the people who are subjected to them are the most vulnerable and disadvantaged in the community. As I said, some have substance abuse issues and many are illiterate and homeless. Some are mentally ill. Many do not know the names of the streets. They do not have any comprehension of the area they are prohibited from entering. Many have no means of getting out of the prohibited area - they have no money and it might require a walk of several kilometres if they know where the area is to get out of it. We have found that people have been prosecuted within 20 minutes of getting a move-on notice for breaching it and not getting out of the area. Many do not own a watch so they do not have any conception of the time limits imposed in the notice. These people have no meaningful prospect of being able to properly understand the notice or being able to comply with it. All are arrested. No-one in my experience, since this legislation came in, has been issued with a summons. People get locked up for it, invariably overnight. The advice is that if there is some defect in the order a person should plead not guilty. The problem is that if the matter is remanded, these people, by virtue of their social circumstance, do not come to court. They are then charged with a breach of bail, which

also carries a sentence of imprisonment. The problems are compounded further down the line. At a very basic level, our submission is that there is no need for this sort of legislation given the fact that there are other laws that have been in existence for some time that can adequately cater for the criminal misconduct that justifies the issuing of a notice in the first place.

[11.44 am]

Mr Collins: I might ask Mr Eggington to briefly explain to the committee our concerns with respect to the history of these sorts of laws in Western Australia, and the impact of them upon the Aboriginal community. For many Aboriginal people, these laws hearken back to a time when the law was extremely harsh on Aboriginal people.

Mr Eggington: Thank you, Peter. With these comments we are trying to give the committee a clear picture of the fact that sometimes intent goes wrong. We are trying to reduce the numbers of Aboriginal people going into custody. It is something that this state and the commonwealth have committed to as a result of the Royal Commission on Aboriginal Deaths in Custody. Mr Collins has not talked about a seventeen-year-old mentally ill person who spent 20 days in custody because of a breach of a move-on law. Her home was in the area covered by the move-on order, and was in breach of the order by going home. All of these are crazy things. If the intent of this legislation is to deal with wild youth coming out of parties, where there are 150 young kids on the street who need to be pushed home quickly before anything happens, then this is a clear example of a case in which the intent of the law is not being upheld. For our people, the idea of continuing to be pushed from public places and being squeezed out of country hearkens back to the "prohibited area" days. That is why the Aboriginal Legal Service will continue to bring to the attention of the committee and anyone else the repugnant nature of these types of laws, and the way in which they are policed. Peter will probably talk about the prohibited area legislation which prevented people from going into certain areas and which enforced curfews.

Mr Collins: To pick up on Dennis's example, the Aboriginal Legal Service acted for the seventeen-year-old on Monday. She suffers from what appears to be a very serious mental illness - some sort of psychosis. She was charged with four successive breaches of a move-on order. I do not know the detail, and I am not seeking to criticise the police. However, the case points up the dovetailing negative impact of these sorts of laws upon Aboriginal people. The girl was granted bail, but it was what is called supervised bail. Under juvenile legislation, if a parent is not able to act as a responsible adult, the supervised bail process is there to organise for a placement so that the person can be released from custody on bail. The difficulty for this young woman was that because of the magnitude of her mental health problems there was no-one in a position to take up supervised bail for her, so she languished in custody for 20 days. When dealt with, she was given a section 67 order under the Young Offenders Act, which meant that she was not subject to any further punishment by virtue of the fact that she had spent 20 days in custody for these offences. That is a stark illustration in my submission of how the laws can impact upon the very vulnerable in the community.

Hon GEORGE CASH: Given the special circumstances, would that have been any different had the person been arrested rather than being given a move-on order and breaching the move-on order?

Mr Collins: Possibly not.

Hon GEORGE CASH: I have a question for Mr Eggington, and Mr Collins might also like to comment. We have listened to your comments with respect to the disadvantages you see in move-on orders. I think we understand the issues that you have raised. Do you believe that there are any advantages in move-on orders? I raise the question because one of the objectives stated at the time that the move-on order legislation went through the Parliament was that the government and the Parliament of the day did not want people to be arrested if there was an alternative. It was believed that a move-on order might be a practical alternative. We have heard about the disadvantages, and

you have provided us with a very significant submission that you made to the Attorney General on the general law relating to move-on orders. What advantages do you see, if any?

Mr Eggington: Under current policing procedures and the way the Aboriginal community is policed - not only the Aboriginal community - it has come to my notice recently that people who look different are getting move-on notices. People of gothic dress code are moved on because they do not look like the norm. It is very difficult, given the relationship that our community has with the police, for me to see an advantage. Should there come a time when Aboriginal people are treated fairly and equally, then there may come a time when move-on notices are a far more acceptable means of removing people from an area instead of them getting into trouble and being arrested. However, once again, it is very complicated because we need to acknowledge literacy and numeracy levels and move-on notices being issued to people who are affected by substance or alcohol abuse and do not comprehend the notice. Under current circumstances I cannot see that there is any advantage to the move-on laws.

Mr Collins: Theoretically there probably could be some benefits. If a move-on notice is issued to someone participating in schoolies week, requiring them to move out of a public place where all sorts of nuisances are taking place, then there are some real benefits if the person complies, because they will not be charged and they are moved out of harm's way. However, the theory presupposes that the person has the wherewithal to comprehend what the notice entails, and the capability and motivation to comply. As Mr Eggington pointed out to the committee, the opposite is the case with most of our clients because of their social circumstances. Some are simply incapable of being able to do what the notice requires them to do, and that is where the difficulties are thrown up.

CHAIR: What has your experience been with respect to the reasonableness of move-on orders? You alluded to the areas that would be described in a move-on order, and you are clearly indicating to the committee that you think that the areas that have been demarcated are beyond reasonable. Is that your experience in the courts, in the sense of whether or not the courts are prepared to uphold move-on orders?

Mr Collins: That is a very good question, if I may say. It is a great question for the reason that we have had very few cases in which clients have been charged with breaches of move-on orders that have gone on to a contested hearing. There are two reasons for that. The first is that some cases have been withdrawn by the prosecution before reaching that stage, in response to submissions from the ALS recommending that the matter should be withdrawn. The second and more compelling reason is that there are situations in which matters are booked for a contested hearing, the ALS has sought to argue the point that the expansive nature of the prohibited area is so unreasonable as to vitiate the notice, and the matter has not gone to a hearing because the client has not turned up. People are invariably bailed, as they should be for these sorts of offences, but they do not get to court. We have not really had an opportunity to properly litigate these matters.

CHAIR: Is there not enough case law on this issue?

Mr Collins: There is none, as far as I am aware.

CHAIR: What is your relationship with the police in having the matter addressed?

Mr Collins: We have had some discussions with senior police, who have expressed understanding of our concerns. However, to be blunt, the experience on the ground has not changed.

CHAIR: I have a question about clause 69, which is something that you have identified in your submission, concerning the power to search people in public places. You state that this is -

> . . . a serious erosion of the right of freedom of movement and the right of privacy.

How would you curtail clause 69? Would you also comment on the right of freedom of movement, and under what circumstances you would find it reasonable to constrain that right?

Mr Collins: I was primarily involved in drafting the ALS submission to the committee and I will answer this question by way of the example I used in the submission. The concern I have is that the clause would, as I understand it, contemplate the police having the power to cordon off very large areas of public space. The example given is the foreshore on the Australia Day fireworks night. The police could require everyone entering the cordoned off area to submit to a search. That is where, in my submission, the concern about freedom of movement is thrown up. Do we really need a law that theoretically prevents large numbers of people from entering an area that has been prohibited by the police? Although there are issues to do with poor behaviour and criminal behaviour by people at these sorts of events, there are also very many people who go to these events and who behave in an entirely lawful and appropriate manner, and who could be subject to this sort of request by the police. If the police hold the requisite reasonable belief that someone might be about to commit an offence, they can by all means take appropriate action; however, I cannot see the necessity for a clause such as this, to effectively cordon off large areas of public space and subject everyone trying to enter it to a search. It is not required. The ALS considers that the potential for conflict with the police is manifest.

Hon GEORGE CASH: Clause 69 deals with people in public places and the searching of those people for security purposes. However, surely clause 69(1)(c) qualifies the entitlement of a police officer to have someone searched for security purposes. In your comments you have, in part, acknowledged that. However, you seem to suggest that clause 69 would allow everyone to be searched. Surely that could only possibly occur if clause 69(1)(c) was in play, and the officer reasonably suspected everybody who entered that area. It is a very, very significant qualification.

[12.00 noon]

Mr Collins: It is. I suppose it all gets back again to the exercise of police discretion and the way the clause operates in practice. We can see, despite the requirement of a reasonable suspicion, that in practice the legislation could be used to target particular individuals in the community.

Hon GEORGE CASH: When you say target, -

Mr Collins: That is overstating it.

Hon GEORGE CASH: I understand where you are coming from when you say target. We are faced with the requirement to provide words that reasonably protect the whole of the community. I know there will always be cases at the extremes, which we can dream up. I do that on a regular basis in the Parliament, and people look at me very strangely at times, but in fact some of my extreme cases are happening every Friday night around the community. However, it seems to me that clause 69(1)(c) is a very, very significant qualification. I am not sure that you are in a position to criticise that clause. You are certainly in a position to highlight the practical circumstances that might evolve from the clause, and, in part, that is what you have been doing; you have certainly done that in other areas within this bill, not criticising the specific words but drawing to our attention the practical circumstances that occur.

Mr Collins: I understand what you are saying. To be frank, I do not think I can sensibly argue with you. Ironically enough, the extreme examples are often not extreme, if I understand what you are saying correctly, because they do happen on a very regular basis. I think my primary point is that our submission is that there is no need for a law such as this, given the other powers that police have in the act. If the law is introduced, there is no doubt, from our experience, that it will throw up issues in relation to the exercise of police discretion, as you have already mentioned to me, in the enforcement of it.

CHAIR: In your submission you also comment on clause 73. You refer to section 92 of the Criminal Investigation (Identifying People) Act and observe that clause 73 is tougher on the suspect. You express the concern you have with the pursuit of a comprehensive DNA database. You suggest that the power to forcibly compel an individual to undergo a forensic procedure be

confined to serious offences only. Will you explain to the committee why you make that distinction and why you would have difficulty with any offence being captured? I am mindful that you make a further comment about safeguards. Notwithstanding the safeguards, why would you confine that to more serious offences?

Mr Collins: The requirement that someone submit to the provision of a forensic sample is again an invasion of privacy on one level. We would submit that section 92 of the Criminal Investigation (Identifying People) Act to some extent reflects that concern, because it confines the provision of a sample to offences punishable by 12 months' imprisonment or more. It has to be a serious criminal offence in order for a sample to be compulsorily provided. Clause 73 would contemplate, as we have indicated in our submission, someone who has been charged with disorderly conduct being required to provide a sample, or someone who has been charged with street drinking. I cannot think of a reasonable argument why someone who has committed the offence of disorderly conduct would be compelled to provide a DNA sample, except to fortify a DNA database for Aboriginal persons. There is no sensible justification for requiring somebody who has been charged with disorderly conduct to provide a sample in those circumstances, in my submission. That is the primary concern. There is, of course, good reason for this, but the primary purpose behind providing a forensic sample is usually to assist the police in the investigation of the particular criminal offence. Granted, if it goes into the database, these random checks can be done, and that might implicate someone in the commission of another offence, but the primary reason is to facilitate police investigations. I would argue strongly that we do not need a DNA sample from someone charged with disorderly conduct. I do not care how good or bad the police case is against the individual, the individual should not be required to provide a DNA sample in those sorts of circumstances.

CHAIR: In a similar vein, you object to clause 98, which provides for a senior officer giving approval for a non-intimate search. Will you explain to the committee your objection to a senior officer giving that approval?

Mr Collins: Our submission is that there should be some safeguards built into this process. The best safeguard that we can think of is having magistrates approve the provision of these sorts of samples. It happens in Victoria. I have practised in Victoria. The process works very efficiently. Most applications by police for a suspect to provide a sample are unopposed, so it is not a situation where the courts are clogged with contested hearings on this issue. Most applications are made during the course of another court appearance, so it is very much an incidental application. There are matters that are contested, but there may be good grounds for contesting them. We contemplate that arising in the context of an application for the provision of a DNA sample from a child in some circumstances.

CHAIR: Will you explain a little more the message of your submission on clause 117? A number of references are made to difference clauses. Clause 154 states that the court must take into account any other matters the court thinks fit when deciding whether or not the desirability of admitting evidence in that way outweighs the undesirability of admitting evidence and whether or not that is in similar terms to the provision for exceptional circumstances.

Mr Collins: The High Court in its decision in Swaffield and Pavic, which is referred to in our submission, spelt out as recently as 1998 the law in relation to admissibility of confessions and admissions. Without going into the detail of the decision, in essence it says that there are issues of admissibility in relation to the question of voluntariness, issues of admissibility in relation to fairness and issues of admissibility in relation to admissibility on public policy grounds. Our reading of clause 154 is that the clause confines admissibility issues to public policy considerations, and it ought not. There may be good reasons, according to established principle, why a confession should be excluded on the grounds of, for example, voluntariness. Accused have a right to silence. If a confession is made involuntarily when the accused, in the Aboriginal context, either does not

understand their right to silence or has their will overcome during an interview process, that confession should be sought to be excluded on a traditional voluntariness basis. My reading of clause 154 is that the clause does not necessarily contemplate admissibility arguments in relation to voluntariness; likewise, with fairness, there might be a raft of reasons why an Aboriginal accused has made admissions, which would make it unfair to admit them in evidence against them. They might understand the caution, but they might be affected by alcohol. They might have an interview friend sit with them who does not know what his role is and is imploring them to answer questions, contrary to their right to silence. I could provide a number of examples. We say that clause 154 needs to be expanded to make specific provision for exclusion based on questions of voluntariness and fairness and that it should not be confined to this balancing up of public policy considerations. To expand the clause to reflect that would mean no more than codifying the common law articulated in the case of Swaffield and Pavic.

CHAIR: That is how you would propose to amend clause 154 to incorporate those principles?

Mr Collins: Yes. We would also like to see clause 117(3) pick up what is contained in section 570D(2)(c) of the Criminal Code; that is, that it be included in the clause that -

> (2) On the trial of an accused person for a serious offence, evidence of any admission by the accused person shall not be admissible unless -
>
> . . .
>
> (c) the court is satisfied that there are exceptional circumstances which, in the interests of justice, justified the admission of the evidence.

That is a catch-all provision with an exceptional circumstance base, and the interests of justice requirement as well, which a court would have to consider in relation to an admissibility issue.

CHAIR: We are operating under gentle time restraints today. I have only one more question for you, but I will submit that to you in writing. We will send that to you and ask you if you could address in writing the issue raised in the question and if there is anything as a result of today's hearing that you want to add to the submission that you have already made to us. I will wrap up our session with you and remind you that you will be getting a copy of the transcript, so you may correct any errors and send it back, bearing in mind the obligatory warnings and cautions I gave you at the beginning of the session. Thank you very much for your evidence, which has been interesting.

Mr Collins: We thank the committee for our being given the opportunity to raise concerns.

Mr Eggington: Thank you very much.

Hearing concluded at 12.14 pm