

REPORT OF PROCEEDINGS BEFORE

STANDING COMMITTEE ON LAW AND JUSTICE

REVIEW OF THE CRIMES (FORENSIC PROCEDURES) ACT 2000

At Sydney on Monday, 24 September 2001

The Committee met at 10 a.m.

PRESENT

Mr R. D. Dyer (Chair)

The Hon. J. R. Ryan

The Hon. P. J. Breen

The Hon. J. Hatzistergos

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KENNETH MICHAEL MIDDLEBROOK, Chief Superintendent, Commander of Security Investigations, Silverwater Correctional Complex, Jamieson Street, Silverwater,

THOMAS McLOUGHLIN, Senior Assistant Superintendent Department Liaison Officer, Silverwater Prison Complex, Jamieson Street, Silverwater, and

DAVID CHARLES HAVILAND, Policy and Projects Officer Operations Division, Roden Cutler House, Campbell Street, Sydney, sworn and examined:

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

Mr MIDDLEBROOK: Yes, I did.

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

Mr MIDDLEBROOK: Yes, I am.

CHAIR: The department has made a submission to the inquiry. Are you happy to have that included as part of your sworn evidence?

Mr MIDDLEBROOK: Yes, I am.

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

Mr McLOUGHLIN: I did.

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

Mr McLOUGHLIN: I am.

CHAIR: I take it you are happy to have your submission included as part of your sworn evidence?

Mr McLOUGHLIN: I am.

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

Mr HAVILAND: I did.

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

Mr HAVILAND: Yes, I am.

CHAIR: I take it you are happy to have your submission included as part of your sworn evidence?

Mr HAVILAND: Yes, I am.

CHAIR: Can I say to you all 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 will be willing to accede to your request. I would like to thank you all very much for the department's submission and for agreeing to give evidence to the Committee this morning. Can I invite Mr Middlebrook to make a brief opening statement to the Committee.

Mr MIDDLEBROOK: As the Committee would be aware, the Crimes (Forensic Procedures) Act is administered by the Attorney General. The implementation of the actual testing process is the responsibility of the New South Wales Police Service. As custodian of inmates who are subject to the legislation, it was necessary for the Department of Corrective Services to participate in this implementation process.

Prior to the development of an implementation strategy, representatives from corrective services and the

corrections health service, together with members of the New South Wales Police Service, travelled to Victoria to observe the collection of forensic samples from inmates and to meet with police and corrective service officers responsible for implementation of the Victorian legislation. At that time Victoria was the only State collecting forensic samples from inmates.

As a result of that visit we identified two important points. One was the necessity for the effective education of both staff and inmates prior to the commencement of the testing and although not provided for, but in the legislation, the benefit of introducing a cooling off period, or time out, was recognised. This is the period between when an inmate initially is advised and refuses to supply a sample and when the sample or force could be used or may be used to obtain that sample.

To facilitate the implementation process, the following action was taken by corrective services prior to the commencement of testing on 8 January. Two departmental officers were nominated to be the liaison officers between corrective services and the New South Wales Police Service and both officers reported directly to me.

A senior officer of each correctional centre was nominated as the correctional centre liaison officer and their main duties were to deliver an education campaign to inmates and staff, to act as a first point of contact for inmates with queries or concerns about the legislation or testing process, to liaise with the two departmental officers appointed about the implementation process or any other issue, and to assist inmates in obtaining legal advice, organising the interview, friends and interpreters if required, act as an independent person within the context of the legislation, act as the delegate of the governor or superintendent of each correctional centre to ensure that tests are carried out in accordance with legislation and in a manner that will not cause unrest among the inmates in those correctional centres.

The education campaign incorporated face-to-face information sessions. Information videos, brochures and handouts were delivered simultaneously at all correctional centres on Monday, 27 November 2000 and that education is ongoing.

The inmate development committees, which are made up of representatives from inmates in correctional centres and all those correctional centres, were consulted in relation to the legislation and testing procedures. Standard operating procedures for staff involved in the implementation process were developed and distributed. There were 140 copies of the legislation distributed to correctional centre libraries for use by inmates.

External agencies, such as the Legal Aid Commission and the Ombudsman, as well as community interest groups were consulted in relation to corrective services implementation strategy and the department offender management system was enhanced to include the forensic procedures module, and this module was not operational until about February 2001.

The above processes were the more significant processes which were implemented by corrective services. Corrective services is committed to ensuring that the administration of the Crimes (Forensic Procedures) Act by police in New South Wales correctional centres is done in accordance with the legislation, with due regard to the safety and dignity of inmates and with as minimal disruption to correctional centres as possible.

The fact that only 10 tests out of approximately 6,650 have been non-compliant would appear to support the corrective services strategy in relation to forensic testing.

CHAIR: In commencing the questioning period, could I indicate that any question I might ask, or my colleagues might ask, can be responded to by one or more of you as you choose. In the department's submission there is reference to the fact that at the time the police service began taking samples in January this year, that there were 7,150 full-time inmates and of those about 5,800 were sentenced inmates, including appellants.

You go on to say that there were some difficulties regarding the state of the department's records, in the sense that the department's computer systems were unable to identify inmates according to the maximum penalty for the offence for which they had been imprisoned, because the computer systems are evidently designed to identify inmates according to the actual length of their sentences, so in some cases it followed as a necessary consequence that you had to identify serious indictable offenders by accessing manual records or, more correctly perhaps, I should say by manual inspection of the records. Has that problem been overcome as yet?

Mr HAVILAND: Yes. Initially we provided lists to the police service of all inmates due for release and the police service actually went through those lists and nominated who were serious indictable offenders. Since

that happened, and that was the releases for the first six months of this year, in the intervening period while we were actually using those manual identifications, we have had the offender management system updated so it now does identify serious indictable offences for all inmates and those reports are able to be generated at each correctional centre by the correctional centre liaison officer.

CHAIR: So there is now no continuing problem regarding identifying who is or is not a serious indictable offender?

Mr HAVILAND: No, none at all.

CHAIR: Can I turn to the matter of federal prisoners? I note that there is a passage in your submission dealing with federal prisoners and it appears to be the position that the New South Wales Police Service does not take samples of forensic material from those who are serving a term of imprisonment for only a federal offence. Is that correct?

Mr HAVILAND: Yes.

CHAIR: It is only those offenders who are sentenced for both a federal offence and a New South Wales offence who are tested?

Mr HAVILAND: If the New South Wales offence is a serious indictable offence and if the New South Wales offence is still current.

CHAIR: The Committee has received a submission from a federal prisoner at Junee Correctional Centre. He stated that attempts were made by prison authorities at Junee to pressure him to consent to provide a sample. His submission is that when he objected on the grounds that he was a federal prisoner, he was reclassified, as a punishment.

What procedures are being followed in regard to ACT and federal prisoners and are you in a position to comment on the claims of this prisoner, or any other prisoner, that they have been disciplined for failing to consent to a forensic procedure?

Mr HAVILAND: As far as the actual testing of ACT and federal inmates is concerned, we have updated our reports generated by the offender management system. They now actually specify the jurisdiction of each offence, so if the inmate had multiple offences, it is clear there is X number of New South Wales, Y federal, and Z ACT. There is absolutely no problem in identifying that now, but as far as the claims made by the inmate I do not know.

Mr MIDDLEBROOK: The inmate believed to be referred to in this instance is in fact a federal offender and no sample was taken from him by police. He was in fact reclassified to Goulburn Correctional Centre as a result of his refusal to participate in the program for sex offenders. He is convicted of a child sexual offence and refused to participate in a denier's program, which is part of the requirement in the classification system that they do participate in some of these programs.

This is a program especially designed for offenders of this man's history. This man's refusal to participate resulted in this action. This inmate has since been given another opportunity and at this time is back in Junee.

The Hon. J. F. RYAN: Can I follow it up; which program did he refuse to participate in? There are two sex offenders programs. I think one is called SALK, the other one is CUBIT.

Mr MIDDLEBROOK: All I know is this particular fellow refused to be part of the sexual offenders program, put to him by the program's area at that time and I am told it was the deniers program.

The Hon. J. F. RYAN: Is this the one in Junee or Long Bay?

Mr MIDDLEBROOK: Junee.

The Hon. J. F. RYAN: Is it not a fact that even corrective services has difficulties with that program? The reason I ask the question is it sounds a bit surprising to me that an offender would be reclassified and sent to Goulburn for refusal to participate in that program. I could understand that they refused to transfer to go to CUBIT. Given corrective services have some questions about the program at Junee and do not necessarily

recognise it as being a thorough program at all, the concept that a person would be disciplined for not participating in a program you have some questions about yourselves does not sound to me to be a story that entirely adds up, if I may ask respectfully.

Mr MIDDLEBROOK: I cannot provide any additional information on that. It is an area that I am not familiar with, the sex offenders program.

The Hon. J. F. RYAN: I would request a bit more detail on that, because as you can imagine, an accusation that it appears they may be transferred for failure to participate in a program that they may not necessarily have had a responsibility to participate in at all, is one that this Committee would have to take reasonably seriously and to have an explanation that I guess misses some of the important details may not suit the Committee's needs. Is it possible for you to give the further detail at a later stage?

Mr MIDDLEBROOK: We can come back to you with that.

CHAIR: In any event regarding the prisoner in question, I understand from the previous answer you were giving that he is only a sentenced prisoner for a Federal offence. Is that the position?

Mr MIDDLEBROOK: That is right, that inmate is in fact a Federal offender and no sample was taken by police.

CHAIR: He is not convicted of any offence within New South Wales?

Mr MIDDLEBROOK: If we are talking about the same offender, that is correct.

CHAIR: You might be aware that some time ago there was a television program shown on SBS television in the program under the general heading of "Insight", and it showed footage of the forcible taking of a sample from a prisoner in Victoria. Various parties have criticised the events shown in that segment for its violence. Could you describe for the committee the procedures for the taking of a forensic sample in New South Wales from a non-compliant or non-consenting prisoner and could you indicate, in responding to that question, how many police or prison officers might be involved in a typical procedure?

Mr MIDDLEBROOK: Can I answer the last part first? With the 6,000 odd inmates that have been tested to date the biggest majority of them have been consenting and the staff ratio would have been three to four police that are required to undertake the testing procedures. From correctional officers there would be the correctional centre liaison officer and usually two escorting officers.

In minimum security camps it is not and has not been unusual for it to be one correctional officer, which is the centre liaison officer, and the inmates are called by the camp public address system. In the maximum security gaols there is usually the two officers to escort and there are usually up to four officers from the special regional response teams to assist in case there are problems.

We usually have notice that people are non-compliant and every effort is made to speak to the inmates within that cooling off period. In those few examples where force has been used, it is usually five officers, correctional officers, that would be involved, plus the four testing police, plus the correctional centre liaison officer. That would be the total of our correctional centre and police complement to undertake the testing.

CHAIR: When I viewed the television segment in question I thought that the force used was, to use the vernacular, over the top. However, it is my understanding that that is not replicated within this State, could you confirm that is the case?

Mr MIDDLEBROOK: That is correct. That video was in fact of Victoria and when we visited Victoria we were also shown segments and videos of those sorts of things and it strengthened our resolve to put in that cooling off period and to make sure that we provided the best sort of education we could in the correctional centres so we did not have that scenario.

CHAIR: It is said in the department's submission that officers have been specifically instructed not to coerce or attempt to persuade inmates to provide a sample of forensic material, and at all times inmates are encouraged to seek legal advice should they have concerns with providing a forensic sample; could you confirm that is in accordance with current practice?

Mr MIDDLEBROOK: That is correct.

CHAIR: There is a passage in the department's submission dealing with what is described as the education program within the department concerning the taking of forensic samples, which includes a video and a brochure, as I understand it. Could I say that the indications from the Police Service at this stage appear to be that at least some police officers take the view that the information required to be conveyed to persons being tested is possibly unduly technical and complex. Can you indicate to the Committee what the view of the Department of Corrective Services is in that regard? Can information be conveyed in a reasonably simple and effective fashion to prisoners or is it your view that the legislation might be unduly complex?

Mr MIDDLEBROOK: You are talking two lots of information. You are talking about the information that we provide to inmates that we produced ourselves, which was the video prepared to inform inmates about forensic testing and about what the procedure would be and how the test would take place. We produced in-house a small video; we hired actors and they went through a simulated testing program. That shows then what the inmate can do and it also provides simple information, simple to understand. We believe it is as simple as we could make it for inmates to follow through, find out additional information, make contact with legals or anyone else they would like to contact about that. We followed up with a brochure. We consulted with some other agencies and we took on board the changes that were required in that brochure.

Unfortunately, in a perfect scenario we would have had more time to do this. I ask the Committee to consider that we started working on this in November and the police time frame was that they wished to start testing in January 2001. When you think about covering New South Wales and all the correctional centres and inmates across the State we did not have a lot of time. We did consult where we could. The changes that were recommended, these things take time to send them to other organisations and get the feed back. We took those changes on board, however. The first lot of brochures printed were distributed. The education program had started because we wanted to saturate the correction centres with that information. I believe that was simple to understand and I believe the inmates understood that.

The information read out by police to inmates in testing is a legal document and it is very complex and having sat in, and watched the interview and testing program, I think that there are a lot of inmates that find that difficult to understand, but that is a police issue and I think there are certain requirements in the Act where the information has to be given to the inmates. The information we prepared is very simple and easy to understand.

CHAIR: I appreciate that there are constantly new prisoners coming in to the system and the numbers are quite considerable. It produces what I might call a regular turnover in terms of people coming in to the system and prisoners being released. What proportion of serious indictable offenders within the New South Wales prison system in approximate percentage terms would you say have been tested under the legislation at this point, or the most recent point you are able to indicate?

Mr MIDDLEBROOK: 6,673.

CHAIR: What proportion?

Mr MIDDLEBROOK: That is at 21 September 2001, that is out of 7,000 odd prisoners in custody.

Mr HAVILAND: High 7,000s, but that is since testing has commenced. You would have to be aware that a lot of those inmates have been released. That is not based on any percentage of the current population.

Mr MIDDLEBROOK: Bear in mind that when corrective services was approached to provide assistance to carry out this testing we were under the understanding that we would test around 5,000 prisoners and the police themselves would test people from 1 January on. Once we tested about the 5,000 in custody, that would be it for us. We believed there would be a sunset on that. That does not seem to be happening. The numbers we are testing, we are still testing at the same rates.

The Hon. P. J. BREEN: You mean 1 January this year?

Mr MIDDLEBROOK: Yes. We were under the understanding that the police would start the test at the point of charge and by the time those people were received in the correctional centres they would have been tested.

CHAIR: You are saying the police would have been testing from the point of charge?

Mr MIDDLEBROOK: My understanding when we first started to talk about it was under the

legislation the police were going to test people when they were charged, not when they came into our custody.

CHAIR: Would that be in accordance with the legislation, given that the testing is intended to relate to serious indictable offenders? I would think by definition an offender ought to be a convicted person.

Mr MIDDLEBROOK: I am not sure. All I know is that is what was going to happen and we believed that we definitely had a sunset on our participation in the testing.

CHAIR: Having regard to what you have said about your understanding of who was to do the testing, could you indicate to the Committee are any resource problems arising out of the workload cast on your department?

Mr MIDDLEBROOK: There are. We were never funded or resourced to participate in the forensic testing and all the resources that corrective services have put into this to date have been out of our existing resources. It is very resource intensive when you start with collecting the information to provide to the police to organise the testing and then the information and work that the correctional centre liaison officer must undertake with running the education campaign, as well as the actual testing on the day, is very resource intensive for us.

CHAIR: Some of those resources, in terms of person power, are provided by the police, are they not?

Mr MIDDLEBROOK: They do all the testing, we do no testing whatsoever. All we do is facilitate the inmate to the testing area. That still is resource intensive for us.

The Hon. P. J. BREEN: Can I make a point? If you were first told about it in November and you expected that by 1 January you would be stopping testing, you could not conceivably be doing 5,000 --

Mr MIDDLEBROOK: We never thought that. We started to talk with police I would say in about August last year and we started to put our plans together and we facilitated the trip to Victoria in November, and Mr McLoughlin and Mr Haviland went to Queensland in December, they started. We did not think for a moment we were going to be finished by January. We did not want to start testing until the end of January. January is always a difficult time in the prison system because of staff on leave over the Christmas break. We endeavour to get as many staff off as we can. It is in the summer time, it is hot, people are emotional because of the holiday festive season, and we asked the police would they not start testing until about the end of January.

Testing started on 8 January. We always believed it was going to take us 12 months to capture those inmates that we had identified. We started the program by testing those people that were due for release. We did our lists, the first 8 weeks or 12 weeks, of inmates that were due to be released. They were the prisoners tested first. We always believed that it would take about 12 months. We did not really think that we were going to have an ongoing commitment to forensic testing.

The Hon. P. J. BREEN: You did think you were going to be doing about 5,000?

Mr MIDDLEBROOK: We did.

The Hon. P. J. BREEN: At this point you have passed your expected number and you are not into the 12 month period yet.

Mr MIDDLEBROOK: No.

Mr HAVILAND: Based on the 1999/2000 financial year we get about 160 sentenced inmates per week into custody. We would estimate that probably 100 of those would be serious indictable offenders. At the moment we are testing probably about 200 per week. So we are really only keeping our head above water and 200, given the police resources, would be a good week. It can be, depending on the level of non-compliance, as low as 120, it can be as high as 220, but we average in about the high 100s per week. We are really only testing 90 more than we are getting in.

The Hon. J. HATZISTERGOS: You say you facilitate them for testing, what do you do?

Mr MIDDLEBROOK: We provide the education process to the inmates. Our staff talk to the inmates, our staff talk to the inmates during the cooling off period and we arrange to have the inmate brought from the accommodation area down to the testing site. That is really our involvement.

The Hon. P. J. BREEN: You have someone present during the testing?

Mr MIDDLEBROOK: The correctional centre liaison officer is present while the testing is on.

The Hon. P. J. BREEN: If someone is non-compliant you have four or five officers involved, I think you said.

Mr MIDDLEBROOK: That is correct.

The Hon. J. F. RYAN: Correction centre liaison officer is a term I am not familiar with.

Mr MIDDLEBROOK: The correction centre liaison officer is a senior officer, usually assistant superintendent rank, who is the person responsible to ensure that the education process gets out to the inmates, represents the superintendent or the governor of the centre, and liaises with the two, Mr McLoughlin and Mr Haviland, on the liaison between the police.

The Hon. J. F. RYAN: It is an employee of the Department of Corrective Services?

Mr MIDDLEBROOK: Yes, it is.

CHAIR: As I understand it, there is one such officer to each correctional institution?

Mr HAVILAND: In some cases the larger centres have more than one to make sure all the inmates are covered.

CHAIR: At Silverwater, to take an example, might there be more than one?

Mr HAVILAND: MRRC has three.

The Hon. J. HATZISTERGOS: What is the attitude of the prisoners towards testing in general?

Mr MIDDLEBROOK: I might ask Mr McLoughlin to answer that because he has been with the prisoners on a regular basis.

Mr McLOUGHLIN: The figure that we provide is a 94 per cent consent rate, so they participate in it. Based on those figures, of the 6,673, 6,298 have consented to the sample being taken. That is a swab. The total sample taken as of 21 September 2001 is 6,673 inmates have been tested. 6,298 of those have had the buccal swab taken. They have consented to the sample being taken. It is a 94.4 consent rate, so you have to say that they are going along with it. That is based on the education program as well.

The Hon. J. HATZISTERGOS: Do they understand it?

Mr McLOUGHLIN: That would be a matter for them.

The Hon. J. HATZISTERGOS: We have heard all sorts of stories.

Mr MIDDLEBROOK: I think we have gone to a lot of effort to get the information out in basic simple language. There are three levels of grievance procedure for the inmates and that is the official visitor who visits the centre, the Inspector General that they can write to and complain and also to the Ombudsman. Now, as the person that has been overseeing the forensic testing for the department, there has been only one complaint that has come to me in relation to an inmate who has raised an issue about the forensic testing process, out of 6,673.

The Hon. P. J. BREEN: Earlier you said only 10 people were non-compliant. The figures that Mr McLoughlin has just given suggest that there are 375 people who have not consented. I assume that the difference between 375 and 10 is that the others were compliant after a court order.

Mr MIDDLEBROOK: No.

Mr HAVILAND: They are what we term compliant non-consent, where they will refuse consent to a buccal swab, therefore a senior police officer has to give them an order under section 70. As soon as they refuse consent, the test becomes compulsory. That is the advice that we were given by the Legal Aid Commission, that

they did not advise inmates to consent. They advised them to refuse consent to a buccal swab but to willingly, without resistance, submit to a hair sample after a police order was given. That is the 375.

The Hon. P. J. BREEN: Of those 375, 10 have been non-compliant even beyond that.

Mr HAVILAND: 10 beyond that.

The Hon. P. J. BREEN: When you need four or five officers from the department, is that for these 10?

Mr HAVILAND: Yes. The section 70 is done usually on the spot, where once the inmate refuses consent, the police will make an offer to the inmate saying: Under section 70 I am able to give you an order taking a hair sample. Do you wish to submit to the hair sample being taken. If he says yes, the test is considered compliant and if he says no he is considered a non-compliant inmate and the cooling off period will start then.

Mr MIDDLEBROOK: In the early days of the testing, when it first started in early January, we were unsure how inmates would react to testing and even in places like Glen Innes, Grafton, the isolated areas of the State. We sent our regional response team members to be there, just in case there was a problem.

We were not sure if inmates would try to incite other inmates in the centre and create some difficulty. In the first three months we sent response teams to just about every location, to be on hand. They were not always involved in moving inmates across. In some centres we have controlled movements where we have to bring inmates from one part of the correctional centre, passing through other parts, to get to the testing area, and they have to be escorted.

The Hon. J. F. RYAN: What does the regional response unit look like? Are they dressed distinctly differently to the rest of the standard correctional officers?

Mr MIDDLEBROOK: The dress differs from the blue overalls they use in operations to a correctional officer uniform.

The Hon. J. F. RYAN: Do you not understand how that might be misinterpreted by some inmates to believe that whilst you would consider them there for good order, they might have seen them as a means of intimidating them into giving a sample, not necessarily as voluntarily as they might have intended?

Mr MIDDLEBROOK: Under the circumstances, when we were not sure how inmates would react in those isolated areas, I had no option but to put those teams in place in those areas and the inmates in those isolated institutions are aware and would be familiar with the regular visits of those teams. Those teams regularly visit institutions for a wide range of activities, not just forensic testing.

The Hon. J. F. RYAN: One imagines that the department would not necessarily want to have that sort of resource maintained in any particular corrections centre for any length of time longer than was necessary. It is not hard to imagine how inmates might have been hurried on, in order to get the process over with. Was that likely to have occurred? What action might the corrections have taken to ensure that that impression was not conveyed?

Mr MIDDLEBROOK: I do not believe that impression was conveyed. I think we went through every possible opportunity to provide the education through to the inmates and in the early days of the testing, when those staff were there, either in Mr McLoughlin or Mr Haviland were on site at some of those locations.

Mr HAVILAND: Could I add that the majority of testing, where the security units were there, they were not visible to the inmates, except possibly at a minimum security centre. The inmates would not have known. They were certainly not visible anywhere in the vicinity of the testing area. They were possibly seen at a minimum security centre because it does not have walls. They may have been seen driving in there, but they remained completely away from the test area.

The Hon. J. F. RYAN: Are they armed?

Mr MIDDLEBROOK: No, they are not.

CHAIR: I assumed that when you raised this issue of sending such a team to the more isolated prisons that you were just guarding against the possibility that there might be a riot, or something approaching it, or generalised dissent arising out of the testing, rather than sending it in for the individual prisoners.

Mr MIDDLEBROOK: That is right. In fact we had no idea how inmates would react. We had the Victorian experience. We decided to approach it a little differently to our colleagues in Victoria. In fact, the advice of the Senior Victorian Correctional Officer was that the best thing to do was to saturate inmates with education. They gave us examples of some of the institutions where the individual governors of those centres took it upon themselves to have staff provide the education to inmates and it was obvious to us that those instructions had relatively fewer problems than those who elected to just hit the inmates with a court order and bring them to the testing site.

We still did not know how inmates would react. There was a fair bit of media attention at the time about the introduction of forensic testing. We had no idea how that was going to impact on the inmates in some of these locations and we thought it was in our best interests to have those people on site in case there was a problem.

CHAIR: Coming back to the question of testing itself, if I understand the position correctly, for a non-consenting non-compliant prisoner there can be up to 10 officers present, five from the prison service and five from the police service; am I correct?

Mr MIDDLEBROOK: It depends on the stage it is at. If they fail a consent when first advised, no, that is not correct, because there is a period of time, the cooling off period of up to 10 days. Sometimes that is not practical. If a team goes to an isolated place like Broken Hill or Grafton, the inmate might be spoken to on the Monday and might only have four or five days cooling off. It depends how practical it is to give it. If the inmate is to be discharged on the Wednesday, they might have only two days cooling off.

It gets to the point where the inmate indicates to corrective services that there is going to be a problem, they are not going to comply, or they are going to barricade themselves in their cell, then the regional response team will then go in and remove that inmate and will escort that inmate across to the testing site. Those officers will stay with that inmate.

We resolved early in the piece that the testing of inmates was a police responsibility and our staff would not get involved in that. For common sense reasons, if an inmate was not complying and was struggling with the process, we would hardly take an inmate to a location and put them inside the door and say to the police, you deal with them. That is more for the safety of the inmate.

CHAIR: I was raising the question because it occurred to me that in a given case, if you were dealing with one prisoner, 10 officers in total sounds rather a lot.

Mr MIDDLEBROOK: There are very few circumstances that that would be the case. In many of the cases, and even at a place like Goulburn Correctional Centre, in the early days I visited when the testing process was underway at many of the centres, and at Goulburn, which is a maximum security gaol, inside the testing room there was the corrections liaison officer, one escorting officer and a police officer, Mr Haviland and myself. We were the abnormal number in that particular room. There are very few examples where you would have more than that in the room when the testing was going on.

CHAIR: Can I come to the matter of how hair samples are to be taken? The New South Wales legislation does not actually specify the manner or method of taking a sample, unlike the model bill, the federal bill, and some legislation in other jurisdictions, some of which state that hair must be extracted one strand at a time. What is the procedure in New South Wales prisons regarding the taking of a hair sample? Does a clump have to be taken?

Mr MIDDLEBROOK: That is a police issue. Corrective services staff are not engaged in any part of the testing whatsoever.

The Hon. P. J. BREEN: Are you able to say from your own observations what they do?

Mr MIDDLEBROOK: No, that is entirely a police matter. We do not get involved in the testing of the inmates. Our primary role is to facilitate the area for the testing and to bring the inmate across for the testing. The rest is up to the New South Wales Police.

The Hon. P. J. BREEN: Would not the liaison officer be able to observe the way the police do the testing?

Mr MIDDLEBROOK: They may do but that is a matter for the police to answer that, not corrective services.

CHAIR: Can I ask you a fairly complex question arising out of some evidence given to the Committee earlier during this inquiry by Dr Jeremy Gans of the University of New South Wales Law School? He recommended that a distinction ought to be drawn between self-administered buccal swabs and buccal swabs performed by another person.

In relation to Part 7 of the legislation, he proposed that the police should be authorised to make an order for a prisoner to self-administer a buccal swab or for a hair sample to be taken. Further that a forcible buccal swab would be made an inmate procedure only available after a court order. Now, if that were to happen, would you envisage that such an amendment would create operational difficulties so far as the prison service is concerned?

Mr MIDDLEBROOK: All the buccal swabs taken to date have been self-administered. We would not support somebody else taking a buccal swab. We do think that that would create problems and we would not support that at all.

The Hon. J. F. RYAN: With regard to the counselling that inmates might receive during the cooling off period, how does the Department of Corrective Services distinguish itself from being an agency facilitating DNA testing, to the agency actually carrying out the testing, given that an inmate is probably likely to infer that there is some level of coercion coming from the Department of Corrective Services, as much as they would infer coercion from the police service?

How are you able to get that necessary level of independence that you are not the testing agency, you are simply facilitating, across to the inmate?

Mr MIDDLEBROOK: I do think that we have that level of independence and inmates see that level of independence and there are three other areas that they can raise objections to. As I said before, you have the official visitor to the visitor's centre, they have the Ombudsman they can write to or contact, and the Inspector General that they can write to or contact.

An inmate in a correctional centre can use the telephone system to contact either the Inspector General or the Ombudsman at any time and the official visitor is visiting the centre at least one day a fortnight and if in fact they were concerned about the independence of corrections involved in this process, they could raise it with those people. That has not been raised and I have not had complaints from one of those agencies for the total of 6,673 people tested.

The Hon. J. F. RYAN: Are you aware of what the term "interview friend" means?

Mr MIDDLEBROOK: Yes.

The Hon. J. F. RYAN: Particularly for a person of indigenous background, that the provision in the Act is somewhat being undermined by practices from, allegedly, the Department of Corrective Services where they require the prisoner to pay the cost of transport for interview friends and then at a very late stage, before the procedure is due to take place, it is suddenly rescheduled and the interview friend has arrived for the procedure and then the matter is suddenly rescheduled.

Given the difficulties there are for an inmate to organise that person again, it has been suggested that undermines the position for interview friends.

Mr MIDDLEBROOK: Unless you have a specific example of that, I am not aware of that happening anywhere. I am not aware of any request from the inmates to have the department pay for an independent interview friend to be present, but any person nominated interview friend must meet the department's criteria. For example, if somebody had been a banned visitor, or somebody who was banned from visiting a correctional centre, they cannot be allowed to come along as an interview friend.

There are examples where inmates have nominated other inmates to be an interview friend and providing that person has not been on segregation, or been away at another correctional centre, we would agree to that process.

The Hon. J. F. RYAN: Are records kept of the requests for interview friends?

Mr MIDDLEBROOK: At correctional centres there would be records kept.

Mr HAVILAND: There is a pre-test interview done with each inmate and one of the questions asked is "Do you require an interview friend?" Obviously that would relate to an Aboriginal or Torres Strait Islander.

The Hon. P. J. BREEN: In your submission you have said of the 3,000 inmates who provided samples prior to May 2001 more than 500 were entitled to ask for a legal representative to be present. In only one instance was a legal representative present while a forensic procedure was carried out. That seems to me to be an extraordinary figure in the sense that you would have thought that people who are entitled to a legal representative, just as they might have been entitled to an interview friend, would take advantage of that provision.

Is that a logistics problem, the fact that lawyers are often difficult to get into a police station?

Mr MIDDLEBROOK: The testing is taking place at the correctional centre and I have not seen a request for, or I have had no information that there has been difficulties with that process. During the cooling off period the inmates are encouraged to ring legal aid or ring various representatives. The opportunity is there and I am not aware of any particular instance where people have been denied that.

The Hon. P. J. BREEN: Is it likely that the lawyers are just giving them advice over the phone and therefore not going?

Mr HAVILAND: A lot of tests have been suspended so an inmate can actually go and make a legal call and they generally come back and will go through with the test following the advice of their legal representative. In the initial stages there was a lot of poor advice actually being given, from our experience, from a lot of the inmates' legal representatives. Obviously they were not aware of the legislation.

The Hon. P. J. BREEN: Is there any correlation between those figures in relation to legal representatives and the point that Mr Ryan raised about interview friends?

Mr MIDDLEBROOK: You mean us paying for that?

The Hon. P. J. BREEN: Just the fact that there are so few legal representatives attending and the point that Mr Ryan was making, I think, that there might be many instances where interview friends are not being given the opportunity to be present when they ought to be.

Mr MIDDLEBROOK: I do not think that is the case. I mean, every opportunity is given to inmates to organise that and the onus is on them to organise that and we make that clear right from the start. I mean, we facilitate the phone calls. We facilitate them to have access. We facilitate the information. The onus is on them to organise that part of it.

The Hon. J. F. RYAN: How many days do they usually get to organise it? Do they get plenty of notice?

Mr HAVILAND: Yes.

Mr MIDDLEBROOK: There have been times when a test has been suspended.

Mr HAVILAND: That is to obtain legal advice over the phone, but initially we were probably getting seven days to 14 days notice of when testing was going to commence. Now I think we are putting out a schedule probably six weeks in advance, and part of our SOPs is that the correctional centre liaison officer, again in that pre-test interview, asks the inmate does he require legal representation or an interview friend. If he does, the correctional centre liaison officer should actually schedule the test.

We actually say "All right, if you do want an interview friend present, we will schedule the test for a particular time on a particular day", and we inform the interview friend. We actually will provide a phone call for the inmate to do that.

CHAIR: Have you noticed any increased instance of the use of an interview friend on the part of Aboriginal inmates?

Mr HAVILAND: The majority of Aboriginal inmates have had interview friends who have been representatives from Aboriginal welfare organisations or our regional Aboriginal project officer and they will sit in on possibly all the tests for that day for Aboriginal and Torres Strait Islander inmates and they are someone that the inmates trust and it has worked extremely well and there has been absolutely no complaint about it.

They have actually been requested by the inmates. They are not someone that we have actually placed there.

The Hon. J. F. RYAN: You would say that the provision of interview friends is a system that is working well?

Mr MIDDLEBROOK: I would say that, yes.

The Hon. J. F. RYAN: One of the things that has been said to the Committee is that sometimes Aboriginal or Torres Strait Islanders were discriminated against by other inmates because they were seen to have a legal privilege greater than their own; are you familiar with any instances?

Mr MIDDLEBROOK: I have not seen any examples of that and I have not had that reported.

The Hon. J. F. RYAN: What are the grounds on which an interview friend is considered to be unacceptable and are written reasons provided to the individuals concerned?

Mr MIDDLEBROOK: I am not aware of any interview friend that has been deemed unsuitable to date but any inmate that nominated somebody that had been classified as a prohibited visitor to a correctional centre, that person would be deemed unsuitable and those people have been previously written to. If that had been the case we would follow up in writing. I have not had that request nor have I heard of that happening.

CHAIR: Have you noticed any instances within the prison system of procedures being disrupted by interview friends?

Mr MIDDLEBROOK: No, I have not seen any issues and not heard of any issues since we started testing.

The Hon. J. F. RYAN: Just to make one item clear, you said that corrective services officers do not participate in the taking of samples and so on?

Mr MIDDLEBROOK: That is correct.

The Hon. J. F. RYAN: Does that include restraining an inmate whilst a sample is being taken?

Mr MIDDLEBROOK: If an inmate requires restraining from the accommodation area across, the only time that we will be involved is in maintaining that restraint while that person is in the chair. It is a common sense thing and it is for the safety of the inmate as well as the safety of those around them. The officers do not get involved in taking the sample, that is a police issue. Our officers are there to restrain the inmate only on that occasion.

The Hon. J. F. RYAN: All of that procedure in which an inmate was being restrained would ordinarily be captured on video, would it not?

Mr MIDDLEBROOK: Yes, it is. When that happens, additional to the police video that is taken for the whole procedure, one of our standard operational procedures is that the event is videoed from the time the cell door is opened until the inmate is placed back into a yard or back into their cell.

The Hon. J. F. RYAN: Section 54(7) of the Crimes (Forensic Procedures) Act provides for an independent person who is not a police officer to be present, if the procedure is not electronically recorded due to impracticality or objection of the subject. First of all, I suppose it would be worthwhile getting some information from you on what proportion of forensic tests would be taken in circumstances where they were not electronically recorded?

Mr HAVILAND: Very few that I am aware of that I have witnessed.

Mr MIDDLEBROOK: I am not aware of any test that was done without at least a video being on. I

cannot think of any and I have not heard of any. As my colleagues have said, that is something you would have to go to the police with.

The Hon. J. F. RYAN: Are there circumstances in which a prison officer might have been selected to Act as the independent person carrying out the observation required under 57(4)?

Mr MIDDLEBROOK: Selected by whom?

Mr HAVILAND: The correctional centre liaison officer acts as that person, he is there for every test.

The Hon. J. F. RYAN: It says here:

If the carrying out of the forensic procedure is not to be recorded by electronic means the forensic procedure must be carried out in the presence of an independent person who is not a police officer.

Would you see some value in that independent person not being a person who was a corrective service officer as well?

Mr HAVILAND: Under section 54 it would be impossible to know when an inmate was going to refuse to have the test videoed to have someone on standby all the time for them to come in and sit in when the inmate refuses to be video taped.

The Hon. J. HATZISTERGOS: How do you see your role in this testing sequence? I know there is a certain number of administrative steps that you take, but do you see your role as a facilitator of the police, or do you see your role of somehow safeguarding the inmate's interests by directing them to various sources, what is your role?

Mr MIDDLEBROOK: It is a bit of both. Basically our role is to facilitate the legislation. The legislation is there and what we need to do, the police are going to test the inmates, we have a responsibility to ensure that happens with the least fuss possible and to maintain the dignity and the security of the correction centre and dignity of the inmates. That is our role. Our role is the care and safe custody of those inmates and get them across there, and to do that we resolve to give them as much information as we possibly can. And I think that you would find that the majority of inmates would prefer that we are the ones providing that information to them rather than the police. That is our role and our role only. I do not see our role being involved any further or getting involved with the testing.

The Hon. J. HATZISTERGOS: Have there been any disputes with the police in relation to the carrying out with the procedures?

Mr MIDDLEBROOK: We have regular meetings with them. I think in the early days our only disputes were administrative things, as to what time police turned up to correctional centres, and the fact we had staff in a lot of cases paying them overtime and they were there from eight o'clock and the police might not turn up until ten o'clock; mainly housekeeping issues, really.

The Hon. J. F. RYAN: If there was an intent that this procedure was observed independently it could be said that whilst it is true the Department of Corrective Services have not got exactly the same role as the New South Wales Police Service, they would not necessarily be seen as completely independent of the process. There are all sorts of reasons in which one would imagine that it would be in the interests of the Department of Corrective Services to have the matter completed efficiently and so on.

In circumstances where there is a fair level of mass testing going on within say a larger establishment like the MRRC, it would not be hard to organise a person who was completely independent and observed the process from go to woe. Even the videos are not necessarily observed by anybody outside the two departments, are they?

Mr MIDDLEBROOK: If the inmate wishes to raise an issue the Ombudsman can get access to the videos and they have done. I wonder how practical it would be to have independent people come in. I do believe that we are independent, we are the people that are charged with the safe custody of the inmates and I believe our staff that were selected for the correctional centre liaison officers have been trained, they are people nominated by the governor of the correctional centre who has, in fact, an interest in making sure that it is done very professionally, because he or she is the person who has to live with that inmate when the police have gone. We have to deal with that.

The Hon. J. F. RYAN: We have had submissions to the Committee where inmates have said they were given the opportunity to provide a test, they declined, they were then spoken to by officers of the Department of Corrective Services who said, "If you decline and continue to resist, we have 16 or 17 people in boiler suits who will come and visit you and see that it happens". I am not suggesting for a minute that that occurs, but there is a real difficulty when the process occurs in the privacy of a correction facility, albeit some of it is video taped, but not all. There is obviously a period of interaction between the Department of Corrective Services officers and the inmate prior to the inmate arriving at the site for testing and so on, if there was an independent person present that was not from the Department of Corrective Services and the Police Service, it would be easier to ensure that allegations of that nature were easily disproven.

Mr MIDDLEBROOK: If you are asking me if I object to an independent person there I would say, no, I have no objection, but I do not see that as the role of corrective services to organise that independent person. We have not been funded or resourced to provide the assistance that we are already asked to provide and I think that would be a huge impost on us to organise independent people.

If in fact the Police Service or some other body wish to arrange for an independent person I would not object to that but I do not see it is corrective services' role to arrange that person.

The Hon. J. F. RYAN: How large a resource issue would it be? For example, the 6,000 odd tests that you have had, how many days would testing have occurred at say a place like the MRRC?

Mr MIDDLEBROOK: It is not always at the MRRC.

The Hon. J. F. RYAN: I understand that but I am using that as a fairly large institution.

Mr MIDDLEBROOK: You would be talking five days a week.

The Hon. J. F. RYAN: For how long?

Mr MIDDLEBROOK: At the MRRC there has been 40 occasions since about 8 January and there has been 1,106 testing days across the State since 8 January. You would be talking about the logistics in organising an independent person on 1106 occasions right across the State.

The Hon. J. F. RYAN: Has corrective services ever suggested having the lay visitors observe the procedures at least for a period of time in part or have the capacity to observe it at their own request, just to simply walk in on it, has that occurred?

Mr HAVILAND: They have done that, yes.

Mr MIDDLEBROOK: In fact, one of the processes we went through was to take the opportunity at the official visitors annual conference to provide them with the information and they were encouraged to take as much an active role at the correctional centre to find out and be there to provide the information to inmates if it was needed. I think we are prepared, the inmates and those people going in, for this.

The Hon. J. F. RYAN: Would the refusal of an inmate to participate in a test ever have an impact on their classification?

Mr MIDDLEBROOK: No, not the refusal of the test, no. There have been examples where inmates have made statements and provided information to institutional staff about what might happen to them if they gave a DNA sample. In one case an inmate told no less than three separate staff members that if, in fact, he gave a DNA sample he could be convicted for other crimes. This person had done two lengthy sentences prior. He was in a minimum security environment and it was my decision to move him to a more secure environment until we could test that information he provided.

The Hon. J. F. RYAN: There would be at least one way in which this particular procedure has had an impact. Could you think of any other examples?

Mr MIDDLEBROOK: We deliberately put in a mechanism that would prevent governors of correctional centres from moving people from the centre for simply failing to agree to a test. The procedure if somebody failed to, or did not, consent to the DNA process, the procedure to have them removed from a correctional centre had to go through both classification and they had to contact me as the overall person sitting

over that to get approval to do that. That happened on one occasion.

The Hon. J. F. RYAN: The version of the story put to the Committee was that a person refusing to have a test is possibly making an admission that there are other offences for which they might have been responsible and that being the case they then do constitute a higher risk and it would be necessary to reclassify them. Are you able to reassure the Committee that that has not occurred?

Mr MIDDLEBROOK: Only on that one occasion where an individual did tell three staff members his involvement in other crimes. Given the history of that particular inmate I made the decision to shift the inmate to a more secure location until we could test that information.

The Hon. J. F. RYAN: I am not sure of all the various clauses of the Act, it is a very complicated Act and I make no pretence of being a lawyer but as I understand it there are a number of categories of inmates who would want to be tested under the conditions where they have been ordered to do so by a court. This apparently gives them a very different capacity to have the records removed. Are facilities available for inmates to make that explanation because they have been advised by their legal advisers that they should only consent to a test under the conditions where a court order is required and what arrangements occur within the Department of Corrective Services to facilitate the giving of a sample under those conditions?

Mr McLOUGHLIN: There have been 360 what we term as "hair" orders, that is a senior police officer's order to give a sample. Prisoners have refused to consent, which is their right, but they have complied with the legislation once they have been issued with what is termed as a "hair" order under section 70. Four inmates have been issued with court orders for blood samples and they have all taken the opinion that they have a right of appeal should that DNA be used against them. I have spoken to all four for the blood tests and I was present for quite a few of the hair samples and that is the opinion they took. They said that was the instructions given to them by solicitors, whether it was or was not, that is what they have said.

The Hon. J. F. RYAN: There would be no adverse impact on them within them the Department of Corrective Services if they took the view that that was the best way for them to go about providing their sample, they would not be held in any tighter level of security, they would not be subject to any loss of privileges or change in their classification system if they chose to give their sample in that fashion?

Mr McLOUGHLIN: It is of no concern to us at all if they have complied with the legislation, they have given a blood sample by court order or they have complied under the section 70 hair sample. If they have complied with the legislation, it is of no concern to us.

We have appellants, people who have appealed against their conviction or sentence, and some of them have held off to get a hair order, or something like that, so that their sample cannot be tested until such time as their appeal period is over. If they win the appeal the sample is destroyed.

The Hon. J. HATZISTERGOS: What were the circumstances in which the four blood orders were taken?

Mr McLOUGHLIN: The inmate had shaved every piece of hair off their body.

The Hon. J. HATZISTERGOS: So it was impossible, in all four cases?

Mr McLOUGHLIN: There was no other hair to take, the only other hair was pubic hair and the police cannot do that.

The Hon. P. J. BREEN: Were they the only cases where there have been court orders and they were in relation to people who were all shaved?

Mr McLOUGHLIN: Yes, sir, as far as I am aware.

The Hon. J. F. RYAN: In terms of giving advice to the inmates, as I understand, at one stage there was some material distributed to inmates which indicated they could have been subject to an additional term of imprisonment, I think it was a brochure of some sort, which apparently was corrected and reissued. Has all the necessary action been taken to ensure that the original issue of the brochure has been retracted given that it contains inaccurate advice?

Mr HAVILAND: We do not believe that advice was inaccurate. The actual new brochure still contains

that advice that they will be subject to a penalty of up to 12 months if they fail to comply with a court order under section 75.

The Hon. J. F. RYAN: There was a brochure that did not include the information about it being subject to a court order though, was there not?

Mr MIDDLEBROOK: There has only been a minor word change in the brochure. That was done on the advice of an external agency.

Mr HAVILAND: It actually says:

A further period of 12 months imprisonment if you fail to comply with a court order authorising police to take a sample.

The Hon. P. J. BREEN: Is that the same brochure attached to the written submission?

Mr HAVILAND: I do not have the submission. I think you have the draft of a new one. I have a finished copy of the new one if you would like one.

The Hon. J. F. RYAN: The old one is gone?

Mr HAVILAND: The old one is still out there. The new ones are ready to be distributed now. They have only just come back from the printers in the last fortnight and the person doing the position at the time has since retired.

CHAIR: Would you like to tender a copy of the new brochure?

The Hon. J. HATZISTERGOS: Have you had any resistance to the issue of the blood orders?

Mr McLOUGHLIN: No.

The Hon. J. F. RYAN: The Department of Corrective Services is a member of the Interdepartmental Committee of Crimes (Forensic Procedures) Act which apparently meets monthly. Are you able to provide details to the Committee on matters that have been discussed at the meetings?

Mr MIDDLEBROOK: We are a member. The committee meets bi-monthly and it is chaired by Deputy Commissioner Moroney of the New South Wales Police Service. The issues discussed there are the concerns from the inter-agency departments that sit on that committee; Department of Health, corrective services, police, people from the laboratory, the Ombudsman has a representative on that committee, the Department of Public Prosecutions are part of that, and the representatives from the various courts and the Attorney General's Department. Usually the issues are of a general nature. There are very few issues relating to the testing of prisoners and any minutes that you require would be best obtained by contacting Mr Moroney. He is the chair of that committee.

The Hon. J. F. RYAN: You have given us the details of when it meets and who chairs it. What sort of issues are discussed with that committee?

Mr MIDDLEBROOK: A lot of the issues that have been discussed in the past, we tabled our standing operation procedures, we tabled the video that we produced, the police tabled the video they put up for staff training, a lot of the issues that have been discussed are not relevant to the corrective services; about whether hospitals or medical staff will be involved in community type testing from police. Very few issues that have come across the table relate to corrective services and our involvement with the prisoner testing.

The Hon. J. F. RYAN: What information is given to inmates about the storage, use and removal of their DNA profile?

Mr MIDDLEBROOK: That is explained by police at the time. They read out the legal document to the inmates.

The Hon. J. F. RYAN: That is it?

Mr HAVILAND: There is actually a part on the brochure, and it is fairly detailed in the video that is

shown to the inmates.

The Hon. P. J. BREEN: Can I say about the brochure, that although it asks the question, "What happens to the sample", it does answer it by saying that once a sample is taken it will be placed in a sealed back. It does not say what happens to the sealed bag.

Mr MIDDLEBROOK: When the police are going through their explanation of the documentation, they go step by step to the inmate and say what is going to happen to the sample. When the sample is actually sealed in the bag, the police, when they are sealing that, advise the inmate that they have sealed this and it will be conveyed to whatever police station and it will be sent to the laboratory. They go through a lot of effort to explain that to the inmate. That process is also on video.

The Hon. P. J. BREEN: Do prisoners ever express concern about their sample and what might happen to it?

Mr MIDDLEBROOK: I am not aware of any complaint or concern that has been raised.

Mr McLOUGHLIN: Inmates sometimes have some concerns in regard to it, but the police explain it to them and they either accept or reject it.

The Hon. P. J. BREEN: Do they ever raise the question whether their sample might turn up at a crime scene?

Mr McLOUGHLIN: The police explain to them that once the sample is profiled that the divisional laboratory then destroys everything that is in the bag. That is all destroyed.

The Hon. P. J. BREEN: That is explained to them?

Mr MIDDLEBROOK: Yes.

CHAIR: Has any particular concern been expressed to your knowledge by any Aboriginal inmate on cultural grounds in relation to the taking of body samples?

Mr MIDDLEBROOK: No.

Mr HAVILAND: No, not that I am aware of.

The Hon. J. F. RYAN: Your submission indicates that the department's officers have been specifically instructed not to coerce or attempt to persuade inmates to provide a sample of forensic material. Evidence received by the Committee from the Council of Civil Liberties and other prison support groups raises questions about whether this directive is being consistently followed. Complaints have been received regarding the issue of reclassification, and we have dealt with that issue, warnings that hair samples will be removed on the spot if prisoners did not consent and the use of the holding cells for cooling off periods or no cooling off periods being provided at all. Are you aware of any such practices?

Mr MIDDLEBROOK: No, I am not aware of any. The training provided to the correctional centre liaison officers is very clear and specific about the information we provide and the video provided to them again was easy to understand and the message was in there about what the inmates can and cannot do. I am not aware of any threats or any intimidation being used by any of our staff on these inmates.

The Hon. J. F. RYAN: Just reading from one submission here, it says that by May 2001 over 3,000 New South Wales prisoners had been tested, with physical force required on only four occasions, although the threat of physical force was very common. There must be some stage at which the department would have to discuss with the inmate that if they did not comply with the legislation they could be restrained. How is that done without it sounding like a threat of physical force?

Mr HAVILAND: The department has been very transparent. We are up front with the inmates that there is a cooling off period and at the end of that cooling off period the police will return and if they fail to comply with the police order, force may be used. We only explain what is actually written in the legislation.

Mr MIDDLEBROOK: Can I remind you too that again the official visitor, the Ombudsman, and the Inspector General are there if in fact the inmates felt they were being threatened in any way and I have not yet

seen or had any correspondence from any one of those people, other than the one issue I spoke about, the inmate being transferred from the Silverwater Correctional Centre, which was at my direction and that was prior to the inmate being tested.

The Hon. J. F. RYAN: There was one we talked about earlier where they believed they were reclassified.

Mr MIDDLEBROOK: That is the fellow at Junee.

The Hon. J. HATZISTERGOS: Is the complaint against corrective services or is it against the police?

Mr MIDDLEBROOK: What complaint are we talking about?

The Hon. J. HATZISTERGOS: I notice this brochure does not refer to the avenues of complaint you refer to.

Mr HAVILAND: They are normal. The inmates know that they are normal avenues of complaint, not only about forensic testing, but about anything. They would be aware. Our officers actually inform the inmates to go to the Ombudsman, or to the official visitor, or the Inspector General.

The Hon. J. F. RYAN: In the course of educating inmates no specific mention is made that those facilities are available to them if they are concerned about the use of force?

Mr MIDDLEBROOK: Yes, there is in the video. The video is very clear.

The Hon. J. F. RYAN: While we are on the subject of the video, I understand the Committee does not have a copy of the video. Could you please organise to supply us with one?

Mr McLOUGHLIN: I thought I had one with me this morning.

Mr HAVILAND: I have one.

CHAIR: In due course could the Committee please have a copy? A copy of the video is now tendered.

The Hon. J. F. RYAN: While the inmate is going through the cooling off period, are any special arrangements made other than the fact that they will be interviewed occasionally?

Mr MIDDLEBROOK: They have access to telephones to make calls and they are encouraged to do so. You will see in the video that it encourages people. In fact one of the scenarios in the video shows an inmate sitting down with a legal aid officer and the legal aid officer explaining the process. The correctional centres have telephone systems where the inmates can make toll free calls to the Ombudsman and Inspector General.

Mr HAVILAND: If the inmate has no funds to credit, we will actually provide free calls during the cooling off period to legal people or anyone else he may wish to call.

The Hon. J. F. RYAN: What sort of advice would be given to an inmate during one of the interviews which takes place between them and corrective services staff during this cooling off period? What would be discussed and how would such an interview be conducted?

Mr HAVILAND: The interview is to gauge the level of compliance, if the inmate has changed his mind, if he requires to speak to a legal person, if he requires to speak to a psychologist, virtually to meet his needs in relation to what is going to happen and also to explain to him and make sure that he is aware of what will happen in accordance with the legislation.

The Hon. J. F. RYAN: How many people have been in the cooling off period, in rough terms?

Mr HAVILAND: It would be impossible to say.

The Hon. J. F. RYAN: Are we talking about tens, hundreds?

Mr HAVILAND: Less than 100 I would imagine. Inmates who have been deemed to be non-complying when they left the test area in the first instance would be less than 100, I imagine.

The Hon. J. F. RYAN: The interview which is conducted with them, who would normally do the interview; the liaison officer?

Mr HAVILAND: The governor or his delegate, the governor of the institution or the liaison officer.

The Hon. J. F. RYAN: Where would the interview take place?

Mr HAVILAND: The inmate is subject to normal discipline and normal routine during the cooling off period. It could be anywhere in the centre.

The Hon. J. F. RYAN: The most likely scenario is that the person doing the interview would approach the inmate in the course of the day and pull them aside for a period of time, or is it a formal interview?

Mr HAVILAND: Without knowing virtually which individual time it happened, I would say yes.

Mr MIDDLEBROOK: It differs from centre to centre. The physical environment or location would impact on how they do that. Some of the older correctional centres do not have the necessary interview rooms and the interview or conversation might take place in the wing, yard or workshop, wherever the inmate is. In the newer centres it might be in a formal interview room, case manager's office, something like that.

Some of the more proactive liaison officers have involved the inmate development staff, so the psychologists, the welfare, the program managers have been involved. In most cases the inmates are spoken to by the designated person who is the governor's representative.

The Hon. J. F. RYAN: Both Mr McLoughlin and Mr Middlebrook have been mentioned in despatches by various inmates writing to the Committee in terms of conducting this interview. What have you told inmates about the potential use of the force which might be applied?

Mr MIDDLEBROOK: I have not spoken to an inmate, because my role as commander of security and investigation does not put me on the coal face talking to inmates. Mr McLoughlin and Mr Haviland have both been out in correctional centres talking to inmates.

The Hon. J. F. RYAN: How have you handled the issue of force?

Mr McLOUGHLIN: I have spoken to inmates who have originally said they were not going to consent to the interview. They have said they were not going to comply with the hair order. The cooling off period has been given. If I am in the area I will call in and speak to the inmate and just ask him what the problems are, has he contacted a solicitor, does he realise he is a serious indictable offender, does he realise under section 70, once the police issue an order, force can be used to obtain the sample and he should maintain his dignity and not let that occur. He can certainly not consent, but he must comply with the legislation.

The Hon. J. F. RYAN: There would never be circumstances in which it would ever be put to an inmate, some description like there will be a number of people in boiler suits around to pick you out of your cell and drag you across?

Mr McLOUGHLIN: No.

The Hon. J. F. RYAN: I only use this expression because it has actually been used to the Committee, that it has happened to people. It would be irresponsible of us not to put this to you.

Mr McLOUGHLIN: I have told inmates that if they fail to comply, that the security unit will come around and place them in a security belt and they will be taken down to the testing unit where the test will be conducted.

The Hon. J. F. RYAN: Some detail is in fact given to the inmates what form the force will take?

Mr McLOUGHLIN: That is right.

The Hon. J. F. RYAN: The security unit, is this one person or a group of people?

Mr McLOUGHLIN: Mr Middleton spoke about the regional security units. At least four people from that unit will come around.

The Hon. J. F. RYAN: They are certainly made to understand that a group of people will visit them, and it will be the security unit and from the description of people it is immediately apparent to the inmate so they know what the security unit was, and they would be taken in a belt and they would be physically restrained.

Mr MIDDLEBROOK: Yes.

The Hon. J. F. RYAN: What is the security belt?

CHAIR: Is that a straight jacket?

Mr McLoughlin: It is a restraining device. It is a belt that fits around the waist and a pair of hand cuffs are attached to it so the inmate's hands are kept down and secured.

The Hon. P. J. BREEN: Commander, when you spoke earlier, you indicated that you thought that there would be a sunset period in this forensic testing and I think you mentioned a figure of 5,000 inmates that you expected would be tested as the proposal was originally contemplated. What is your belief now about that? Do you still think there will be a sunset period or are you adjusting yourself to be able to do this long term?

Mr MIDDLEBROOK: I think we are adjusting ourselves to having to do this for some time. We have spoken to the Police Department and they are going to regionalise the testing teams. I can see that the testing will be continuous in the reception gaols, where we are receiving inmates from the courts, and I think that will be ongoing.

The Hon. P. J. BREEN: Do you have any expectation of additional resources to help you deal with that?

Mr MIDDLEBROOK: We are putting up a case to argue for additional resources for that, because it is resource intensive.

The Hon. P. J. BREEN: Do you feel in any way disappointed by the fact that you have to be continuously involved in this?

Mr MIDDLEBROOK: Yes, I do. I think at the end of the day our responsibility is to carry out the legislation as passed by the Government, but to enable us to do that we need the resources to do it and to take the resources from some other area to be able to do it is, I think, a little unfair. Providing we are given the resources to carry this out then I have no objection, but it has to be resourced.

The Hon. P. J. BREEN: Apart from the question of resources you do not have any serious objection to being involved on a continuing basis in the procedure?

Mr MIDDLEBROOK: My responsibility is to make sure that if the legislation is enacted and it is passed by the Government and it is legislation, I have a responsibility to make sure it is acted upon in a very responsible manner.

The Hon. P. J. BREEN: Have you heard of any proposals to do it some other way, by outsourcing it somehow or getting another organisation to do it?

Mr MIDDLEBROOK: No, we have not.

The Hon. J. HATZISTERGOS: You say that you were not resourced to do this work and that you have had to use your existing resources to do it. The fact of the matter is, however, if these procedures were going to be carried out in correctional facilities you would need to be the one to facilitate it. There is no one else to act as a substitute for any of the tasks you undertake.

Mr MIDDLEBROOK: I think that is correct, but the people who require this to be done, the various parts of Government, or various other agencies, I think underestimated the resources required for corrective services to carry this out. We, in turn, are probably putting a lot of resources in there, based on the fact that we do know correctional centres, and after the experiences we have seen in Victoria and what Mr McLoughlin and Mr Haviland have seen in Queensland, we knew that we needed to get the information out. We were of the view that if we spent the money on the educational process, we would not be spending money dealing with issues once the testing started.

The Hon. J. HATZISTERGOS: We heard from the police when they were referring to people who had been the subject of testing, a Dr Raymond, I think, said on 15 August that on the statistics that he had at the time that he gave evidence, eight prisoners who gave hair samples indicated that they were going to put up a struggle and two actually did so. Are you aware of those cases, or what happened to those two prisoners?

Mr MIDDLEBROOK: Not really, but, I mean, it is not unusual for a number of prisoners to say they would not consent but at the time when they finally get around to the consenting time they comply, whether it be by a hair pull or a buccal swab. I am not aware of those particular examples.

The Hon. J. HATZISTERGOS: You said that there were two prisoners who actually struggled.

Mr MIDDLEBROOK: I am aware of two instances where force was used and possibly they are the two that Dr Raymond is talking about.

The Hon. J. HATZISTERGOS: What did those incidents involve?

Mr MIDDLEBROOK: One was at Long Bay and one was at Junee. There were two in Junee - three then - one at Long Bay.

The Hon. J. HATZISTERGOS: They were forcibly restrained?

Mr McLOUGHLIN: That is correct.

The Hon. J. HATZISTERGOS: You may not have a view about this but it would be interesting to know. The legislation at the moment requires serious indictable offenders all to be tested one way or another. Is there a case, so far as you can see, for better targeting of the testing in corrective services?

Mr MIDDLEBROOK: You are right, I do not have a view on that. It is not one I would be prepared to answer. My role is to facilitate the legislation as it stands now.

The Hon. J. F. RYAN: Mr Middlebrook, you would be the most senior person in the Department of Corrective Services that the police would deal with on this issue?

Mr MIDDLEBROOK: That is correct.

The Hon. J. F. RYAN: Have the police ever suggested to you that they are concerned about the legal validity of the tests that they are giving, given the complexity of the warnings that they have to give inmates?

Mr MIDDLEBROOK: No, I cannot recall, no. We have not discussed that with the police and that has not been indicated to me.

The Hon. J. F. RYAN: You are aware that there is a section of the Act that has not been proclaimed. Section 8 has not been proclaimed. Has there been any discussion between yourself and the police whether the failure to proclaim that section of the legislation would have any validity on the test?

CHAIR: I am sorry, that reference is to Part 8.

Mr McLOUGHLIN: That was only discussed in general terms at the interdepartmental committee meeting. It has never been raised between police and corrective services on any basis at all, as far as the validity of testing is concerned. It has never been. It was only mentioned once at the interdepartmental committee meeting.

The Hon. J. F. RYAN: What was the circumstance in which it was mentioned there?

Mr McLOUGHLIN: Something to do with juveniles, as far as I can remember.

The Hon. J. F. RYAN: What action was taken to rectify the concern?

Mr HAVILAND: It was actually about taking samples from children under 10 and this legislation may conflict with existing legislation, where the police are able to take forensic samples from children under 10 who have actually been assaulted, so it has been conflicting with that legislation and that was the reason.

Mr McLOUGHLIN: The Attorney General and police were going to discuss the issue. It has not been raised again as far as I am aware.

The Hon. J. HATZISTERGOS: We have had some evidence from the police that at the point where the test is being taken and procedures are being explained to the inmates, or suspects in some cases, that there have been instances where they have switched off and started staring in the air or not paying any attention to what is being said. Has that been a common occurrence?

Mr MIDDLEBROOK: Mr McLoughlin and Mr Haviland have been participating in a lot more tests than I have seen.

Mr McLOUGHLIN: Have you seen what the police have to read out?

The Hon. J. HATZISTERGOS: We have seen it and there have been suggestions that it is overtly complicated.

Mr McLOUGHLIN: It is full of legalese and jargon.

The Hon. J. HATZISTERGOS: What I want to know is the reaction of prisoners, are they paying attention?

Mr HAVILAND: Where inmates have had a problem with understanding, the police have gone to a lot of trouble to explain to them each section or help them understand what has been read. Mr McLoughlin would be aware too that a lot of inmates do not want to hear it, they want to get the test over and done with. They virtually ask the police to forget it, they want the police to get it done.

Mr MIDDLEBROOK: The police still go through it. I have sat there where an inmate has said, "I know what it all means. Just give me the test", and the officer has said, "No, I am required by law to read this to you", and he has gone on and read it.

Mr HAVILAND: They do go to a lot of trouble to actually try and explain.

CHAIR: Can I just raise one other issue with you, the Police Minister announced last week on 18 September that an innocence panel is to be established to determine applications by people arising out of DNA material that they might have been wrongly convicted of an offence. The membership of the panel does not appear to include the Department of Corrective Services. Could I ask how the department sees itself as interfacing with this procedure or is it too early to ask this?

Mr MIDDLEBROOK: It might be a little early. I think we are completely independent. I do not think we have a role on that innocence panel. My only comment would be if the innocence panel call for information, that we provide that independently. We have not been involved in the process at all.

(The witnesses withdrew)

(The Committee adjourned at 11.45 a.m.)

