VICTORIAN PARLIAMENT
LAW REFORM COMMITTEE

ADMINISTRATION OF JUSTICE OFFENCES

FINAL REPORT

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Parliament of Victoria

Law Reform Committee

Administration of Justice Offences

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Functions of the Victorian Parliament Law Reform Committee

Under section 12 of the *Parliamentary Committees Act* 2003 (Vic):

> (1) The functions of the Law Reform Committee are, if so required or permitted under this Act, to inquire into, consider and report to the Parliament on any proposal, matter or thing concerned with—
>
> (a) legal, constitutional or parliamentary reform;
>
> (b) the administration of justice;
>
> (c) law reform.

Terms of Reference

Referred by the Governor in Council on 6 May 2003

To inquire into, consider and report to Parliament on:

1. The current state of law in Victoria in relation to administration of justice offences (such as perjury, perverting the course of justice, falsifying evidence and threatening witnesses); and

2. Whether these laws should be amended, and in what way, having particular regard to interstate laws and the recommendations of the Model Criminal Code Officers Committee Discussion Paper on Administration of Justice Offences (July 1997).

FOREWORD

A system of justice fairly administered and free of corruption or obstruction underpins our democratic society. Public confidence in the justice system is fundamental to its proper functioning. Hence, offences which have a tendency to undermine or interfere with the justice system are considered to be serious in nature and usually carry heavy maximum penalties. It is these administration of justice offences which are the subject of this Report.

The context of our review of these laws was set by the terms of reference for the inquiry which directed the Committee to have particular regard to interstate legislation and the recommendations of the Model Criminal Code Officers Committee (MCCOC) in their report on these offences. The benefits of consistency with other jurisdictions and of clarity and transparency of the law, became key themes in the Committee's consideration of the issues raised.

In Victoria the common law offence of attempting to pervert the course of justice covers a variety of conduct, whereas in many other jurisdictions separate statutory offences have been created to cover particular conduct. The Committee's first task was to decide the threshold question of whether a general offence should be retained, or whether a codification of the offence by creating separate offences was desirable. The Committee chose the latter course believing that it had distinct advantages in terms of improving accessibility and clarity of the law, and in creating greater consistency with other jurisdictions.

The other major administration of justice offence considered was perjury. Again, Victoria currently relies on common law for the definition of what constitutes perjury, and again the Committee determined that a move towards codification was appropriate.

Whilst generally accepting that a change towards codification was advantageous the Committee was, however, careful to confine itself largely to clarifying, rather than extending, the existing law. Evidence received did not generally identify a need for expansion.

In reaching its conclusions the Committee was given significant assistant from witnesses, particularly those practitioners in this area of law who provided essential information about how the law works in practice. I wish to express our sincere thanks to all those who made submissions both in writing and orally, to the Committee. The Committee is acutely aware of the very important role which stakeholder and public consultation plays in the production of our reports. I would also like to thank the members of the Committee for their contributions to this Report.

The Report owes an enormous amount to the original research and writing of the discussion paper and draft by Kristin Giles, whose attention to detail provided many stakeholders with a succinct summary of the current law in this area for the first time. Kristin has now left the Committee but her expert contribution to this and other reports over the past two years has been greatly appreciated by the Committee. Michelle McDonnell has ably stepped in to redraft the final Report and finalise its recommendations. Merrin Mason, as always, has contributed her considerable expertise to the work done by the Committee on this reference, and skilfully supervised the research and discussion which have led to this Report. Jaime Cook has provided able administrative support and backup for the Committee's work. This Report would not have been able to be concluded without the effective work of the staff team.

The Committee hopes that this Report will result in reform which produces greater clarity of the law in this area, increased national consistency between Australian jurisdictions and improvements to the administration of justice in Victoria.

I commend the Report to the Parliament.

Rob Hudson MP, Chair

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That a new statutory provision be created for perverting the course of justice that incorporates the common law elements of the offence so that the new provision would make it an offence to "do an act that is capable of and has a tendency to pervert the course of justice". ***That the provision define the meaning of "tendency" as meaning "a possibility or risk that the course of justice will be perverted".***	MCCOC recommended that a general offence of perverting the course of justice be created, however the Committee has not recommended the same wording as the MCCOC provision. ***Discussion Paper p. 93.*** ***Model Code Section 74.1.***
Recommendation 2 ***p. 61***	MCCOC Model Code
That the proposed new statutory offence of perverting the course of justice specify intention as the mental element of the offence.	The Model Code provision is similar. ***Discussion Paper p. 88.*** ***Model Code Section 74.1.***
Recommendation 3 ***p. 74***	MCCOC Model Code
That the Crimes Act 1958 (Vic) be amended to change the maximum penalty for the offence of perverting the course of justice to 15 years imprisonment.	MCCOC recommended in its final report that the maximum sentence should be 5 years imprisonment. ***Discussion Paper p. 88*** ***Model Code Section 74.1.***

Recommendation 4 ***p. 94***	MCCOC Model Code
That there be no change to the current law in Victoria concerning false accusation of offences.	This is contrary to the MCCOC recommendation that a separate offence for 'false accusation of offence' be created. ***Discussion Paper p. 107.*** ***Model Code Section 74.3***

Specific Offences relating to evidence and witnesses

Recommendation 5 ***p. 111***	MCCOC Model Code
That statutory offences be created in Victoria for the misuse of evidence, making it an offence to: ***(a) fabricate or alter evidence;*** ***(b) destroy, conceal or suppress evidence; and*** ***(c) knowingly use fabricated or altered evidence.*** ***Where the intention is to:*** ***(a) prevent the bringing of judicial proceedings; or*** ***(b) influence the outcome of current or future judicial proceedings; or*** ***(c) improperly use the judicial proceedings for the purpose of impugning or vilifying the accused person or other witnesses.*** ***That the maximum sentence for this offence be 7 years imprisonment.***	The MCCOC provision is similar to the Committee's recommendation however the Committee has not adopted the same wording. For example, the model provision refers to "making or using false evidence" whereas the Committee recommends "fabricate or alter". ***Discussion Paper p. 61.*** ***Model Code Section 72.1. + 72.2***

Recommendation 6 ***p. 114***	MCCOC Model Code
That a specific statutory offence of deceiving witnesses be created in Victoria, making it an offence to deceive another person with the intention that the other person or a third person will: ***(a) give false evidence at legal proceedings; or*** ***(b) withhold true evidence at legal proceedings.*** ***That the maximum sentence for this offence be 5 years imprisonment.***	The Committee has endorsed the MCCOC model provision. ***Discussion Paper p. 71.*** ***Model Code Section 73.1***
Recommendation 7 ***p. 117***	MCCOC Model Code
That a specific statutory offence of corruption of a witness be created in Victoria, making it an offence to: ***provide, or offer or promise to provide, a benefit to another person with the intention that the other person or a third person will:*** ***(a) not attend as a witness at legal proceedings; or*** ***(b) give false evidence at legal proceedings; or*** ***(c) withhold true evidence at legal proceedings.*** ***That the provision also makes it an offence to ask for, or receive or agree to receive, a benefit for themselves or another person with the intention that they or another person will:*** ***(a) not attend as a witness at legal proceedings; or*** ***(b) give false evidence at legal proceedings; or*** ***(c) withhold true evidence at legal proceedings.*** ***That the maximum penalty for this offence be 7 years imprisonment.***	The Committee has endorsed the MCCOC model provision. ***Discussion Paper p. 73*** ***Model Code Section 73.2***

Recommendation 8 ***p. 120***	MCCOC Model Code
That a specific statutory offence of threatening a witness be created in Victoria, making it an offence to cause or threaten to cause any detriment to a person (who intends to attend as a witness at proceedings) with the intention that the person or another will: ***(a) not attend as a witness at legal proceedings; or*** ***(b) give false evidence at the legal proceedings; or*** ***(c) withhold truthful evidence at the legal proceedings.*** ***That "threat" be defined to include a threat made by any conduct whether explicit or implicit and whether conditional or unconditional.*** ***That the maximum penalty for this offence be 5 years imprisonment.***	The Committee has endorsed the MCCOC provision with modification—with definitions of "threat" and "witness". ***Discussion Paper p. 75.*** ***Final Report p. 95.*** ***Model Code Section 73.3***
Recommendation 9 ***p. 123***	MCCOC Model Code
That a specific statutory offence of preventing a witness from attending legal proceedings be created in Victoria, making it an offence to intentionally prevent (by conduct) a person from attending as a witness at legal proceedings. ***That the maximum sentence for this offence be 5 years imprisonment.***	The Committee has endorsed the MCCOC provision with modification — the Committee suggests that the definition of witness should include persons who have not been summoned. ***Discussion Paper p. 77.*** ***Model Code Section 73.4.***

Recommendation 10 ***p. 125***	MCCOC Model Code
That a specific statutory offence of preventing a witness from producing an item in evidence be created in Victoria, making it an offence to intentionally prevent a witness from producing an item in evidence where the item is required to be produced by subpoena or summons. ***That the maximum sentence for this offence be 5 years imprisonment.***	The Committee has endorsed the MCCOC provision with modification. ***Discussion Paper p. 79.*** ***Model Code Section 73.5.***
Recommendation 11 ***p. 144***	MCCOC Model Code
That an offence relating to reprisals against witnesses and other participants in legal proceedings be enacted in Victoria making it an offence for a person without reasonable cause to procure or cause violence, injury, damage or loss to any person with the intent to punish a participant in a legal proceeding (other than a party to civil proceedings) for anything said or done in the course of, or in relation to the legal proceeding. ***That the maximum sentence for this offence be 5 years imprisonment.***	The Committee has endorsed the MCCOC provision with modification. The Committee does not recommend the "perjury defence" but does recommend a "reasonable cause" defence and that the provision extend to cover reprisals against other participants in the legal system. ***Discussion Paper p. 83.*** ***Model Code Section 73.6.*** The Committee has endorsed the maximum sentence recommended by MCCOC. ***Discussion Paper p. 80.*** ***Model Code Section 73.6.***

Accessory after the fact

Recommendation 12 ***p. 155***	MCCOC Model Code
That in Victoria the offence of accessory after the fact continue to apply only to serious indictable offences.	The Committee has not endorsed the MCCOC recommendation that the offence of accessory after the fact should apply in relation to any offence. ***Discussion Paper p. 123.*** ***Final Report p. 155, 157.*** ***Model Code Section 74.5.***
Recommendation 13 ***p. 161***	MCCOC Model Code
(a) That a provision be created in the Evidence Act 1958 (Vic) which provides that formal proof of the conviction of a principal offender may be led in evidence at the trial of an accessory after the fact and that the conviction of the principal offender will constitute prima facie proof of the commission of the principal offence. ***(b) That the provision also state that, for the avoidance of doubt, at the trial of an accessory after the fact, evidence of out of court admissions made by a principal offender cannot be used in evidence to prove the commission of the principal offence where such admissions are contrary to the rule against hearsay evidence.***	These issues were not considered by MCCOC but were raised in the Committee's Discussion Paper.

Recommendation 14 ***p. 174***	MCCOC Model Code
That the existing provisions contained in s 325(1) of the Crimes Act (Vic) relating to the knowledge or belief requirement for the offence of accessory after the fact be retained in Victoria.	MCCOC recommended that a 'believed' offence must be related to the actual offence whereas s. 325(1) applies where the accessory knows or believes the principal offender committed the actual offence or any serious offence. ***Discussion Paper p. 125.*** ***Model Code Section 74.5(1)(b)(ii)***
Recommendation 15 ***p. 177***	MCCOC Model Code
That the defences of "lawful authority" and "reasonable excuse" to the offence of accessory after the fact in s 325(1) of the Crimes Act 1958 (Vic) be retained.	MCCOC recommended that there be reliance on the general defence of lawful authority rather than a specific provision in section 75.5. ***Discussion Paper p. 129.***
Recommendation 16 ***p. 180***	MCCOC Model Code
That no change be made to the current Victorian law relating to the offence of accessory after the fact in relation to the disposal of the proceeds of an offence.	The statutory offence in Victoria does not expressly apply to the disposal of the proceeds of an offence whereas MCCOC recommended that such provisions should. ***Discussion Paper p. 127.*** ***Model Code Section 74.5.(1)(b)(ii)***

Recommendation 17 ***p. 182***	MCCOC Model Code
That the reference to "conviction or punishment of the principal offender" in relation to the accessory after the fact provision in s. 325(1) of the Crimes Act 1958 (Vic) be retained.	MCCOC reached the conclusion that any conduct which occurs after the apprehension and the commencement of prosecution could be more appropriately dealt with as a separate offence. The Committee has however recommended no change to the current provision. ***Discussion Paper p. 131.***
Recommendation 18 ***p. 187***	MCCOC Model Code
That the current penalties in section 325(4) of the Crimes Act 1958 (Vic) for the offence of accessory after the fact be retained.	MCCOC recommended a sliding scale of penalties with a maximum sentence of 10 years imprisonment whereas the Committee recommends the retention of the 20 year maximum sentence. ***Discussion Paper p. 131.*** ***Model Code Section 74.5.***

Perjury

Recommendation 19 ***p. 204***	MCCOC Model Code
That the current law in Victoria which provides that witnesses who give unsworn evidence due to impaired mental functioning or youth are not liable to perjury, be retained.	The MCCOC view mirrors the position in Victoria. ***Discussion Paper p. 41.*** ***Model Code Section 71.2(1)(d)***

Recommendation 20 ***p. 213***	MCCOC Model Code
That section 314(3) of the Crimes Act 1958 (Vic) be amended so that: ***a) the offence of perjury is restricted to statements (both written and oral) made on oath or affirmation in or for the purpose of "legal proceedings"; and*** ***b) "legal proceedings" be defined as meaning "proceedings in which judicial powers are exercised, and includes proceedings in which evidence may be taken on oath"; and*** ***c) a reference to "legal proceedings" includes a reference to any such proceedings that have been or may be instituted.***	The Committee endorses the MCCOC provision. ***Discussion Paper p. 17.*** ***Model Code Section 71.1(1)***
Recommendation 21 ***p. 215***	MCCOC Model Code
That the Crimes Act 1958 (Vic) be amended, making it a separate offence to deliberately make a false statement on oath or affirmation, where the statement is not made for, or in the course of "legal proceedings" (as defined in Recommendation 20 above). ***That the maximum penalty for this offence be 5 years imprisonment.***	MCCOC was of the view that this offence should be dealt with by separate legislation outside the Model Code. ***Discussion Paper p. 25.***
Recommendation 22 ***p. 222***	MCCOC Model Code
That s 314 of the Crimes Act 1958 (Vic) be amended to clarify that the mental element for the offence of perjury is the lack of belief that the statement was true.	MCCOC recommended that the fault element for perjury should be "recklessness as to the falsity of the statement" in line with its general recommendation that recklessness should be the basic fault element in the Model Code.

	Discussion Paper p. 11. ***Final Report p. 17.*** ***Model Code Section 71.1(1)(b)***
Recommendation 23 ***p. 227***	MCCOC Model Code
That the offence of perjury in s. 314 of the Crimes Act 1958 (Vic) specify that the offence of perjury only applies to statements that are objectively false.	The Committee endorses the MCCOC provision. ***Discussion Paper p. 13.*** ***Final Report p. 17.*** ***Model Code Section 7.2.1(a) (in Final Report)***
Recommendation 24 ***p. 230***	MCCOC Model Code
That the offence of perjury in s. 314 of the Crimes Act 1958 (Vic) be amended to provide that if a sworn statement includes an opinion of the person making the statement, the statement is false if the opinion is not genuinely held by the person.	The Committee endorses the MCCOC provision. ***Discussion Paper p. 47.*** ***Model Code Section 71.2(4)***
Recommendation 25 ***p. 241***	MCCOC Model Code
That the common law rule of evidence requiring that evidence of perjury be corroborated be retained.	This recommendation is contrary to MCCOC which recommended that there should be no corroboration requirement. Instead MCCOC recommended that the consent of the DPP should be required before a person could be charged with perjury. ***Discussion Paper p. 51*** ***Final Report p. 59*** ***Model Code Section 71.2(1)(5)***

Recommendation 26 ***p. 252***	MCCOC Model Code
That a new provision be inserted in the Crimes Act 1958 (Vic) which provides that a jury may convict a person for the offence of perjury where they are satisfied beyond reasonable doubt that: ***(a) the person made two sworn statements, one of which is irreconcilably in conflict with the other; and*** ***(b) the person is guilty of perjury in respect of one of the sworn statements; but*** ***(c) the jury is unable to determine which of those statements constitutes the offence.*** ***That the provision specify that it is immaterial whether or not the two statements were made in the same proceedings.***	The Committee endorses the MCCOC provision. ***Discussion Paper p. 43.*** ***Model Code Section 71.2(3).***
Recommendation 27 ***p. 260***	MCCOC Model Code
That no change be made to the current maximum penalty of 15 years imprisonment for the offence of perjury.	MCCOC recommended a 10 year maximum penalty. ***Discussion Paper p. 4.*** ***Model Code Section 71.1.***
Recommendation 28 ***p. 265***	MCCOC Model Code
That the offence of perjury in section 315 of the Crimes Act 1958 (Vic) be amended to provide that it is immaterial whether or not the sworn statement concerned a matter material to the legal proceedings.	The Committee endorses the MCCOC provision. ***Discussion Paper p. 35.*** ***Model Code Section 71.2(1)(a)***

Recommendation 29 ***p. 269***	MCCOC Model Code
That the offence of perjury in the Crimes Act 1958 (Vic) be amended to provide that the court, body or person dealing with the legal proceedings must have jurisdiction.	This is contrary to the MCCOC recommendation which concluded that jurisdiction should be immaterial. ***Discussion Paper p. 41.*** ***Model Code Section 71.2(1)(c)***
Recommendation 30 ***p. 272***	MCCOC Model Code
That the offence of perjury in the Crimes Act 1958 (Vic) be amended to provide that, it is immaterial whether or not the court, body or person dealing with the legal proceedings was properly constituted or was sitting in the proper place.	The Committee endorses the MCCOC provision. ***Discussion Paper p. 39*** ***Model Code Section 71.2(1)(c)***
Recommendation 31 ***p. 275***	MCCOC Model Code
That the offence of perjury in s. 314 of the Crimes Act 1958 (Vic) not be amended to specifically refer to 'perjury by an interpreter'.	MCCOC recommended the creation of a separate offence for perjury by an interpreter. ***Discussion Paper p. 31.*** ***Model Code Section 71.1(2).***

EXECUTIVE SUMMARY

In 2003 the Victorian Parliament Law Reform Committee (the Committee) received terms of reference to report to Parliament on the current state of the law in Victoria in relation to administration of justice offences. In general, this covers offences which have a tendency to interfere with or undermine the justice system.

Under the terms of reference, the Committee considered whether these laws should be amended having regard to interstate laws and the recommendations of the Model Criminal Code Officers Committee Discussion Paper and Report on Administration of Justice Offences (1997-1998).

In determining which offences this Inquiry would cover, the Committee focused on the offences that were considered by the Model Criminal Code Officers Committee (MCCOC).

This Inquiry examines the following offences:

- **Attempting to pervert the course of justice** (Chapter 2): a general common law offence where a person does an act that has a tendency to 'obstruct' the course of justice;

- **Specific offences relating to interference with evidence and witnesses** (Chapter 3): offences which are currently covered in Victoria by the general offence of attempting to pervert the course of justice;

- **Accessory after the fact** (Chapter 4): an offence where a person does an act after a principal offender has committed a serious offence in order to assist the principal offender escape justice; and

- **Perjury** (Chapter 5): an offence to make a false statement under oath or affirmation.

The Committee's approach

The terms of reference guided the structure of this Report so that each Chapter examines each offence by analysing the current state of the law in Victoria and then comparing it with the relevant MCCOC recommendation. The Committee then examines interstate laws and other relevant law reform agency recommendations before considering witnesses' submissions.

The Committee recommendations are based on a number of guiding principles which include transparency and consistency in the law. Many of the recommendations are also influenced by the Committee's general support for the codification of administration of justice offences.

Codification of administration of justice offences—Chapter 1

The Committee examined the arguments for and against 'codification'—enacting written codes which comprehensively state the law. This was an issue central to the MCCOC recommendations. MCCOC's goal was to put forward its draft code as a model for all the Australian jurisdictions to adopt at their discretion. For the Committee it was a threshold question which affected its conclusions on many other issues in the Inquiry.

The Committee has decided to recommend reforming the current law relating to the administration of justice by codifying it and creating separate statutory offences. In reaching this view, the Committee was influenced by a number of factors. Firstly, the Committee wishes to make a contribution towards harmonising the criminal laws across Australia by adopting in so far as possible, the recommendations of MCCOC. Secondly, the Committee believes that creating separate statutory offences will assist in the understanding of these offences and contribute to the creation of a more

"knowable and accessible" criminal law. Thirdly codes are democratically made and can be democratically amended by the Legislature.

In this Report the Committee endorses a number of the MCCOC draft provisions. There are also a number of MCCOC recommendations which the Committee, for various reasons does not support and the Table of Recommendations gives a detailed comparison of Committee and MCCOC recommendations.

Attempting to pervert the course of justice—Chapter 2

Attempting to pervert the course of justice is currently a common law offence in Victoria. It is an offence to do an act that has a *tendency* to pervert the course of justice. The Committee considered that the law is not entirely clear on what is meant by some of the elements of this offence, including the term "tendency". The Committee recommends that Parliament enact a statutory offence which is based on the existing common law offence and that the provision defines what is meant by "tendency". (Recommendation 1). The Committee also recommends that the new statutory offence should specify intention as the mental element of the offence. (Recommendation 2).

The Committee examined the penalty for attempting to pervert the course of justice and concluded that the maximum penalty should be 15 years imprisonment, consistent with the maximum penalty for the offence of perjury. (Recommendation 3).

Specific offences relating to interference with evidence and witnesses—Chapter 3

Along with retaining the general offence of attempting to pervert the course of justice, the Committee also examined whether specific offences should be created. In line with our general support for the codification of administration of justice offences, the Committee has decided to recommend the creation of a number of specific offences.

In supporting the creation of these offences, the Committee is not recommending fundamental changes to the law. Our goal is to clarify the current law and to make it more transparent and accessible. The Committee believes that a delineation of the ways in which justice can be perverted in the form of separate statutory offences will assist in the understanding of these offences.

In this Chapter, the Committee recommends that statutory offences be created for:

- **misuse of evidence** (Recommendation 5): making it a statutory offence to fabricate, alter, destroy, conceal or suppress evidence, or to knowingly use such evidence;
- **deceiving witnesses** (Recommendation 6);
- **corrupting witnesses** (Recommendation 7);
- **threatening witnesses** (Recommendation 8);
- **preventing witnesses from giving evidence** (Recommendation 9);
- **preventing witnesses from producing physical evidence** (Recommendation 10); and
- **reprisals against witnesses** (Recommendation 11)

Accessory after the fact—Chapter 4

Unlike most other administration of justice offences, the offence of accessory after the fact is defined in legislation. Section 325 of the *Crimes Act* 1958 (Vic) makes it an offence to assist another person (who has committed a serious offence) to escape justice.

The Committee considers that this statutory offence is appropriate and that it should be retained. (Recommendations 12-18). However we also recommend that special rules of evidence for this offence should be enacted to clarify the law. (Recommendation 13). The Committee recommends that statutory rules of evidence should be created which confirm the law in Victoria. The rules should provide that proof of the conviction of the principal offender may be admitted in evidence at the trial of an accessory after the fact, as prima facie evidence that the principal offence was committed. Also, the Committee recommends that the rules should confirm that at the trial of an accessory after the fact, evidence of out of court admissions made by the principal offender cannot be used in evidence to prove that the principal offence was committed— if it is contrary to the rule against hearsay evidence.

Perjury—Chapter 5

For the offence of perjury, Victorian law has extended the application of common law perjury but has not replaced it. Section 314 of the *Crimes Act* creates a statutory offence of perjury but it does not define the elements of offence and the common law elements of perjury apply by default.

The Committee considers that the current law relating to perjury is confusing and out of step with interstate laws and the MCCOC draft code and recommends that section 314 be substantially amended. (Recommendations 19-31).

The Committee considers that the offence of perjury should be restricted to statements made for the purpose of legal proceedings, while a lesser offence of making a false statement should apply to other statements not made for the purposes of legal proceedings. (Recommendations 20 and 21).

The mental element currently applicable for perjury provides that it is sufficient that the defendant had a lack of belief in the truth of the relevant statement. The Committee proposes that this common law rule be put into statutory form. (Recommendation 22).

In relation to 'opinion evidence', the Committee considers that the *Crimes Act* should provide that where special witnesses give 'opinion evidence', that the opinion is false if the opinion is not genuinely held by the witness. (Recommendation 24).

The Committee also recommends that perjury should apply only to statements that are objectively false (Recommendation 23) and that it should be immaterial whether the statement concerned a matter material to the legal proceedings or whether the court or tribunal was properly constituted. (Recommendations 28 and 30).

There are also a number of recommendations in relation to perjury in which the Committee recommends retaining the status quo. The Committee recommends no change to the common law rule of evidence requiring that the prosecution lead independent evidence to support a charge of perjury. (Recommendation 25). The Committee also recommends no change to the current maximum penalty of 15 years imprisonment. (Recommendation 27).

In Recommendation 26, the Committee recommends the creation of a specific statutory provision which provides that a jury may convict a person of perjury if the person has made two sworn statements that are irreconcilably in conflict with each other but where the jury is unable to determine which of the statements is false.

Finally, in Recommendation 31 the Committee does not consider that it is necessary to enact a specific offence dealing with perjury by an interpreter as it is considered that the existing law adequately covers such behaviour.

CHAPTER ONE – INTRODUCTION

> Justice, as the law understands it, consists in the enjoyment of rights and the suffering of liabilities by persons who are subject to the law to an extent and in a manner which accords with the law applicable to the actual circumstances of the case. The course of justice consists in the due exercise by a court or competent judicial authority of its jurisdiction to enforce, adjust or declare the rights and liabilities of persons subject to the law in accordance with the law and the actual circumstances of the case. The course of justice is perverted (or obstructed) by impairing (or preventing the exercise of) the capacity of a court or competent judicial authority to do justice.[1]

This quotation, taken from the High Court decision of *R v Rogerson,*[2] explains the terms "justice" and "course of justice" in the context of the offence of perverting the course of justice, one of the key offences the Committee will consider in this Inquiry. However, it could apply equally to the other "administration of justice offences" covered in this Report because they can all be seen as offences against justice and our justice system as a whole. Because of the subversive effect these offences can have on the justice system, they are viewed very seriously by our courts. The following quotation, taken from a recent decision of the Victorian Court of Appeal, illustrates this point:

> It is apparent that the integrity of the operation of the system of courts upon which, it must be remembered, our community depends for the proper determination of matters of fact in both civil and criminal proceedings, may be seriously compromised and the achievement of the ends of justice thwarted by the deliberate making of false statements on oath. It is not always easy or even possible to establish that perjury has been committed. Sometimes, unfortunately, the lie may not be exposed and the injustice which has been occasioned remains unrectified. Not only can this have a serious effect upon those with a direct interest in the outcome of the particular matter, but it may also engender a reduction of confidence in the community in the reliability of court decisions generally. For these and a number of other good reasons, the crime

[1] *R v Rogerson* (1992) 174 CLR 268, p. 280.
[2] Ibid.

> of perjury, particularly when committed in a curial [court] setting, is regarded very seriously indeed.[3]

Terms of reference

On 6 May 2003 the Victorian Parliament Law Reform Committee (the Committee) received terms of reference from the Governor in Council asking it to inquire into, consider and report to Parliament on offences relating to the administration of justice. The terms of reference refer to the offences of perjury, perverting the course of justice, falsifying evidence and threatening witnesses but this list is not exhaustive.[4] The Committee will discuss later in this Chapter what is meant by the term "administration of justice offences" and which offences the Committee intends to cover in this Report.

The Committee has been asked to report on the current state of law in Victoria in relation to these offences and to consider whether and, if so in what way, the law should be reformed. The terms of reference require the Committee to have particular regard to interstate laws and the recommendations of the Model Criminal Code Officers Committee (MCCOC) Discussion Paper on Administration of Justice Offences (July 1997).[5] Later in this Chapter the Committee will provide background on this Discussion Paper, the subsequent Final Report of MCCOC[6] and MCCOC generally.

The offences at the heart of this Inquiry are complex, requiring a detailed examination of judicial decisions and statutes. For this reason, many of the issues raised in this Report are directed at specific elements of the offences and may have more relevance to a legal audience than to a lay reader. On the other hand, the Committee is cognizant of the importance of administration of justice offences to the community as a whole and hopes that this Report will also attract a more general audience. To this

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[3] *R v Schroen* [2001] VSCA 126, para 14.

[4] The terms of reference require the Committee to report on the state of the law in relation to administration of justice offences "*such as* perjury, perverting the course of justice, falsifying evidence and threatening witnesses." It should be noted that falsifying evidence and threatening witnesses are not separate offences in Victoria but rather fall within the ambit of the general common law offence of attempting to pervert the course of justice: see further Chapter 2.

[5] Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, Model Criminal Code, Chapter 7, *Administration of Justice Offences,* Discussion Paper, July 1997.

[6] Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, Model Criminal Code, Chapter 7, *Administration of Justice Offences,* Report, July 1998.

end, the Committee has attempted to strike a balance by providing a detailed level of legal analysis but in language and with accompanying explanations which the Committee hopes will assist the lay reader.[7]

Inquiry process

In August 2003 the Committee released a comprehensive Discussion Paper on administration of justice offences. The purpose of the Discussion Paper was to outline the current state of the law in Victoria as well as to draw comparisons between the law in Victoria and the law in other (mainly Australian) jurisdictions.[8] The analysis was intended to provide background information to relevant stakeholders and members of the public wishing to make a submission to the Inquiry.

In order to assist stakeholders and others, in the Discussion Paper for this Inquiry the Committee also sets out the scope of the Inquiry and posed a series of questions about possible reforms to the current law. The questions were intended to be a general indication rather than an exhaustive list of the areas which the Committee intended to cover in this Final Report, the Committee recognising the important contribution of stakeholders to identifying issues in an Inquiry. While the Committee particularly welcomed submissions which directly addressed the questions identified, the Committee also encouraged comments on other issues relevant to the terms of reference.

With the release of the Discussion Paper the Committee called for written submissions to the Inquiry to be submitted by 31 October 2003. The Inquiry received 10 written submissions from a range of interested parties whose names and affiliations (where relevant) are set out in Appendix 2 to this Report.

Because the terms of reference for this Inquiry require the Committee to have particular regard to interstate laws, between 11 and 13 November 2003 the Committee travelled to Sydney and Brisbane to meet with interstate organisations with expertise in criminal law. In Sydney the Committee met with representatives from the New

[7] In some cases this has been done by supporting statements made in the text with more detailed comments in the footnotes.
[8] We have included some limited analysis of overseas jurisdictions, particularly the UK, New Zealand and Canada.

South Wales Law Society, Legal Aid, the Public Defenders Office, the Attorney-General's Department, the Office of the Director of Public Prosecutions and the New South Wales Council for Civil Liberties. In Brisbane the Committee held meetings with the Director of Public Prosecutions, the Department of Justice and Attorney-General, the Bar Association and Legal Aid.

On 24 November 2003 the Committee then held public hearings with Victorian stakeholders. At these hearings the Committee heard oral submissions from representatives of Victoria Legal Aid, the Victorian Bar, the Director of Public Prosecutions, the Criminal Bar Association and Benjamin Lindner, barrister and text book contributor on administration of justice offences.

Administration of justice offences is a complicated area of the law and the Committee has found the submissions it has received and the evidence it has heard to be of invaluable assistance in helping the Committee to reach conclusions and formulate recommendations for reform.

Codification versus common law

Before explaining the meaning of administration of justice offences and outlining which offences the Committee will be considering in this Report it is important to understand the terms "codification" and "common law." This is because the terms "Code jurisdictions" and "common law" or "non-Code jurisdictions" are used throughout this Report and because codification of the law is likely to be the single most important reform option in the area of administration of justice offences.

The Australian legal system is regarded as a *common law system*. Other common law systems include England, from which the Australian legal system was originally derived,[9] New Zealand and the United States. Other legal systems throughout the world, particularly in continental Europe, are known as *civil law systems.* The primary difference between common law and civil law systems is that in civil law systems the law is largely derived from "Codes"—legislation which attempts to "cover the field" of a particular area of law and which is the primary source of law.

[9] Peter Gillies, *Criminal Law,* 4th ed, 1997, p. 8.

The Committee will elaborate on the meaning of Codes and codification in the context of Australian criminal law later in this Chapter.

In contrast, in common law systems such as Australia many legal principles are developed by judicial decisions. The common law has been described as:

> The body of decisions developed over hundreds of years by different judges […]. It is basically the collected principles of law extracted from all the decisions handed down in the senior courts of England, Australia and other countries that share our type of legal system.[10]

Judges interpret and develop the common law mainly by examining the principles in previous cases with similar facts which, depending on a number of factors,[11] may be precedents which they are bound to follow or of persuasive value only. It has been acknowledged that Courts, particularly the High Court of Australia, can play a role in modifying and expanding the common law to correspond with contemporary values of society.[12] However, in doing so they are subject to constraints such as the doctrine of precedent[13] and the constitutional separation of powers which provides that the three arms of government (the executive, the legislature or the Parliament, and the judiciary or the Courts) are separate and that "their respective functions and powers are mutually exclusive."[14]

Pursuant to the doctrine of the separation of powers the legislature has responsibility for making new laws or modifying old ones. This means that common law principles have increasingly been modified by statute law. In such cases the common law continues to play a role in the construction of the statute unless it has been specifically

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[10] Fitzroy Legal Service, *The Law Handbook,* 2003, p. 3.

[11] These factors include where the Court fits in the judicial hierarchy – lower Courts such as the Magistrates' Court and the County Court are bound by the decisions of superior courts such as the High Court and the Supreme Court and whether the principle under consideration was part of the "ratio decidendi" of the case (that is the process of reasoning leading to a judicial decision) or merely "obiter dictum" (that is a remark made in passing or "judicial observations which do not form part of the reasoning of a case") —see *Butterworths Concise Australian Legal Dictionary*, 2nd edition, 1998, pp 312 and 365.

[12] *Dietrich v R* 109 ALR 385, p. 403 per Brennan J.

[13] This doctrine, also known by its Latin term "stare decisis" is the doctrine "under which a court is bound to follow previous decisions, unless they are inconsistent with a higher court's decision or wrong in law:" *Butterworths Concise Australian Legal Dictionary*, above note 11, p. 408. As the High Court has noted: "there are limits imposed by the authority of precedent not only on courts bound by the decisions of courts above them in the hierarchy but also on the superior courts which are bound to maintain the authority and predictability of the common law:" *Dietrich v R* 109 ALR 385, p. 403 per Brennan J.

[14] *Butterworths Concise Australian Legal Dictionary*, above note 11, p. 396.

excluded.[15] Even where detailed and comprehensive legislation is enacted, common law will apply to any area not covered, and to assist with interpretation of terms and phrases.

However, in some Australian jurisdictions, legislatures have opted to enact a Criminal Code which set them apart from the jurisdictions where the common law as modified by statute continues to apply. The Committee will now look at the two streams in Australian criminal law.

Code jurisdictions and common law jurisdictions in Australian criminal law

Criminal law is mainly an area of state responsibility.[16] This means that every State and Territory of Australia has its own criminal law legislation. The Australian jurisdictions generally fall within one of two streams: the common law jurisdictions (or non-Code States) and the Code jurisdictions. New South Wales, Victoria, the ACT, South Australia and the Commonwealth[17] are generally regarded as common law jurisdictions whereas Queensland, Western Australia, Tasmania and the Northern Territory are known as Code jurisdictions. However, as already stated, even the law in non-Code States does not derive completely from the common law. In fact there is a considerable degree of variation between the non-Code States in their reliance on the common law. For instance, in 1990 New South Wales abolished some 14 common law offences and replaced them with statutory offences contained in a new Part of the *Crimes Act 1900* entitled "Public Justice Offences."[18] In contrast the Victorian *Crimes Act 1958* contains no such heading and the role of statute law is

[15] Gillies, above note 9, p. 8.
[16] See ibid, Introduction III. Sources of the Criminal Law, pp 8-11.
[17] However, the Commonwealth has enacted part of a Criminal Code (*Criminal Code Act 1995*), which is eventually intended to be a Model Criminal Code for all Australian jurisdictions: *Butterworths Concise Australian Legal Dictionary*, above note 11, p. 72. The ACT has also recently enacted the Criminal Code 2002—however it does not cover the offences under consideration in this Discussion Paper.
[18] The 14 offences which were abolished are set out in section 341 of the *Crimes Act 1900 (NSW).* The amendments were introduced by the second reading speech which described the then law in New South Wales as "fragmented and confusing, consisting of various common law and statutory provisions, with many gaps, anomalies and uncertainties […]." New South Wales, *Parliamentary Debates,* Legislative Assembly, 17 May 1990, 3692 (Mr Dowd, Attorney-General).

arguably less than that of any other Australian jurisdiction.[19] Similarly in Code jurisdictions the common law may still have some, albeit limited, relevance, as the Committee notes in the next section of this Chapter.

Meaning of codification and development of Australian Criminal Codes

Professor Matthew Goode, member of the Model Criminal Code Officers Committee since its inception, cites with approval the following definition of a Criminal Code taken from an American article:

> [A Criminal Code] is a pre-emptive, systematic, and comprehensive enactment of the whole field of law. It is pre-emptive in that it displaces all other law and its subject areas save only that which the Code excepts. It is systematic in that all of its parts, arranged in an orderly fashion and stated with a consistent terminology, form an interlocking, integrated body, revealing its own plan and containing its own methodology. It is comprehensive in that it is sufficiently inclusive and independent to enable it to be administered in accordance with its own basic policies.[20]

Because the purpose of the Code is to "cover the field" of a particular area of law[21] the Codes have displaced the substantive common law of crime by specific legislative provision.[22] The result of this is that the common law can only play a limited role in the Code States. Its use as an interpretative aid is restricted to cases where the Code is ambiguous or where the language used in the Code has a technical meaning at common law.[23]

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[19] In the General Introduction MCCOC notes: "However, in the non-Code States, a mixture of statute law and common law offences apply, statute law having the least role in Victoria;" MCCOC Discussion Paper, above note 5, p. 1.

[20] Matthew R Goode, 'Codification of the Australian Criminal Law,' *Criminal Law Journal* (1992) 16, 5-19. The citation of the American article from which this extract is taken is: Hawkland, 'Uniform Commercial Code Methodology,' (1962) *U. Illinois L.F*. pp 291-292.

[21] However, Goode states that the definition he gave "does not mean that a Criminal Code can or should be absolutely comprehensive." It should include all major indictable and summary offences [but] […] the line must be drawn somewhere:" Goode, 'Codification of the Australian Criminal Law,' above note 20, p. 9.

[22] Gillies, above note 9, p. 9. Later (at p. 10) Gillies comments: "the substantive criminal law in the Code States is the product of the Code. Thus it is no longer appropriate to speak of these States as retaining the common law of crime in the sense in which that description is applied to other Australian jurisdictions. Thus, they are referred to as the Code States."

[23] Note that the position is different in Canada where "the common law is frequently considered in the interpretation of the Code:" Peter MacKinnon and Tim Quigley, 'Developments in Canadian Criminal Law 1995,' Criminal Law Journal -Volume 20, Dec 1996, 321, p. 321. However, Gillies notes that in

In *Mellifont v Attorney-General*[24] the Court summarised the role of the common law in the interpretation of a Criminal Code:

> [I]t is not legitimate to look to the antecedent common law for the purpose of interpreting the Code unless it appears that the relevant provision in the Code is ambiguous. That ambiguity must appear from the provision of the statute; in other words, it is not permissible to resort to the antecedent common law in order to create an ambiguity. Nor, for that matter, is it permissible to resort to extrinsic materials, such as the draft Code and Sir Samuel Griffith's explanation of the draft Code […] in order to create such an ambiguity.[25]

The oldest Criminal Code in Australia is the Queensland Criminal Code, often called the Griffith Code after its author, Sir Samuel Griffith, the former Chief Justice of Queensland. The Griffith Code was enacted as the *Criminal Code Act 1899* and came into force on 1 January 1901. The Queensland Code has influenced the Codes of all other Australian Code States[26] (Western Australia, Tasmania and the Northern Territory), with the Western Australian Code being most closely based on the original.[27]

Because of the influence of the Queensland Code, in this Report we generally draw on this Code for examples of Code provisions, noting the provisions of the other Codes only in so far as they differ from the Griffith Code.

Which offences are regarded as "administration of justice offences"?

There appears to be no general consensus among Australian jurisdictions as to which offences come within the scope of the term "administration of justice offences." In Victoria this area of the law is mainly governed by the common law which means

practice the Supreme Court of Queensland is less willing to look to the common law than the Supreme Courts of Western Australia and Tasmania: Gillies, above note 9, p. 10.

[24] *Mellifont v Attorney-General* (Qld) [1991] 173 CLR 289.

[25] Ibid, p. 309.

[26] Author Sally Kift notes that the Griffith Code "was undoubtedly a remarkable document for its time and it powerfully influenced the development of Criminal Codes in other Australian States and also abroad:" Sally Kift, 'How not to amend a Criminal Code,' *Alternative Law Journal,* Vol. 22, No. 5, October 1997, 215-219, p. 215.

[27] O'Regan, *New Essays on the Australian Criminal Codes,* 1988, p. 103. See Chapter VIII for an in depth analysis of the "migration" of the Griffith Code both in Australia and overseas. See also Gillies, above note 9, pp. 9-11. Gillies states that the Queensland and Western Australian Criminal Codes are "virtually identical:" p. 9.

there is no definitive list of offences which are regarded as administration of justice offences in this State.

The task of identifying administration of justice offences is somewhat easier in States which have codified their criminal law such as Queensland, Western Australia and the Northern Territory or which have made some attempt to replace common law offences with statutory offences in this area, such as New South Wales. This is because there is usually a relevant chapter heading in the legislation. However, using interstate precedents to assist us to define "administration of justice offences" is complicated by the fact that the list of administration of justice offences varies from jurisdiction to jurisdiction. To make matters more difficult, commentators on this area of the law differ in their classification of this group of offences.[28]

In fact, even the title "administration of justice offences" is not universal. For example, the relevant part of the South Australian *Criminal Law Consolidation Act 1935* is entitled "Offences of a public nature;"[29] in New South Wales it is "Public Justice Offences;"[30] in Queensland the title reads "Offences relating to the Administration of Justice;"[31] and the relevant sections in the Tasmanian Code appear in a Part entitled "Crimes Concerning the Administration of Law and Justice and Against Public Authority."[32]

The Offences covered in this Report

Despite the diversity, there are some offences which appear in the relevant sections of legislation in all Australian jurisdictions (except the ACT and Victoria where the main source of law is the common law). These are perjury and all related offences such as

[28] For instance, in Chapter 32 entitled "Offences Against Justice" Gillies examines accessories after the fact and its statutory equivalents, attempting to pervert the course of justice and its statutory equivalents and "statutory offences involving concealment of an offence, replacing misprision of felony," but not perjury: Peter Gillies, above note 9, pp 818-842. The commentary on "Offences against Justice" in Ian Freckelton's *Criminal Law Investigations and Procedure,* 2000 covers perjury, perverting the course of justice, bribery of public officials and rescue, but not accessories (inter alia) which is covered in a separate section dealing with complicity in crime. While the authors' selections do not suggest that these offences are the only ones they consider to be "administration of justice offences" they may nevertheless be illustrative of what the authors consider to be the principal offences in this category.
[29] *Criminal Law Consolidation Act 1935 (SA),* Part 7.
[30] *Crimes Act 1900 (NSW),* Part 7.
[31] *Criminal Code Act 1899 (Qld),* Chapter 16.
[32] *Criminal Code Act 1924 (Tas),* Part 111. Chapter X is entitled 'Crimes Relating to the Administration of Justice.'

giving false testimony[33] and attempting to pervert the course of justice and related offences such as falsifying, destroying or concealing evidence and protecting or threatening witnesses. These are also the offences specifically referred to in the terms of reference for this Inquiry and are therefore the main offences which the Committee will consider in this Report. The common law offence of attempting to pervert the course of justice[34] and its statutory equivalents in other States is covered in Chapter 2; Chapter 3 discusses offences relating to falsifying and destroying evidence and threatening witnesses and Chapter 5 deals with perjury.

The other offence which will be covered in this Inquiry is that of accessory after the fact. The offence of being an accessory after the fact (the term "accessory" is used in Victoria[35]) is discussed in the MCCOC Discussion Paper and Report in the Part on perversion of the course of justice and related offences. For this reason and because it is in some ways related to the offence of attempting to pervert the course of justice, the Committee considers that the offence of accessory after the fact is of sufficient significance to be considered in this Report.[36] Chapter 4 contains the analysis of that offence.

Apart from these offences, there are a number of other offences which may be considered to be administration of justice offences in one or more jurisdictions. It is not possible to cover all offences which may be considered administration of justice offences in one jurisdiction or another. The Committee has therefore found it necessary to limit the scope of this Inquiry. In the next section the Committee outlines some of the main offences which have been excluded from the scope of the Inquiry.

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[33] E.g. *Crimes Act 1914 (Cth)*, s. 35.

[34] It is intended that this Chapter cover all related uses of the terms – for example the MCCOC Discussion Paper, above note 5, p vi has subheadings for deceiving witnesses, corrupting witnesses, threatening witnesses, preventing witnesses, preventing the production of things in evidence and reprisals against witnesses. It must be remembered that these are not separate offences in Victoria; hence the discussion in this Chapter relates to interstate legislation.

[35] See Freckelton, *Criminal Law Investigations and Procedure*, above note 28, para 1.1.3400.

[36] As noted above (at note 9) Gillies examines the offence of accessory after the fact in his discussion of "offences against justice."

Exclusion of contempt, judicial corruption, unlawful oaths and crimes outside the main criminal legislation

Contempt of court has been defined as "words or actions which interfere with the proper administration of justice or constitute a disregard for the authority of the court."[37] Although, as this definition indicates, contempt of court is related to the administration of justice, the Committee has decided not to consider it in this Inquiry. In making this decision, the Committee has opted to follow the example of most other published reports on this subject area, including the MCCOC Discussion Paper and Report.[38] Given the complex nature of the law of contempt and the fact that, unlike the offences under consideration in this Inquiry, the term covers civil as well as criminal offences, the Committee considers that the subject is worthy of a separate inquiry. The Committee also notes that criminal contempt does not appear in the relevant Part or Chapter on administration of justice offences in any Australian jurisdiction.

The Committee has also decided not to analyse certain specific offences which appear in the legislation of some Australian jurisdictions, namely: judicial corruption; a judge or magistrate acting oppressively or with interest; and unlawful oaths. The Committee has excluded these offences on the basis that they were dealt with very briefly in the MCCOC Discussion Paper and Report and the conclusion was reached

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[37] *Butterworths Concise Australian Legal Dictionary*, above note 11, p. 91, citing *Lewis v Ogden* (1984) 153 CLR 682.

[38] In the General Introduction to the Discussion Paper MCCOC notes that, while "contempt of court is allied to the subject of administration of justice […] [it] has concluded that contempt of court is not appropriate for inclusion as a whole in the Model Criminal Code:" MCCOC Discussion Paper, above note 5, p. 1. However, it does recommend the inclusion of a statutory offence of publishing any matter that could cause a miscarriage of justice—see p. 97. The Committee decided not to deal with this possible offence because the Committee believes it would warrant an analysis as to how it fits with the general law of criminal contempt which the Committee has determined is outside the ambit of this Inquiry. The UK Law Commission also excludes contempt from the ambit of its Inquiry. It noted that the law of contempt had recently been the subject of another inquiry, the recommendations of which were under consideration: pp. 2-3: Law Commission, Criminal Law—*Offences Relating to Interference with the Course of Justice* (Law Com. No. 96), 1979. The Review of Commonwealth Criminal Law, Discussion Paper No. 16, *Offences Relating to the Administration of Justice*, July 1988 also declined to incorporate contempt on the grounds that it had been discussed fully by the Australian Law Reform Commission in a recent report. However, it went further, stating: "It is not necessary that the rules regarding contempt should be included in a consolidating law dealing with crime. Sir Samuel Griffith did not think it necessary to include those rules in his [Queensland] Code […]:" p. 11. However, the exclusion of contempt is not universal: the Criminal Law and Penal Methods Reform Committee of South Australia considered contempt in some detail in its Fourth Report entitled *The Substantive Criminal Law,* July 1977—see Chapter 7—Offences Relating to the Administration of Justice and Public Administration, pp. 224-248.

in all cases that the Model Criminal Code should not contain these offences.[39] It was considered that the conduct covered by these offences is more adequately covered by other offences.[40] The Committee also notes that, like any other citizens, magistrates and judges are subject to the offences described in this Report; the recent conviction of former Queensland Chief Magistrate Diane Fingleton under a new section in the Queensland Code relating to reprisals against witnesses is a case in point.[41] In addition, a number of other interstate offences which were discussed very briefly by MCCOC and generally excluded from the suggested Model Criminal Code, will not be canvassed in this Report.[42]

Finally, it should be noted that in each jurisdiction there are lesser offences which also relate to the administration of justice, particularly regarding interference with police investigations. For example, the *Summary Offences Act 1966 (Vic)* contains offences relating to the harassment of witnesses and making false reports to police.[43] In Queensland the *Police Service Administration Act 1990* makes it an offence to make a false representation causing police investigations and it was recently reported that Queensland authorities had commenced a summons action against teenage runaway Natasha Ryan and her boyfriend Scott Black under this provision.[44]

This Inquiry's Victorian focus justifies a brief discussion of sections 52A and 53 of the *Summary Offences Act 1966 (Vic*) which appears in Chapters 2 and 3. However, given the number and complexity of more serious administration of justice offences which are the subject of this Inquiry, for the purposes of this Report the Committee has not conducted a comparative analysis of lesser offences in other jurisdictions or researched such other offences in this State.

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[39] Moreover, none of these are offences under the *Crimes Act 1958* in Victoria; given the magnitude of the research required to outline the current state of the law in Victoria, the Committee has had to decide on some limits to its discussion of interstate offences.

[40] For instance, MCCOC noted that judicial corruption is essentially a bribery offence and should be covered by bribery provisions rather than by a separate offence in a Chapter on administration of justice offences: above note 5, p. 135.

[41] *R v Fingleton* [2003] QCA 266. The provision pursuant to which Fingleton was convicted is section 119B "Retaliation against a judicial officer, juror, witness or family."

[42] These include: impersonation of a member of a jury, pleading guilty to a charge in the name of another, misprision of felony and compounding penal actions.

[43] *Summary Offences Act 1966 (Vic),* sections 52A and 53.

[44] Queensland Police Service, *Filing of summonses against a Rockhampton man and woman at the Brisbane Magistrates' Court*, Media Release, (8 May 2003).
Since then Scott Black has been charged with perjury "for allegedly telling police he had know knowledge of Ms Ryan's whereabouts after she disappeared from her Rockhampton home in August 1998." No further charges have been made against Ms Ryan: 'Runaway's Partner on Perjury Charge.' The Australian, Saturday 13 December 2003, p. 9.

Limited discussion of sentencing

In this Report the Committee refers to the maximum penalties imposed for each offence and calls for submissions as to whether the current maximum sentences are appropriate, having regard to factors such as the seriousness of the offence and the maximum penalties in other jurisdictions. While the Committee makes some reference to case law in relation to the sentencing of these offences, it is outside the scope of this Inquiry to conduct a review of general sentencing principles which have application well beyond administration of justice offences.

Common feature: a strike at the heart of the administration of justice

> Offences that damage the administration of justice strike at the very heart of our judicial system. It is fundamentally important that confidence is maintained in our system of justice, and to this end it must be protected from attack. Those who interfere with the course of justice must be subject to severe penalties. Not only do offences concerning the administration of justice affect individuals, but the community as a whole has an interest in ensuring that justice is properly done.[45]

As this passage from a Second Reading Speech of the then New South Wales Attorney-General, Mr Dowd, indicates, offences such as perjury and perverting the course of justice are regarded by governments, judges and society as a whole as very serious crimes. The common feature of these offences and the reason why they are viewed so seriously, is the threat they pose to the due administration of justice.[46] Whether an accused has lied under oath in a courtroom, concealed or tampered with evidence of a crime, threatened a witness or assisted someone else who has committed a crime, the effect of the actions is the same: the important role of our system of justice in investigating and prosecuting crime and in ensuring truthful evidence is given in court is potentially compromised.

The comments made by judges when sentencing administration of justice offences resonate with the language of attack on the justice system. The offences "strike […]

[45] New South Wales, *Parliamentary Debates,* above note 18, p. 3691.
[46] MCCOC notes by way of introduction that "This Chapter deals with a miscellaneous collection of offences, the common feature of which is relationship to the administration of justice. Because of that relationship, these offences must rank high in importance in the criminal laws of the Commonwealth, States and Territories:" MCCOC Discussion Paper, above note 5, p. ii.

at the very core of the integrity of the administration of justice"[47] or "strike at the very heart of the justice system"[48] or the "very foundation of the legal process."[49] They emphasise that "public confidence in the administration of justice is vital to the welfare of society"[50] and speak of the breach of public trust and confidence involved when offences of this nature are committed.[51] As one judge put it:

> […] [T]here are few more serious offences possible in the present day […] than those which tend to distort the course of public justice and prevent the Courts from producing true and just results in the cases before them.[52]

Meaning of administration of justice

It is therefore clear that administration of justice offences undermine the functioning of the due administration of justice, but what is meant by the term "administration of justice"? The term is often used but seldom defined, even in published reports on these offences.[53] However, reported decisions in relation to the meaning of the "course of justice" (an element of the offence of perverting the course of justice) are instructive. We refer, for example, to the quotation from the High Court decision of *R v Rogerson*[54] on the first page of this Chapter. There the Court stated that the course of justice consisted in the due exercise by courts or other competent judicial

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[47] *R v Farquhar* (unreported, NSW CCA, 29 May 1985), as quoted in the Victorian Sentencing Manual, 2nd ed 1999, para 26.102.

[48] *R v Pangallo* (1991) 56 A Crim R 441, pp. 443-4. In *Morex Meat Australia Pty Ltd and Doube* [1995] 78 A Crim R 269 the comments of Wallace J in *Higgins* (unreported, Court of Criminal Appeal, WA, 25 July 1990) were adopted: "[…] the offence of attempting to defeat the course of justice has consistently been treated, like perjury, as a crime which strikes at the very heart of the administration of justice and, as such, deserving of custodial punishment."

[49] *R v Schroen* [2001] VSCA 126, para 14.

[50] *R v Kellow* (unreported, Vic CCA, 17 August 1979), per Young CJ, as quoted in Victorian Sentencing Manual, above note 47, para 26.402.

[51] *R v Schroen* [2001] VSCA 126, para 14.

[52] *Andrews* (1972) 57 Cr App R 254 per Widgery LCJ as cited in the Victorian Sentencing Manual, above note 47, para 26.102.

[53] An exception to this is the discussion of the meaning of the "course of justice" in cases on attempting to pervert the course of justice. See further Chapter 2. Most reports and text book authors confine themselves to a few introductory lines on these offences before analysing the individual offences in detail. Gillies writes of "a considerable number of offences which incriminate the person who commits an act which is prejudicial to the functioning of the system of justice […]": Gillies, above note 9, p. 818. No such introductory comments or definition of the offences can be found in the UK Law Commission Report, above note 38, or of the WA Murray Committee: Murray M QC, *The Criminal Code: A General Review*, WA, 1983. Similarly Freckelton, *Criminal Law Investigations and Procedure*, above note 28, includes no general introductory comments on this group of offences as a whole in the Chapter on "Offences against Justice."

[54] *R v Rogerson* (1992) 174 CLR 268.

authorities to "enforce, adjust or declare the rights and liabilities of persons subject to the law in accordance with the law and the actual circumstances of the case."[55]

Decisions such as *R v Rogerson* and other materials the Committee examined indicate that the administration of justice at the very least encompasses the course of judicial proceedings. Offences such as perjury[56] and many forms of attempting to pervert the course of justice such as threatening witnesses or tampering with evidence are often committed either inside the courtroom or in circumstances where court proceedings are underway.

However, it is clear that the administration of justice and therefore the ambit of administration of justice offences can extend even further than this. The offences of perverting the course of justice and accessory after the fact and even, in some cases, perjury[57] can also be committed before judicial proceedings have commenced and yet this does not make them any less offences against the administration of justice.

In *R v Rogerson*[58] the High Court noted that the offence is "an interference with the due exercise of jurisdiction by courts and other competent judicial authorities."[59] However, the High Court acknowledged that, because courts could only hear cases following an investigation process, "any act which has a tendency to deflect the police from invoking that jurisdiction [for example, to lay charges which could lead to a prosecution] when it is their duty to do so is an act which tends to pervert the course of justice."[60] In other words, the course of justice may in some cases extend to acts which impede police investigations.[61]

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[55] Ibid, p. 280.
[56] Although "non-curial" perjury is also possible (that is perjury committed outside a court proceedings, for instance in an affidavit setting out the witness's evidence), curial perjury is regarded as the more serious form of the crime: e.g. *R v Kellow* (unreported, Vic CCA, 17 August 1979) and *R v Westphal* (unreported, Court of Appeal, 28 March 1996).
[57] This is due to the extension of perjury in Victoria by section 314 of the *Crimes Act 1958 (Vic)* and section 141 of the *Evidence Act 1958 (Vic)*.
[58] *R v Rogerson* (1992) 174 CLR 268.
[59] Ibid, p. 284.
[60] Ibid.
[61] See discussion in Chapter 2. The same applies to the offence of accessory after the fact—acts such as concealing a body or otherwise assisting the principal offender after the commission of a crime take place before judicial proceedings have been commenced. See further Chapter 4.

Background to the Model Criminal Code Officers Committee

As the Committee noted above, the Committee has been directed to have regard to the MCCOC Discussion Paper on "Administration of Justice Offences." The late 1980s and early 1990s was a time when the codification of the Criminal Law in Australia was the subject of considerable debate.[62] In June 1990 the Standing Committee of Attorneys-General (SCAG) placed the question of a National Criminal Code for Australia on the agenda.[63] SCAG established a Committee (which by 1993 had become known as the Model Criminal Code Officers Committee) whose membership consisted of a representative from each jurisdiction with criminal law expertise.[64] The first formal meeting of the new Committee was convened in May 1991 and since its inception it has produced numerous Discussion Papers followed by Reports.[65]

It is important to understand the goals of MCCOC. According to one of the founding members of MCCOC the Model Criminal Code project is "not an attempt to force a uniform scheme on any Australian jurisdiction."[66] Nor is it an attempt by the Commonwealth to usurp the criminal law powers of the States. Rather:

> It is an attempt by a group of experts, with considerable input from widespread community consultation, to put in the public arena a set of best practice basic criminal law provisions in the form of a criminal code which can serve as a model for all Australian jurisdictions to pick up and use in whole or in part when they want to do so. The aim is, in short, voluntary consistency not compulsory uniformity, with the agenda and its results being transparent, owned by all jurisdictions and not just being driven by one.[67]

Several jurisdictions have implemented MCCOC recommendations.[68] However, in relation to Chapter 7 "Administration of Justice Offences" it appears that no Australian jurisdiction has undertaken reforms as a direct result of the

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[62] For a useful background to the inception of MCCOC see Matthew R Goode, 'Constructing Criminal Law Reform and the Model Criminal Code,' *Criminal Law Journal,* Volume 26, June 2002, 152-174. Goode refers (inter alia) to the *Review of Commonwealth Criminal Law,* 4th Interim Report, November 1990, chaired by Sir Harry Gibbs (the Gibbs Committee Report); the Third International Law Congress held in Hobart 1990, and a 1991 conference convened by the Society for the Reform of Criminal Law. The Final Report of this latter Conference noted that it "appeared there was reason for optimism that the process of consistent codification of the criminal law in Australia could and should proceed:" see pp. 153-154.

[63] See ibid p. 155 and MCCOC Discussion Paper, above note 5, p. i.

[64] Ibid and MCCOC Discussion Paper, above note 5, p. i.

[65] For a useful list see Table 2 of Goode, 'Constructing Criminal Law Reform and the Model Criminal Code,' above note 85.

[66] Ibid, p. 16.

[67] Ibid.

[68] Ibid, see Table 3 Current Implementation Record.

recommendations.[69] In a recent article member of MCCOC, Matthew Goode, notes that the Discussion Paper and subsequent Final Report "excited no controversy and appears to have gone pretty well unnoticed […]."[70] "It is not," he concludes, "an area of the law which appears to excite any attention from legislators, academics or those otherwise involved in the criminal law."[71]

It is worth noting that a recent comparative survey of law and order legislation in Australia concluded that there is a continuing trend towards uniformity in criminal laws, stating that:

> there has been a trend in recent years to enact legislation in accordance with the models developed by the Commonwealth, in particular, the Model Criminal Code, with the treatment of the offences in different jurisdictions subsequently becoming more consistent.[72]

The Committee's approach

In any law reform project it is important to identify the key themes which will guide the Inquiry and, in particular, the formulation of recommendations. The starting point for defining the Committee's approach are the terms of reference. As we have already noted, the terms of reference for this Inquiry require the Committee to examine the law in Victoria and options for reform, with particular regard to interstate laws and the MCCOC Discussion Paper. The terms of reference have guided the structure of each Chapter of this Report: namely a discussion of the law in Victoria followed by a comparative analysis of interstate laws and the recommendations of the MCCOC Discussion Paper, and where relevant, other law reform agencies. This is followed by an examination of witnesses' submissions to the Inquiry and finally by the Committee's conclusions in relation to the particular topic under examination.

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[69] Ibid. Chapter 7: Offences against the Administration of Justice is the only Report to have the word "none" next to the implementation record. The Committee has also checked for any implementation since the publication of Goode's article and has not been able to identify any which was a direct result of the MCCOC Discussion Paper and Report.

[70] Ibid, p. 6.

[71] Ibid.

[72] Talina Drabsch, Briefing Paper 6/2003, *Law and order legislation in the Australian States and Territories, 1999-2000: a comparative survey*, New South Wales Parliamentary Library. For instance in 1995 the Commonwealth, currently known as a common law jurisdiction, passed the first stage of a new Criminal Code—the general principles of criminal responsibility (*Criminal Code Act 1995)*. Since then the *Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Act 2000* has been passed and the rest of the Code is being developed progressively.

However, the terms of reference offer no specific assistance on the themes which should guide the Inquiry. As foreshadowed in the Discussion Paper, in formulating our conclusions and recommendations for reform the Committee has been guided by a number of principles, principally:

- *transparency:* is the law easy to find and understand? How can it be improved so that it is more transparent and accessible? Would codifying the law necessarily assist this process?

- *practicality and effectiveness*: How effective and practical are current laws and how could their practicality and effectiveness be improved? What light do prosecution and conviction statistics shed on these issues? Would there be any practical difficulties in implementing reform (such as codifying the law)? Would the cost of reforming the law be offset by the benefits once the reforms have been implemented?

- *consistency:* how "internally consistent" are the laws in Victoria currently? How could consistency best be improved? What about consistency with other States, the Commonwealth and with the Model Criminal Code? Is this a goal we should be striving for?

It will be clear from the commentary on each of these themes that the question of codification is central to this Inquiry. In the next section, the Committee examines the perceived advantages and drawbacks of codification.

Why codify? The advantages and disadvantages of codification

Arguments for and against enacting a Criminal Code will inform any decision about whether to codify particular administration of justice offences (or all of them). The issue of codification is also central to the MCCOC Discussion Paper and Report to which the Committee is required to have regard. For these reasons, the Committee provides a brief summary of some common arguments for and against codifying the law.

It is important to note, however, that the specific subject matter of this Inquiry means that a detailed analysis of the relative merits of a Code covering the whole of the

criminal law clearly falls outside the scope of the terms of reference. It is also important to remember that even if Victoria were to abolish all common law administration of justice offences and replace them with statutory ones it would not thereby become a "Code jurisdiction" in the sense of, for example, Queensland or Western Australia.

There is however no doubt that the issue of codification of administration of justice offences is pivotal to this Inquiry and has attracted by far the most interest and debate of any issue. The question 'to codify or not to codify' is directly relevant to the first 21 of the 45 questions posed in the Discussion Paper (namely, those questions covering the offence of perverting the course of justice and specific offences relating to evidence and witnesses) and informs the approach to many of the questions relating to accessories after the fact and perjury.

For this reason, the Committee has decided to examine this issue separately from the rest of the questions posed in the Discussion Paper. Due to the importance of the issue and its impact on the other parts of this Report, the Committee has decided at this stage to examine the arguments both for and against codification, as well as our witnesses' submissions on the issue. The Committee will then follow with the Committee's conclusions on codification.

Arguments in favour of codification

Codes make the law easier to find and understand

The process of finding the common law can present a particular challenge not only for lay people but often also for lawyers. As Matthew Goode puts it:

> There are a number of dimensions to the problem. The first and most basic is that the criminal law is scattered all over the statute book and even more of it can be found only by wading through massive volumes of law reports — and even then, the citizen might not find an answer to a simple question.[73]

Commentators have emphasised the importance of giving the average citizen an opportunity to find and understand the law and suggest that codification may be the

[73] Goode, 'Codification of the Australian Criminal Law,' above note 20, p. 9.

way to do this.[74] For instance, the Canadian Law Reform Commission has argued that laws will be more accessible if they are "reorganized in a logical coherent way,"[75] pointing out that few lay people have the skills to weigh the impact of legal rules developed through case law.

As long ago as the nineteenth century the Attorney-General in England said in the House of Commons:

> Surely, it is a desirable thing that anybody who may want to know the law on a particular subject should be able to turn to a chapter of the Code, and there find the law he is in search of explained in a few intelligible and well-constructed sentences; nor would he have to enter upon a long examination of Russell on Crimes, or Archbold, and other text-books, because he would have a succinct and clear statement before him.[76]

More recently, the then New South Wales Attorney-General referred to the problems with the common law when he introduced a Bill aimed at rationalising and reforming the law in relation to administration of justice offences in that State.[77] While the Act did not purport to completely codify the offences, it nevertheless went a considerable way towards codification and the statements made by the former Attorney-General echo some of the arguments commonly advanced in favour of Codes:

> At present there is no comprehensive statement of the law relating to public justice offences. The law is fragmented and confusing, consisting of various common law and statutory provisions, with many gaps, anomalies and uncertainties. Common law offences have no specific penalty provided, and the exact limits of these offences are sometimes difficult to establish. The bill will rectify this by creating specific offences dealing with a number of areas.[78]

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[74] Ibid and see Criminal Law and Penal Methods Reform Committee of South Australia, above note 38, (quoted in ibid, p. 12): "One object of codification of any branch of the law is to reduce it to writing in straightforward and easily comprehensible terms so that the ordinary man of average intelligence and education will be able to understand it and to know what he is sometimes presumed to know, namely what is the law." In response to the argument that the criminal law is too complex to be stated precisely yet in a way in which the average citizen can understand it, Goode counters that the proper response is law which is not comprehensible is bad law: "The regulation of the crucial relationship between the victim and the criminal and between State and citizen must be expressed in a way that all can understand. A relationship that is too complex to be so stated has it wrong:" ibid, p. 13.

[75] Law Reform Commission Canada, *Towards Codification,* quoted in Goode, 'Codification of the Australian Criminal Law,' above note 20, p. 11.

[76] Hansard, House of Commons, April 3 1879, vol. 245 (3rd series), col 316, as cited in the Hon. Mrs Justice Arden DBE, "Criminal Law at the Crossroads: The Impact of Human Rights from the Law Commission's Perspective and The Need for a Code," [1999] *Crim.L.R*. 439.

[77] New South Wales, *Parliamentary Debates*, above note 18.

[78] Ibid, p. 3692.

Witnesses' submissions

The Victorian Bar is the most vocal proponent of the codification of administration of justice offences and made the following submission to this Inquiry in support of codification:

> Serious criminal offences should be knowable and accessible. All members of the public, parliamentarians, officials and lawyers should have a readily available means of finding out what the law is in relation to offences against the administration of justice. The law ought not be left in a state where it is only practically accessible to specialist criminal lawyers. It follows that the law in relation to offences against the administration of justice ought to be codified.[79]

The thrust of the Victorian Bar's arguments in favour of codification is as follows. Vaguely defined offences such as perverting the course of justice "breach the very important principle that the type of conduct which is prohibited should be known in advance:"[80]

> That is, I think, a very deep principle in the criminal law that you should only be punished for things which are well known in advance to be criminal and easily known. It is not good enough in my view that expert criminal lawyers can tell you at the end of the day if you are charged whether you are guilty or not and give you a prediction about what a jury should do.[81]

Such offences should not continue to be the norm in the modern era according to the Victorian Bar. Hence, offences such as perverting the course of justice should be clarified and made more accessible through codification.

Victoria Legal Aid also supports codification partly because Codes are "easier to find and understand for the lay people". [82]

The Inquiry also received a submission from John Pesutto, who wrote on behalf of a group of constituents of the East Yarra Province electorate. This group of constituents believe that codification of the offences under review is a desirable objective, noting that:

> Members, most of whom are laypeople, consider that the present interaction of common law principles coupled with occasional intervention by statute is very confusing. While this may be an argument for codification across all forms of criminal misconduct, it certainly would simplify the sources of law and make it more

[79] The Victorian Bar, submission no. 10, p. 1.
[80] The Victorian Bar, submission no. 10, p. 1.
[81] Dr David Neal, *Minutes of Evidence,* 24 November 2003, p. 15.
[82] Victoria Legal Aid, submission no. 7, p. 2.

> accessible for laypeople who would, in many cases, have little or no means to research relevant authorities and consider the application of statutes that might extend, qualify or displace common law principles.[83]

Interstate submissions

A number of interstate witnesses referred to the improvements in the transparency of the law and, accordingly, to the positive educative effect of Codes. For instance, Mr Greg Smith from the New South Wales Office of Public Prosecutions, noted that Codes were easier to find than the common law which "is something where sometimes you have to read the 18th and 19th century law books to identify or have access to books such as Archbold."[84]

Later, Stephen Kavanagh, Acting Deputy Director for Public Prosecutions (Legal) of the Office of the Director of Public Prosecutions, New South Wales, also referred to the fact that Codes helped not just the public but also all those responsible for interpreting and enforcing the law:

> From our point of view the advantage of having the statute over the common law is that it provides greater clarity for, I suppose, the foot soldiers who are responsible for enforcing this law. There is an advantage for the police in that when confronted with a particular set of facts they can look through the statute and they have their options. They do not need to have a detailed knowledge of what the common law is. So it gives them an advantage in the field. It gives us an advantage when we come to prosecute the matters.[85]

The Director of Public Prosecutions in Queensland, Leanne Clare, also referred to the greater clarity and certainty which codification engenders:

> Having everything in a volume gives one greater confidence that with all the parties involved —between the defence, the Crown prosecutor and the judge—people are going to raise the relevant issues in relation to the criminal law […][86]

In relation to the allegation that Codes are inflexible and still require judicial interpretation, Ms Clare again referred to the greater certainty that a Code provides:

> The other side of that is the certainty you get from the Code. We know what the law is and was at the time of a particular offence, because it is here. We still continue to get the law clarified by the Court of Appeal, of course, but the answers still come back to this piece of legislation and I think that is very useful. It is useful for counsel who are instructing their clients, giving them legal advice as to how they should plead

[83] East Yarra Province constituents, submission no. 5, p. 1.
[84] Greg Smith, *Minutes of Evidence*, 12 November 2003, p. 36.
[85] Stephen Kavanagh, *Minutes of Evidence,* 12 November 2003, p. 33.
[86] Leanne Clare, *Minutes of Evidence,* 13 November 2002, p. 60.

> —the way in which they should conduct their defence. It is useful for Crown prosecutors to work out what evidence is relevant, who should be called, what sorts of charges should be laid and if any charges should be laid.[87]

Legal Aid Queensland also emphasised the greater certainty and accessibility of Codes compared to the common law:

> On the whole I think it is positive that we are a code state. I think the codification of the common law in Queensland has proved a success over the last 100 years or so. It has made the law certain and it has made it more accessible to people other than specialist lawyers. Even within specialist lawyers it has enabled [the law] to be found more easily than when you are finding common law from judges' decisions.[88]

An extension of the point that codification assists people (including the lawyers and the police) to understand the law, is the argument that it makes the law easier to sum up to a jury. As Stephen Kavanagh from the Office of the Director of Public Prosecutions in New South Wales put it:

> One other thing which I did not mention earlier is that it is probably easier for a judge summing it up to a jury. So there are practical benefits: one, the police if they are charging; two, ourselves if we are involved in the case; and three, if it goes to a jury the judge is in a position where he can explain the ingredients of the offence and give a copy of the offence to the jury and let it look at it.[89]

On this point, Queensland Director of Public Prosecutions, Leanne Clare (a former acting District Court Judge) agreed that "it is much easier for judges, I think, to sum up to the jury when they have the law codified."[90]

Codes have a clearer penalty regime and allow for summary disposition of the offences

Interstate submissions

Another benefit of codification cited by New South Wales witnesses was the fact that it allowed for the summary disposition of these offences (which at common law were triable on indictment only—as is presently the case for the Victorian offences of perjury and perverting the course of justice). Brian Sandland from Legal Aid New

[87] Ibid.
[88] Howard Posner, *Minutes of Evidence*, 13 November 2003, p. 101.
[89] Stephen Kavanagh, *Minutes of Evidence*, 12 November 2003, p. 40.
[90] Leanne Clare, *Minutes of Evidence,* 13 November 2003, p. 60.

South Wales argued that this allowed for offences to be dealt with "more quickly with fewer appearances, greater efficiencies for the criminal justice system as a whole and advantages to the accused and the prosecution in terms of preparing the case."[91]

The New South Wales Office of the Director of Public Prosecutions also referred to the benefits of specific maximum sentences (which were previously indeterminate).[92]

Codes reduce the cost of justice

It has also been argued that codifying the law can make it "cheaper to buy."[93] For instance, a Code may minimise appeals designed to "discover" the law and may provide better guidance for courts faced with novel fact situations.[94] A Code would also eliminate litigation which examines contrasting lines of case law.[95] The Canadian Law Reform Commission summarises these arguments particularly succinctly:

> Instead of finding the justification for a principle in a long chain of precedents, of doubtful import in some instances, the judge could refer to codified statements and draw conclusions from them […]. Moreover, the uncertainty inherent in the application of precedents would at least be replaced by the relative certainty of clearly set out legal principles. At the same time, the courts would no longer be forced to decide between divergent or contradictory precedents.[96]

Witnesses' submissions

The fact that Codes reduce the costs of justice was noted by Victoria Legal Aid as another argument in favour of codification. [97]

Codes are democratically made and amended

Another argument commonly advanced in favour of Codes is that they are democratically made and can be democratically amended by the legislature. It has

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[91] Brian Sandland, *Minutes of Evidence,* 11 November 2003, p. 14.
[92] Greg Smith, *Minutes of Evidence,* 12 November 2003, p. 36.
[93] "Cheap to buy" is one of the benefits outlined by Goode 'Codification of the Australian Criminal Law,' above note 20, pp. 13-14.
[94] Ibid.
[95] Ibid.
[96] Law Reform Commission Canada, above note 64, p 24, quoted in ibid.
[97] Victoria Legal Aid, submission no. 7, p. 2.

also been argued that many judges are reluctant to contribute to the development of the law (also known as "judge made law") and if they do so, they often do not do it well.[98] Matthew Goode, founding member of the MCCOC Committee and proponent of Criminal Codes, argues that the modern reality is that the legislature is the "law reform agency of first and often only instance" and that this is appropriate from the viewpoint of social democratic theory. "Once this is conceded," he continues, "the codification argument is all one way […]" [in favour of codification].[99]

Witnesses' submission

According to Victoria Legal Aid, Codes affirm the democratic nature of the law and this is a positive argument in favour of codification. [100]

Codes could achieve national consistency in criminal law

Historically, criminal law in Australia has largely been a state responsibility which has meant that each state and territory has developed its own criminal law. Supporters of codification believe that the inconsistencies in the criminal laws of each state and territory would be reduced if each state and territory adopted the provisions recommended by MCCOC. According to this group, inconsistencies in the law leads to legal inequality—what might be regarded as a criminal offence in one jurisdiction may not be considered criminal behaviour in another. National consistency would also lead to greater efficiency in the administration of justice. Also, the penalty for the same criminal behaviour may vary widely between jurisdictions. As one delegate at an International Criminal Law Congress put it:

> It was thought by many [at the Congress] that difference for difference sake was no longer justifiable in a 20th Century confederation that was one nation. [101]

Witnesses' submissions

At the public hearings Dr Neal, who appeared on behalf of the Victorian Bar, emphasised the benefits of national uniformity, noting that there is a real prospect of

[98] Goode, 'Codification of the Australian Criminal Law,' above note 20, p. 15.
[99] Ibid p. 16.
[100] Victoria Legal Aid, submission no. 7, p.2.
[101] Goode, 'Codification of the Australian Criminal Law' above note 20, p. 15.

uniformity along the lines of the MCCOC provisions. If codification is to proceed, according to Dr Neal, there should be a bias in favour of national uniformity:

> There is a clear public benefit in maximising uniformity in the laws relating to serious criminal offences. Apart from the benefits of consistency and fairness throughout Australia, there are ancillary benefits in preparing legal texts and commentaries and allowing legal practitioners to give advice and appear in all Australian jurisdictions.[102]

Dr Neal emphasised the credentials and expertise of the Model Criminal Code Officers Committee, noting that the MCCOC Report had undergone "a very serious and detailed process."[103] These considerations "ought to be things which would weigh heavily with this Committee in thinking about the workability of the proposals that have been put forward."[104]

While the Criminal Bar Association (CBA) supported the "no reform position" in its submission, at the public hearings Mr Morrissey made a number of comments which suggested that the CBA would be prepared to support codification under certain circumstances. National uniformity, noted Morrissey, would be "a matter which clearly weights in favour of reform"[105] and responded affirmatively to the Committee Chair's comment that "if there was a compelling case, if there was the possibility of uniformity amongst the states, if there was the possibility of clarity in some aspects of the law then you would not necessarily be opposed."[106]

The Office of Public Prosecutions agreed with this view, submitting that, if codification of these offences is thought to be necessary, then uniformity among Australian jurisdictions should be the goal:

> The jury might still be out […] on the Model Criminal Code but I think you will find in our written submission [our view is] "If we're going to have statutory reforms, then we probably ought to do it in a form that's pretty much as other people have done it."[107]

[102] The Victorian Bar, submission no. 10, p. 3.
[103] Dr David Neal, *Minutes of Evidence,* 24 November 2003, p. 15.
[104] Ibid, p. 16.
[105] Peter Morrissey, *Minutes of Evidence,* 24 November 2003, p. 39.
[106] Ibid, p. 49.
[107] Paul Coghlan QC, *Minutes of Evidence,* 24 November 2003, p. 121.

Codes are more responsive to change

According to this argument, the common law is made by judges but arguably judges are constrained by the doctrine of precedent whereas codes can be more responsive to change as they can be modified by Parliament. Further, even though Codes are established by statute, judges will interpret the meaning of the Code in accordance with the facts of individual cases.

Witnesses' submissions

John Pesutto on behalf of a group of East Yarra constituents put forward this argument, pointing out that the group believed that Parliaments are generally in a better position to adapt the law to changing attitudes and technologies, such as the Internet. He submitted that Parliament can act more rapidly to address the need for change "whereas Courts can only implement change within the doctrine of stare decisis [108] and only on the occasions when actual cases permit."[109]

Codes are working effectively in other jurisdictions

Another argument in favour of a codified system is the fact that codification appears to be working effectively in other jurisdictions such as New South Wales.

Witnesses' submissions

Dr Neal on behalf of the Victorian Bar submitted to the Committee that the offences recommended by MCCOC have existed almost without exception in other Australian jurisdictions, inferring that their practical operation had been tested.[110]

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[108] "Stare decisis" is the doctrine "under which a court is bound to follow previous decisions, unless they are inconsistent with a higher court's decision or wrong in law:" *Butterworths Concise Australian Legal Dictionary*, above note 11, p. 408. As the High Court has noted: "there are limits imposed by the authority of precedent not only on courts bound by the decisions of courts above them in the hierarchy but also on the superior courts which are bound to maintain the authority and predictability of the common law:" *Dietrich v R* 109 ALR 385, p. 403 per Brennan J.

[109] East Yarra Province constituents, submission no.5, p. 3.

[110] Dr David Neal, *Minutes of Evidence,* 24 November 2003, p. 22.

Interstate witnesses

New South Wales witnesses with knowledge of the common law administration of justice offences prior to codification in 1990 did not identify the sorts of changeover problems as suggested by Victorian witnesses such as the Criminal Bar Association.

Brian Sandland, Director, Criminal Law, had the following to say about the changeover:

> Although the lawyers who worked in the system were not overwhelmingly unhappy with the adequacy of that system —after all, we grew up with and inherited a common-law system and lawyers were used to it —the advantages were that after the amendments came through we had a neat package of laws which people in the main understood. As I say, they were more accessible. I am not aware of either the defence or the prosecution side having any problems with […] running offences against justice after these reforms came in. In fact they were welcomed in the main, as I understand it, because of the simplification of the procedure, clarification of the penalties and a certainty around what the law was. […] My feeling, from having worked in that system, was that this was a change which was welcomed and was pretty seamless in the sense that practitioners on either side did not report, to my knowledge, any difficulties with the application of the law and the new procedures that were introduced.[111]

Stephen Kavanagh, representing the New South Wales Office of the Director of Public Prosecutions agreed with this view, stating that he was at the Office of Public Prosecutions in 1990 and thought that codification "probably clarified the law and made it easier."[112]

Codes do not necessarily reduce rights and freedoms

As a counter to the argument that codification reduces rights and freedoms it can be argued that this is not a problem with Codes per se—after all it is possible to build protection of rights and freedoms and appropriate discretion into codified provisions—but rather with the policy behind Codes. Cameron Murphy, President of the New South Wales Council for Civil Liberties acknowledged this when he told the Committee:

[111] Brian Sandland, *Minutes of Evidence*, 11 November 2003, p. 15.
[112] Stephen Kavanagh, *Minutes of Evidence*, 12 November 2003, p. 38.

> I do not think it matters so much if you codify in a way that still preserves people's rights and provides for an element of discretion. The problem we have is that it is not being done.[113]

And:

> […] I do not think there is any problem generally with codification of laws. They can be made clearer for people so that you know where the law is, what your obligations are under the law and what your rights are. That is a desirable outcome. The problem is that that is not the process in terms of policy or otherwise that is being engaged in […]. So I do not think it matters so much whether the law is codified or not, whether common law is allowed to operate or whether the codification prevails over it in an area, so long as it is done with the consideration of people's basic rights and liberties. That is something that is not often done. It is often done in a haphazard, ill-formulated fashion based on a single event. We have had a number of examples of that over the last couple of years.[114]

Another interstate witness observed that the policy of prosecution had more impact on the rights of citizens rather than whether particular provisions (or indeed the whole of the criminal law, as is the case in Queensland) were codified. Asked for his response to the argument that Codes tread on the rights of the ordinary citizen, Ralph Devlin from the Bar Association of Queensland pointed out that, "it is more about the policy of prosecutions rather than whether it is a Code or common law."[115]

Arguments against codification

Codes are less able to keep up with change whereas the common law is more flexible

One of the most compelling arguments against codification is that Codes are less able to keep up with changing societal realities and expectations than the common law. Despite clearly supporting the adoption of a Model Criminal Code, MCCOC acknowledges that the "considerable lapse of time since the enactment of the Codes, requires that the existing Code provisions should be critically re-examined."[116] Even Matthew Goode acknowledges that the criticism that the Codes have become out of date and have not "moved with the times" is one which must be confronted and dealt

[113] Cameron Murphy, *Minutes of Evidence*, 12 November 2003, p. 55.
[114] Cameron Murphy, *Minutes of Evidence,* 12 November 2003, p. 55.
[115] Ralph Devlin, *Minutes of Evidence,* 13 November 2003, p. 90.
[116] MCCOC Discussion Paper, above note 5, p. ii.

with.[117] However on this point, it can also be argued that if a Code *is* regularly reviewed and amended then it can be more flexible than common law which, as noted previously, is constrained by the doctrine of precedent.

Witnesses' submission

Benjamin Lindner extolled the virtues of flexibility of the common law:

> […] The beauty of the common law is that it is flexible and it does incorporate new fact situations, things like the Internet, things like that are going to find their way into criminal activity no doubt, and just how they're incorporated into the old offences or the old language can be a matter of redefining. […][118]

Interstate witnesses

Howard Posner, Senior Solicitor Crime with Legal Aid Queensland, advanced the following argument to the Committee:

> The problem with a Code is the moment you write it down it ossifies. That is a permanent problem with any written Code—common law is forever altering. I suppose the corollary to that is because that is the nature of a Code - you tend to get your Code reforms in chunks and often driven by all sorts of considerations. With the common law you will get gradual change, incremental change all the time, but with a Code you tend to get a logjam of pressure.[119]

After referring to the fact that judges make adjustments to the Code because the Code ossifies, Posner stated:

> The practical problems of that are that possibly it creates more pressure on judges. It is more difficult for them, I think when they do feel that the Code has moved out of step to make alterations than it is in a common –law state where they can simply say, 'Look, times have changed. The common law has moved on, the public perception has moved on, and where the law ought to be has moved on—and that is legitimate. With a Code State you really have to go through the somewhat artificial process of saying, 'We have not reinterpreted the same words.' It may create a greater political pressure on judges. It makes it harder for them to alter. They do, of course, because clearly offences that remain on the statute book become less offensive and others become more offensive as times change.[120]

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[117] Goode, 'Codification of the Australian Criminal Law,' above note 20, p. 14. Later he notes that the problem of keeping up with a "rapidly changing social, economic and political reality" so they do not become "frozen in concept at the time of enactment" is a problem which "bedevils" Australian Criminal Codes: p. 18.
[118] Benjamin Lindner, *Minutes of Evidence,* 24 November 2003, p. 57.
[119] Howard Posner, *Minutes of Evidence,* 13 November 2003, p. 101.
[120] Howard Posner, *Minutes of Evidence,* 13 November 2003, pp. 101-102.

Politicised environment can mar or force amendment of Codes

This argument is the counter to the submission that Codes can "easily be amended in a principled way by the democratically elected legislature in response to changing social needs and expectations."[121] It has been pointed out that, while this is the theory, the practice can be different.[122]

It has been argued that recent attempts to reform the Griffith Code in Queensland highlight the gap between theory and reality. In 1995 a radical new Code was passed in Queensland which dispensed both with the structure and approach of the Griffith Code and also with the recommendations of the Report of the Queensland Criminal Code Review Committee chaired by Rob O'Regan QC (the O'Regan Report).[123] However, before the new Code had entered into force, there was a change of Government and the new Government announced that the Code enacted by the previous Government would be scrapped.[124] Another Committee was duly established and eventually the *Criminal Law Amendment Bill 1996* was enacted.[125] It is worth noting that the new Committee examined the O'Regan Report and the 1995 Code but made no reference to the work of MCCOC, a fact which, according to one author, does not auger well for the adoption of MCCOC recommendations in that State.[126] Author Sally Kift is critical of the process of reform in Queensland and describes the end result as "one of tinkering around the edges" of the Code which failed to introduce a number of much needed reforms.[127]

Witnesses' submissions

Brendon Falzon in his submission stated that he is opposed to codification. According to Mr Falzon the dangers of codification include political expediency and manipulation by the State Government. [128]

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[121] Kift, above note 26, p. 215.
[122] Ibid and see Greg Taylor, 'Dr Pennefather's Criminal Code for South Australia' (2002) 31(1) *CLWR* 62-102. In this article the author argues that "the legislative process is not well adapted to considering lengthy codes, and the political process is too oriented towards short-term goals rather than the long-term benefits which are thought to flow from codification:" p. 62.
[123] Ibid. O'Regan R QC, Herlihy J and Quinn M, *Final Report of the Criminal Code Review Committee to the Attorney-General*, Queensland Criminal Code Review Committee, June 1992.
[124] Kift, above note 26, p. 215.
[125] Ibid.
[126] Ibid, p. 219.
[127] Ibid. p. 216.
[128] Brendon Falzon, submission no. 4, p. 1.

Interstate witnesses

A number of witnesses in New South Wales and Queensland submitted that changes to the criminal codes were sometimes made as a result of media pressure. This particular argument against codification was put most forcefully by the New South Wales Council for Civil Liberties President Cameron Murphy who states that:

> media attention is given to a particular case and there is so-called community outrage about some way in which the court system has dealt with an issue. So codification then begins in order to correct that and put in place a regime where that cannot happen in the future. So it is all about limiting discretion.[129]

While expressing general support for Codes, the Bar Association of Queensland agreed that amendments to Codes are often fuelled as a result of media hype. On the other hand, Tony Glynn SC submitted to the Committee that:

> I am not sure if the common law rides above it (amendments fuelled by media hype around a particular issue) any more than a code does. For example, you may have a common-law offence of perverting the course of justice. There is simply nothing to stop a government legislating and passing an Administration of Justice (Attempts to Pervert) Bill and thereby effectively is changing the common law quite dramatically. What the common law does stop is minor tinkering of the sort we are seeing here [reference to the recent amendment to section 140 of the Queensland Criminal Code].[130]

Codes are not necessarily understandable to the lay person

Another argument which can be levelled against Codes also highlights the gap between theory and practice: namely while in theory Codes should be understandable to the "ordinary man [sic] of average intelligence and education"[131] the reality it is that they are often written for lawyers and can be difficult for lay people to understand.[132]

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[129] Cameron Murphy*, Minutes of Evidence,* 12 November 2003, p. 55.
[130] Tony Glynn SC, *Minutes of Evidence,* 13 November 2003, p. 89.
[131] Criminal Law and Penal Methods Reform Committee of South Australia, above note 38, quoted in Goode, 'Codification of the Australian Criminal Law,' above note 20, p. 12.
[132] Ibid. Goode quotes the Law Reform Commission of Canada as stating that "the principal shortcoming of 'codifications,' [is that] the statutes are written for lawyers and not for the general public," ibid, p. 12. While Goode advocates clarity he also states "it is quite clear that the criminal law cannot and should not be reduced to the lowest common denominator." (p. 12). He also alludes to the ongoing interpretative role of the judiciary.

Witnesses' submissions

Brendon Falzon submitted that "even if the Codes are written in a simple style that is comprehendible to the ordinary man, the reality is that lawyers will still argue about the meaning and interpretation of words".[133] He also argued that making changes to codified offences once they are enacted can lead to increased costs and may erode the community's faith in the legal system. [134]

While Benjamin Lindner does not appear to have a global position in relation to codification, it is clear from his submission that he supports limited codification to clarify and reform the law and possibly also to create separate offences for less serious examples of conduct which could be dealt with by the Magistrates' Court. However, Lindner opposes the creation of separate offences relating to interference with witnesses and evidence, which is the main "battleground" of codification in this Inquiry.

Benjamin Lindner takes issue with one of the main arguments in favour of codification, namely that specific codified offences would enhance the general understanding of criminal behaviour:

> I do not think it does place citizens in a position of not knowing whether they are committing crimes or not […]. The course of justice is anything that happens in the courts or in tribunals or in the organisation of our criminal justice system, and if you try to undermine it or somehow manipulate it, people know that that is what they are doing, and they know that that is wrong, morally wrong, legally wrong and whatever name you put on it it does not really matter, so I do not think that the vagueness of the concept itself is a criticism and that that should in any way be a reason why one should have a specific name for an offence or specific conduct.[135]

Interstate witnesses

Vice President of the NSWCCL, Pauline Wright, told the Committee that, while an attractive feature of Codes is that they make it easier for the person charged to find the law, as it would then appear in the Crimes Act, nevertheless:

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[133] Brendon Falzon, submission no. 4, p.1.
[134] Ibid.
[135] Benjamin Lindner, *Minutes of Evidence,* 24 November 2003, p. 52. Later Lindner again emphasised to the Committee that the public knows that interfering with evidence or witnesses is a crime already: "[…] It seems to me that all of the specific offences are as clear as daylight to members of the community, that such conduct is not tolerated, and it has not been tolerated for years and years, and when such conduct is committed, you do not have people ringing up their lawyer and saying, "Listen, I've just interfered with a witness. I am not sure if that's an offence or not, please tell me." It just does not happen:" p. 54.

> a person who is charged with an offence still has to go to the cases and still has to go behind the legislation to understand what the courts have done in applying the law. So the common law and the courts still have their role in interpretation of the statute. No matter how carefully a section is crafted in terms of drafting, it is going to require some kind of interpretation by the courts. Obviously with a general offence like perverting the course of justice, for instance, the common law as it has grown up is going to inform the future interpretation of that offence.[136]

Status quo is a "known quantity" whereas codes bring uncertainty

Witnesses' submissions

In its written submission the Criminal Bar Association (CBA) is arguably the strongest proponent of the 'no codification' case, [137] as the Committee has already indicated. The CBA answered "no" to nearly all the questions in the Discussion Paper which asked whether new offences relating to witnesses and evidence should be created. Many of its views on codification are implicit in its comments on the offence of perverting the course of justice where it strongly supports the retention of the general offence and expresses concern about a codification of the general offence as well as the creation of new offences dealing with witnesses and evidence.

In the course of the public hearings it became clear that the CBA was putting a "no case" partly because it took the view that no one normally puts the anti-reform position and that a coherent formulation of the arguments against reform would assist the Committee:

> […] It seems to us, the Committee, that it very seldom is that a no case is put coherently because nobody actually likes to say that law reform is bad or wants to stand in the way of law reform as a general category – that therefore it is assumed that law reform is a good thing. It may be that it is in most cases but I therefore took the view that unless there was a very good reason to say yes to any suggested reform or proposal, I would put so much as I was able to, a case for no.[138]

A corollary of this position is the view that there is an inherent value in the status quo in that it is a known quantity. As Peter Morrissey told the Committee:

> The status quo has been tilled over by lawyers and courts and explanations for what an offence may consist of and how a judge might direct a jury and what the elements of the offence are, what the consequences of conviction are, are now part of folklore.

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[136] Pauline Wright, *Minutes of Evidence,* 12 November 2003, p. 53.
[137] Of the five stakeholders whose views are being examined here.
[138] Peter Morrissey, *Minutes of Evidence,* 24 November 2003, p. 38.

> So that even a flawed offence or one which is uncertain has got at least some level of practice behind it which is an important consideration we think […] that people be able to know what they are facing and what their obligations are.[139]

Not only do lawyers understand the current common law, Morrissey suggests, but so does the community. If the general offence of perverting the course of justice "is broken up into fractured offences and if the general offence is simply a residual one to catch all of those actions which do not fit, then I think what the community understands by the offence might be lost."[140]

The uncertainty ensuing upon a change to the law was also emphasised in the CBA's written submission:

> We make the comment generally that new and rational legislative schemes are sometimes betrayed by history, ultimately producing more uncertainty. We think there is a heavy onus on reformers to demonstrate a need for reform. In part, this is because any new scheme will commence with a period of uncertainty, no doubt to the delight of appellate barristers.[141]

The Criminal Bar Association expresses reservations about such wholesale reform and for the most part supports the retention of the common law. The CBA submitted that:

> […] [O]ur concern is to ensure that members of the community are able to know and comply with the state's laws. The CBA therefore responds to your committee's invitation with an overriding concern that the law ought to be discernable and clear.
>
> The CBA has no abstract position on the desirability of reform. We do have a concern that […] relatively stable and relatively uncontroversial laws ought not be altered without very good reason. Alteration necessarily ushers in a period of uncertainty, and must therefore be closely scrutinised.[142]

Codes generally reduce rights and freedoms

Interstate witnesses

The negative impact on rights and freedoms was the chief argument against codification advanced by the New South Wales Council for Civil Liberties. As NSWCCL President, Cameron Murphy pointed out:

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[139] Ibid, p. 39.
[140] Ibid, p. 41.
[141] Criminal Bar Association, submission no. 6, p. 2.
[142] Ibid, p. 1.

> […] The main problem is that when codification of laws takes place it is generally done in a way that reduces people's rights and liberties. It is very rarely that codification will take place to support a right […] In terms of the Crimes Act generally, whenever codification has taken place you will find that it means there is less discretion for the judiciary to act. That is the outcome, and it is very rare that you will get discretion in the codification. It is usually absolute —you must do X or Y if this is the case.[143]

As a corollary of this, the NSWCCL argued that the flexibility of the common law offers greater protection for individuals' rights and freedoms:

> It is the view of the Council for Civil Liberties that the common law allows greater flexibility and because of that it caters better for protecting civil liberties. Judicial discretion in our view is something that does protect best the liberties of citizens because the judge can be looking at the particular circumstances of the particular offence on the day and only the judge knows all of those circumstances.[144]

However Pauline Wright NSWCCL Vice President acknowledged that she was unaware of any particular cases where the codification of administration of justice offences in 1990 had led to the loss of rights and freedoms:

> I personally do not consider the way that the New South Wales legislation was drafted to be retrograde. There were concerns at the time, and I know those concerns were expressed by different people, but I do not really think it has been borne out in practice. [145]

Codification brings unforeseen consequences

Witnesses' submissions

Benjamin Lindner alluded to the danger inherent in codifying the law to create specific offences namely that such offences "might incorporate all sorts of personalities and companies and individuals that might otherwise not have been the subject of the criminal law. The main example of this which Lindner cited, namely the prosecution of former Queensland Chief Magistrate, Diane Fingleton, for breaching a new reprisals against witnesses offence introduced in Queensland in 2002, will be discussed in Chapter 3 of this Report.

[143] Cameron Murphy*, Minutes of Evidence,* 12 November 2003, p. 54.
[144] Pauline Wright, *Minutes of Evidence,* 12 November 2003, p. 53.
[145] Pauline Wright, *Minutes of Evidence,* 12 November 2003, p. 53.

Interstate witnesses

Howard Posner also drew the Committee's attention to the problem of codification leading to unforeseen consequences. This problem is linked to the previously identified drawback of Codes, namely the fact that amendments often come about as a result of media hyperbole and consequent public outrage:

> […] Some of our more recent legislative changes, particularly where they have been innovative, have needed amendment and have created a lot of unforeseen consequences. While that happens all the time with the common law, it is being constantly incrementally adjusted. The problem with a Code is that it is much more difficult to change it because first of all it requires a political admission that something has gone wrong and that it needs changing, which itself requires a series of different dynamics to happen.[146]

Mr Posner also told the Committee of the difficulty of codifying offences to reflect the current common law. He pointed out that such a process nearly always results in later amendments by the Parliament:

> If you set about to codify Victorian criminal law, Parliament will not be making change; Parliament will be discovering what has already been found. But as time goes on every change that is made is then Parliament-driven, and arguably public opinion and public perception driven, rather than legal opinion driven change. As time goes on we gradually have more changes.[147]

Having reviewed the submissions both in favour and against codification the Committee then considered its views on this threshold issue.

Committee's conclusions in relation to codification

The Committee notes the divergence in opinion on the issue of codification. The Committee has decided to recommend the codification of administration of justice offences by:

- retaining general administration of justice common law offences by enshrining them in legislation; and
- creating separate statutory administration of justice offences based on the general common law offences; and

[146] Howard Posner, *Minutes of Evidence*, 13 November 2003, p. 102.
[147] Ibid, p. 103.

- utilising the MCCOC draft code provisions where appropriate.

In arriving at this conclusion the Committee has been influenced by a number of factors. First, the Committee wishes Victoria to make a contribution to the Model Criminal Code process by adopting, in so far as possible, the recommendations of MCCOC. This will assist in the harmonisation of criminal laws across Australia with all the attendant benefits of this referred to in this Chapter of the Report. The fact that MCCOC and every other Australian State and Territory, with the exception of the ACT, have adopted separate offences relating to interference with witnesses and evidence are, in our view, powerful arguments for Victoria to follow suit. However in this Report the Committee will critically evaluate MCCOC's suggested provisions and the Committee will adopt the draft code provisions where the Committee considers that they are appropriate in Victoria.

Secondly, the Committee accepts the common argument advanced in favour of Codes, namely that separate statutory offences will assist the layperson's, the lawyer's and police officer's understanding of these offences. As we indicated earlier in the Chapter, improving transparency and accessibility are guiding concepts the Committee has adopted in formulating the recommendations in this Report, and particularly in this and the following Chapter of this Report.

Thirdly, the Committee subscribes to the view, put most cogently by the Victorian Bar, that serious criminal offences should be "knowable and accessible" and agrees that defining the current general common law offences would assist in attaining this goal.

Fourthly, the Committee believes that codifying the current common law offence would shift the burden of law making in this area back to the Parliament. The Committee sees merit in the argument that legislatively defined offences are democratically made and can be democratically amended by the legislature.

The Committee however supports codification of administration of justice offences with important caveats. The Committee believes that there is the potential for unintended consequences flowing from codification and hence makes recommendations which seek to anticipate and avoid these consequences particularly where the experience of other jurisdictions has provided relevant examples. Also, as a general rule, the Committee does not recommend fundamental changes to the law in this area. In recommending the creation of separate offences, the Committee's goal is to clarify the current law and make it more transparent and accessible. It is not to

create novel offences which would not have been considered offences under the old common law.

CHAPTER TWO - PERVERTING THE COURSE OF JUSTICE

Perverting the course of justice and other related statutory offences, to be discussed in subsequent chapters of this Report, cover a wide range of conduct which has the tendency to interfere with the administration of justice. Due to a number of high profile cases, this offence and related offences have recently been in the spotlight more than the other offences under consideration in this Inquiry. Referring to administration of justice offences generally, MCCOC pointed out:

> While the number of actual prosecutions under these provisions is not large, some prosecutions have in recent times involved issues of great significance to the Australian body politic.[148]

In support of this statement MCCOC referred to the prosecution of former High Court Judge, Justice Lionel Murphy, for attempting to pervert the course of justice.[149] More recent high profile cases include the sentencing of Maritza Wales for attempting to pervert the course of justice and the conviction and sentencing of former Queensland Chief Magistrate Diane Fingleton, under a provision relating to retaliation against witnesses and others.[150]

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[148] MCCOC Discussion Paper, above note 5, p. ii. While MCCOC is referring to administration of justice offences in general, the example it cites (*R v Murphy*) was in relation to the offence of attempting to pervert the course of justice and the statement arguably best applies to this offence.

[149] This case created a furore in legal circles and in the public arena in general and numerous articles have been published on it. One useful series of articles, entitled 'Murphy' by former judges, a Law Reform Commissioner and academics appeared in the September 1985 edition of the Law Institute Journal: *LIJ* (1985) 59, Sep, 892-897.

[150] These cases are discussed in the course of the next two Chapters. The Queensland provision referred to was section 119B of the *Criminal Code Act 1899 (Qld)* entitled "Retaliation against a judicial officer, juror, witness or family."

Structure of Chapter

The offence of perverting or attempting to pervert the course of justice is a common law offence in Victoria. The wide variety of conduct covered by the common law offence is commonly dealt with in separate statutory offences in other jurisdictions. Because the Committee has been charged with setting out the current state of the law in Victoria, the first part of this Chapter sets out the common law offence in some detail. The second part of the Chapter explores the offence in other jurisdictions in which perverting the course of justice (or similar offence) is generally set out in their respective Statutes or Codes. The Committee then considers the global question for reform which is also relevant to the offences discussed in Chapter 4, namely whether the common law should be codified into separate offences.

In Chapter 3 the Committee considers two groupings of offences which are statutory offences in other jurisdictions but not in Victoria, namely falsifying, destroying or concealing evidence and protection of witnesses and others.

Terminology

The UK Law Commission has noted that the wide general offence was "variously referred to as perverting or obstructing the course of justice, obstructing or interfering with the administration of justice, and defeating the due course, or the ends, of justice."[151] In *R v Murphy*[152] the High Court of Australia made similar comments.[153] The use of various terms to describe the offence is also common in Victoria. In the publication entitled 'Victorian Higher Courts Sentencing Statistics: 1997/1998 – 2001/2002,' no fewer than six terms are used to describe the offence.[154]

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[151] UK Law Commission, above note 38, para 3.1.
[152] *R v Murphy* (1985) 158 CLR 596.
[153] Quoting a leading English criminal law text the High Court noted that the offence "is, somewhat confusingly, referred to in a number of ways—for example, defeating the due course of justice, perverting the course of justice, interfering with the administration of justice, obstructing the administration, or course of justice, defeating the ends of justice or even, until recently, effecting a public mischief:" ibid, p. 609.
[154] These were: "act tending and intending to pervert the course of public justice," "attempt to pervert the course of justice," "conspiracy to pervert the course of justice," "doing an act tending and intending to pervert the course of public justice," "doing an act tending to pervert the course of public justice," and "pervert the course of public justice." These descriptions appeared in Table 10 "Number of principal proven offences where the offence group was against property, and the offence was

Completed offence – substantive not inchoate

In the case law examined the offence is often couched in the language of an "attempt" —defendants are charged with "attempting" to pervert the course of justice. Despite this language, it has been held in numerous cases that attempting to pervert the course of justice is not an "inchoate offence."[155] Inchoate is the term referring to preliminary offences such as attempt, conspiracy or incitement.[156] Rather, attempting to pervert the course of justice is a complete offence and the law relating to attempts has no application.[157] The use of the term "attempt" in this context merely refers to the tendency of the conduct to pervert the course of justice and the intention of the accused; the substantive offence is committed whether or not a perversion of justice actually occurs. [158]

The case of *R v Rowell*[159] is generally credited as the source of authority for the proposition that attempting to pervert the course of justice is a substantive offence. In that case Ormrod LJ stated that:

> The use of the word "attempt" in this context is misleading. The appellant was not charged with an attempt to commit a substantive offence but with the substantive offence itself.[160]

The Court in *R v Machin*[161] agreed with this statement and went on to comment:

> The word is convenient for use in the case where it cannot be proved that the course of justice was actually perverted but it does no more than describe a substantive

deception, 1997/98-2001/02: Victorian Higher Court Sentencing Statistics: 1997/1998 – 2001/2002, Department of Justice Victoria, May 2003.

[155] Ian R Freckelton, *Indictable Offences in Victoria,* 4th ed, 1999, pp. 138-9.

[156] *Butterworths Concise Australian Legal Dictionary*, above note 11, p. 219.

[157] David Ross QC, *Crime: Law and Practice in Criminal Courts*, 2001, para 16.620; Freckelton, *Indictable Offences in Victoria*, above note 103, pp. 138-9. Here it is noted that sections 321M to 321S of the *Crimes Act 1958 (Vic)* which is a codification of the law on attempts, would appear not to apply to the offence of attempting to pervert the course of justice because it is a substantive rather than an inchoate offence.

[158] One author has commented that the use of the word "attempt" remains convenient for use in cases "where it cannot be proved that the course of justice is actually perverted." - Archbold, *Criminal Pleading, Evidence and Practice,* 1998, para 28-19, as quoted in Freckelton, *Criminal Law Investigations and Procedure*, above note 28, para 1.9.250.

[159] *R v Rowell* (1977) 65 Cr App R 174.

[160] Ibid, p. 180. In *R v Murphy* 63 ALR 53, p 58, the Court held that section 43 of the Commonwealth *Crimes Act 1914* (the statutory equivalent of perverting the course of justice), "creates an independent substantive offence. It can be misleading to associate it with the derivative offence of attempting to commit a substantive crime."

[161] *R v Machin* [1980] 1 WLR 763.

> offence which consists of conduct which has a tendency and is intended to pervert the course of justice.[162]

The relevant passages from *R v Rowell* and *R v Machin* were cited with approval in the Australian High Court case of *R v Rogerson.*[163]

In another case on the interpretation of equivalent sections of the Western Australian Criminal Code a judge warned of the dangers of confusing an act which is an attempt to pervert the course of justice (a substantive offence) with an attempt at such an act (an inchoate offence):[164]

> Considerations, such as whether the relevant conduct was preliminary, merely preparatory or sufficiently proximate to the commission of the substantive offence, which are relevant to the general law of attempts, do not necessarily have any application to an attempt to pervert the course of justice. *R v Murphy* (1985) 4 NSWLR 42 at 49. The offence is committed whether or not a perversion of justice actually occurs.[165]

One witness to this Inquiry, Benjamin Lindner, was critical of the use of the "archaic" use of the term attempt which he believed should be excised from the offence:

> The law on perverting the course of justice should be 'modernized' by removing archaic terms such as "attempting" in the description of the offence. This can be achieved by way of codifying the law so that the offence clearly states the mens rea and the actus reus required by the offence.[166]

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[162] Ibid, p 767. On the other hand, the Court held that a conspiracy to pervert the course of justice is, like any other conspiracy, an inchoate offence "in the sense that it is complete without the doing of any act save the act of agreeing to pervert the course of justice" per Brennan and Toohey JJ at 279.

[163] *R v Rogerson* (1992) 174 CLR 268 per McHugh J at 297-298. Brennan and Toohey JJ also commented "at common law, attempting to pervert the course of justice, like perverting the course of justice, is a substantive offence:" p. 279. The relevant passages from *R v Rowell* were also cited with approval in *Foord v Whiddet* (1985) 16 A Crim R 464, per Sheppard J, p. 468. There Sheppard J considered that counsel had fallen into the trap of equating an attempt to pervert the course of justice with other attempts (inchoate offences) and noted, "it will be recalled that in Rowell's case Ormrod LJ said that the use of the word "attempt" in this context is misleading […]."

[164] *Healy v R* (1995) 15 WAR 104. The relevant passage from *R v Machin* [1980] 1 WLR 763 was cited at p. 9.

[165] Ibid, per Malcolm CJ, p. 4.

[166] Benjamin Lindner, submission no. 8, p. 1.

Summary of elements of the offence

The prosecution must prove the following elements of the offence:

- that the accused did an act which is capable of and had a *tendency* to pervert the course of justice;
- that the accused did the act with the *intention* of perverting the course of justice; and
- that the acts represented an interference or potential interference with the *course of public justice.*

The Committee examines each of these elements in turn in the next part of this Chapter.

"Tending to pervert"—the physical element

The relevant act must have a "tendency" to pervert the course of justice.[167] It is not necessary to prove that the tendency materialised (or, in other words, that the course of justice was actually perverted).[168] Rather, the balance of judicial authority suggests that it is enough that the act creates only the possibility or risk of injustice.[169]

The facts of the case of *Foord v Whiddet*[170] provide a useful illustration of this principle.

[167] Freckelton, *Criminal Law Investigations and Procedure*, above note 28, para 1.9.290.
[168] *Foord v Whiddet* (1985) 16 A Crim R 464.
[169] Michael Grant, Case and Comment, 'Scholes,' *Criminal Law Journal* – Volume 24, April 2000, 109-114, p. 110. *R v Murray* [1982] All ER 225, p. 228: "In the view of this court, there must be evidence that the appellant has done enough for there to be a risk, without further action by him, that injustice will result." Grant notes that *R v Murphy* 63 ALR 53, p. 61 is authority for the proposition that, in assessing the tendency of conduct "whether the conduct has a prospect of producing a perversion of justice is not a necessary element of the offence."
[170] *Foord v Whiddet* (1985) 16 A Crim R 464.

Foord v Whiddet

The applicant, Judge Foord (a judge of the District Court of New South Wales) applied to the Federal Court for judicial review of an order that he stand trial on a charge of attempting to pervert the course of justice. The Prosecution case was that Judge Foord had approached Mr Briese (the Chairman of the New South Wales Bench of Stipendiary Magistrates) with the aim of influencing another stipendiary magistrate to act "otherwise than in accordance with his duty" in relation to the hearing of a particular committal proceedings. Judge Foord's counsel argued that Mr Briese was under no duty to communicate Judge Foord's request, and in fact declined to act on it, meaning that there was no actual perversion of the course of justice.

However, the Federal Court held that Judge Foord's conduct had the requisite *tendency* to pervert the course of justice and therefore satisfied the physical element of the offence. The Court found that there was sufficient evidence for the case to be heard by a judge and jury.

Judge Foord was later acquitted at the trial.

In *Foord v Whiddet,*[171] Sheppard J emphasised that it is not necessary that the conduct actually succeed in perverting the course of justice. Rather, as his Honour put it:

> No more is required than that the evidence must establish that the accused had done enough for there to be a risk, without further action by him, that injustice might result.[172]

Sheppard J acknowledged that in that case the attempt to exert influence over Mr Briese failed at the outset when Briese refused to do anything about Justice Foord's request. However, the success of the attempt is not relevant. Rather "what must be looked at is the applicant's conduct." His Honour stated:

> In my opinion the offence was either committed or not committed when he finished what he had to say to Mr Briese. I find it inescapable that at that point of time,

[171] Ibid.
[172] Ibid, p. 474.

> however momentary it was, there was the possibility or risk that what the applicant had asked might lead to injustice. Until Mr Briese's reaction to the applicant's words became manifest, the risk was there.[173]

Examples of other cases where the course of justice was not actually perverted but where there was nevertheless a tendency to pervert the course of justice are *R v Vreones*[174] and *R v Murray*.[175]

R v Vreones

The defendant, Vreones, was instructed to take samples from a consignment of wheat which it was thought would be the subject of arbitration proceedings. Vreones duly took the samples, placing them in sealed bags, but later substituted the samples with other wheat. It was found that the swap was deliberate with the intent to deceive the arbitrators. Even though no arbitration took place, Vreones was found guilty of attempting to pervert the course of justice.

R v Murray

"The appellant [Mr Murray] had provided a laboratory test specimen of his blood because he was suspected of driving a vehicle under the influence of alcohol. He was supplied with part of the sample so that he might have it independently checked. Before asking an analyst to analyse it, he tampered with it with the result that the analysis of his part of the specimen revealed a low alcohol content. He did not use the specimen in his defence of the proceedings. He was charged with attempting to pervert the course of public justice and convicted. His conviction was sustained on appeal."[176]

[173] Ibid, p. 475.
[174] *R v Vreones* [1891] 1 QB 360.
[175] *R v Murray* (1982) 2 All ER 225.
[176] This summary of the facts in *R v Murray* appears in *Foord v Whiddet* (1985) 16 A Crim R 464, p. 471.

In *Vreones*[177] the fact that the tampered evidence (the swapping of wheat samples) was never used did not defeat the offence. As Lord Coleridge CJ held:

> The offence of the defendant was completed, so far as his act could complete it, when he sent to London the samples which might or might not be used in the arbitration.[178]

The Court in *R v Murray*[179] reached a similar conclusion. The Court stated that showing that a tendency to pervert the course of justice in fact materialised (in other words that the course of justice was actually perverted), is a "powerful argument to show that there was a tendency; but it is not necessary."[180] In relation to the facts before it here, the Court held:

> [T]here plainly was evidence of such a tendency or possibility, because once the analyst – whether he was a private analyst or a public analyst – analysed this sample of blood and found that it contained a minimal quantity of alcohol, as in the particular circumstances of this case, it was a practical certainty, let alone a possibility, that that information would be communicated either to the solicitor or to the prosecuting authority, or to the police, as indeed happened.[181]

On the basis of the cases already reviewed it would seem that there must only be a possibility that the conduct could pervert the course of justice. However, in *R v Murphy*[182] the New South Wales Court of Criminal Appeal adopted an even wider definition of "tendency," finding that the word had nothing to do with the probability or possibility of the act succeeding. In its view the correct reading of *Vreones* led to the conclusion that conduct which has a tendency to pervert is an act done to fulfil the purpose or intention of perverting; tendency does not refer to the risk of the act succeeding.[183] In the Court's view:

> […] conduct will amount to an attempt [to pervert the course of justice] if it has a tendency to fulfil the guilty intention, that is to say if it is a step directed to or aimed at fulfilling that intention. Whether the conduct has a prospect of producing a perversion of justice is not a necessary element of the offence.[184]

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[177] *R v Vreones* [1891] 1 QB 360.
[178] Ibid, p. 368.
[179] *R v Murray* (1982) 2 All ER 225.
[180] Ibid, p. 228.
[181] Ibid, pp. 228-229.
[182] *R v Murphy* 63 ALR 53.
[183] Grant, above note 116, p. 113. *R v Murphy* 63 ALR 53, p. 59: "In our opinion tendency to pervert as used by Pollock B did not mean tending to achieve the end of perverting but tending to fulfil the purpose of perverting. At all events the conduct in *Vreones* was sufficient to support the conviction for acting with intent to pervert the course of justice not primarily because of any relation it bore to possible or probable consequences but because of its relation to the accused's intentions or purposes."
[184] *R v Murphy* 63 ALR 53, p. 61.

Does there need to be a substantial tendency as distinct from a mere theoretical or remote tendency?

The cases and commentaries on this point are not entirely clear. Freckelton cites *R v Foord*[185] as authority for the proposition that there must be a substantial tendency as distinct from a mere theoretical possibility or remote possibility[186] yet Maxwell J, the single Judge sitting in that case, stated that he saw "no warrant or justification for concluding that the Crown is obliged to prove a "substantial" tendency as distinct from a mere theoretical or remote possibility."[187]

The case of *Healy v R*[188] lends authority to the proposition that there must be at least a "real possibility" that what the accused did might lead to injustice. However, the cases it cites in support of this proposition, namely *R v Murray*[189] and *Foord v Whiddet*[190] refer only to a "possibility" or a "risk" rather than a "real" possibility or risk.[191]

Legal commentator, Michael Grant, takes the view that although the cases "do not speak with one voice" on the meaning of "tendency," there appears not to be a requirement that a substantial tendency needs to be proved; rather all that is required is that there is a risk or possibility (however theoretical or remote) that justice might be perverted.[192]

On the balance of the authorities, it seems that a substantial tendency will not be required. However, one case which appears to indicate that a substantial tendency is required and that conduct which has little hope of succeeding (or is "doomed to

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[185] *Foord* (1985) 20 A Crim R 267. This case involved the same set of facts as *Foord v Whiddet* and arose out of a request for a ruling as to elements of the offence of perverting the course of justice.
[186] Freckelton, *Criminal Law Investigations and Procedure*, above note 28, para 1.9.290.
[187] *Foord* (1985) 20 A Crim R 267, p. 268.
[188] *Healy v R* (1995) 15 WAR 104. *R v Murray* and *Foord v Whiddet* are cited as authority for the proposition that "the tendency of an act or course of conduct to pervert the course of justice will have been proved by showing that there was a risk, without further action by the appellant, that what he had said or done might lead to an injustice in the sense that there was a real possibility that what he had said or done might lead to injustice:" p. 108.
[189] *R v Murray* (1982) 2 All ER 225.
[190] *Foord v Whiddet* (1985) 16 A Crim R 464.
[191] The relevant words in *R v Murray* are: "[…] there must be evidence that the appellant has done enough for there to be a risk, without further action by him, that injustice will result. In other words, there must be a possibility that what he has done 'without more' might lead to injustice […]:" p. 228. The relevant passage from *Foord v Whiddet* is quoted above.
[192] Grant, above note 116, p. 112. In particular, Grant cites the cases of *Foord v Whiddet* 16 A Crim R 464 and *Foord* (1985) 20 A Crim R 267.

failure") will not satisfy this requirement is *Scholes.*[193] The comments made about the offence are not binding on later courts because the initial charge of attempting to pervert the course of justice was dropped. Nevertheless, given it is a recent Victorian Court of Appeal decision, the case of *Scholes*[194] is worth discussing here.

Scholes

Scholes, who had recently been released on parole and was suspended from driving, borrowed a car and drove it dangerously, resulting in the death of his brother and a young woman who had been travelling with him. Immediately following the crash, Scholes got out of the vehicle and roughly dragged the badly injured and bleeding woman into the driver's seat of the car. He subsequently told bystanders at the scene and the police that the woman had been driving the car too fast and had lost control of the vehicle.

As it turned out the actions of Scholes were unlikely to ever succeed in covering up the truth as witnesses had observed him dragging the woman from the passenger's seat to the driver's seat. In addition, the woman's injuries were such that she could not have been sitting in the driver's seat at the time of the accident.

There was considerable discussion about the relevance of Scholes's conduct following the collision. Much of that discussion concerned its relevance for the purpose of sentencing him on the charge of culpable driving and is therefore not relevant here. However, Tadgell JA, with whom the other two judges in the case agreed, also commented on whether the conduct could have amounted to the offence of attempting to pervert the course of justice. In his view it could not. The Judge appeared to reach this conclusion on the basis that the attempt was inept and so doomed to failure that it could not possibly have the tendency to pervert the course of justice:

[193] *Scholes* (1998) 102 A Crim R 510.
[194] Ibid.

> It is fanciful to suppose, in the circumstances of this case, that any of the respondent's post-accident conduct could have had that tendency: it amounted, I should think, to no more than a vain and pathetic attempt by the respondent to avoid reality.[195]

From this passage it is clear that the Court of Appeal took the view that the physical element of the offence had not been established.[196] The main circumstance of the case which Tadgell J appeared to be referring to was the fact that Scholes's actions had been witnessed by others and that the injuries of Scholes and the female passenger were such that she could not have been the driver.[197]

It has been argued that the reasoning in *Scholes* on this point is flawed. As one commentator put it:

> There would not appear to be any sound reason, in either law or policy, why an act aimed at perverting the course of justice should not amount to an offence simply because it was witnessed and not likely, therefore, to succeed.[198]

Importantly, the reasoning appears to be tantamount to arguing that, if it is impossible for the conduct to succeed in perverting the course of justice, the offence is not established.[199] Commentator, Michael Grant has argued that this is not desirable, noting that such an approach could lead to a situation where two persons committing the same act with the same intention could be categorised differently "depending on fortuitous circumstances such as the presence or absence of witnesses or the general competence of execution of the criminal plan."[200]

The Committee considers that the law on the meaning of the word tendency is not entirely clear. The balance of authority suggests that a possibility or risk of perverting the course of justice will be enough (and that this risk need not be substantial), yet the Court appeared to adopt a wider approach to tendency in *R v Murphy* and a narrower approach in *R v Scholes*. In the Discussion Paper the Committee asked for witnesses' views as to the correct approach to "tendency" to pervert the course of justice and as

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[195] Ibid, p. 524.
[196] Grant, above note 116, p. 111.
[197] Ibid and *Scholes* (1998) 102 A Crim R 510, p. 516: "The respondent's pretence that Mrs Swaintston-Dwyer had been driving the Corolla was of course never sustainable, as his plea of guilty ultimately acknowledged. Even leaving aside the observations of the various witnesses at the scene who saw the front-seat substitution, and the riposte of the boy Thomas, Mrs Swainston-Dwyer could almost certainly not have suffered the massive injury to the left side of her head had she not been seated in the front nearside passenger's seat; and the respondent could not have escaped injury (as he substantially did) had he occupied that seat."
[198] Grant, above note 116, p. 111.
[199] Ibid, p. 112.
[200] Ibid, p. 114.

to whether the law needed to be clarified. The more general question as to whether the common law offence of perverting the course of justice should be in statutory form is discussed later in this Chapter.

Witnesses' submissions on tendency

Submissions received by the Committee were split between those advocating legislative change to clarify the meaning of 'tendency' and those who believe that no reform is necessary. The Criminal Bar Association took the view that no clarification to the term is required on the basis that authority favours the view that a *possibility* that the act would pervert the course of justice is sufficient and that therefore the tendency need not be substantial:

> This is consistent with the law that the offence is a substantive one rather than an attempt; the offence exists to deter and punish trying, not trying skilfully. It is consistent with the reasoning in the recent "attempt to pervert" case of *R v Briggs.* In the *Queen v Foord,* Maxwell J found no warrant or justification for requiring the Crown to prove a "substantial tendency," and we share that view.[201]

Benjamin Lindner agreed that the meaning of tendency is clear, having been settled by the High Court in *R v Murphy* which held that 'tendency' is conduct which is "a step directed to or aimed at fulfilling that intention [to pervert the course of justice.]"[202] Accordingly, Lindner concludes that there is no need to clarify the term tendency in legislation, taking the view that "the difficulty is not with the meaning of the term, 'tendency' but with its application to particular facts."[203] In Lindner's view merely swapping the term 'tendency' for a different term such as 'possible risk,' would not clarify the application of the concept to particular fact situations.[204]

Both Lindner and the Criminal Bar Association agreed that the Victorian case of *R v Scholes* does not confuse the issue of 'tendency.'[205] The Criminal Bar Association, for instance, refers to the passage from Tadgell JA's judgment (cited above), noting

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[201] Criminal Bar Association, submission no. 6, p. 3.
[202] Benjamin Lindner, submission no. 8, p. 1; quotation taken from *R v Murphy* 63 ALR 53 at 61.
[203] Benjamin Lindner, submission no. 8, p. 1.
[204] Ibid, p. 1.
[205] Criminal Bar Association, submission no. 6, p 1; Benjamin Lindner, submission no. 8, p. 1. Lindner submits that the reference to *Scholes* in the Discussion Paper is misconceived because the case was an appeal against sentence rather than conviction and because the charge of attempting to pervert the course of justice had been withdrawn. On this basis, he submits "the case is not authority for any particular view, or definition, of the meaning of 'tendency."

that, although the first part of the passage concerned the term 'tendency' the ultimate conclusion was that Scholes's conduct amounted to "not more than a vain and pathetic attempt by the respondent to avoid reality." In other words, as the Criminal Bar Association put it:

> […] [T]he ultimate conclusion appears to be that Scholes lacked the relevant mens rea —his was an attempt to avoid reality rather than to pervert justice. In any event, the comment of Tadgell JA was dicta only. [206]

In contrast, both Victoria Legal Aid and the Director of Public Prosecutions advocate legislative reform to clarify the law in relation to 'tendency.' Victoria Legal Aid points out that:

> The law in relation to this issue has different strands of authority and while it is possible to coalesce the various judgments that the Discussion Paper highlights, it would seem that the meaning of tendency could be clarified productively. [207]

The Director of Public Prosecutions acknowledges that the issue could be clearer than is currently the case and also supports clarification.[208]

However, these stakeholders express opposing views as to the correct approach to reform: should the legislature take a narrow approach to tendency or a broad one? Victoria Legal Aid supports the former approach to tendency—namely a narrow approach. In its view the act of the accused ought to create a substantial or real possibility or risk of injustice and inept attempts or attempts which are "doomed to failure" should not amount to a 'tendency' for the purposes of the offence.[209] The Director of Public Prosecutions, on the other hand, believes that the correct position is that any risk of a perversion of the course of justice should suffice (rather than a real or substantial risk) and that:

> To the extent that Tadgell JA's comments in *Scholes* may be interpreted to mean that certain acts cannot constitute an attempt to pervert, only because of the ineptness and thus low probability of succeeding, it is our view that those comments are unduly restrictive in relation to the proper scope of this offence.[210]

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[206] Criminal Bar Association, submission no. 6, p.3.
[207] Victoria Legal Aid, submission no. 7, p. 1.
[208] Director of Public Prosecutions, submission no. 9, p. 1.
[209] Victoria Legal Aid, submission no. 7, p. 1. VLA refers to *Healy v R* in relation to the first point and *Scholes* in relation to the second point.
[210] Director of Public Prosecutions, submission no. 9, p. 1.

Committee's conclusions on tendency

Due to the Committee's view that the common law offence of attempting to pervert the course of justice should be legislatively rendered in a manner which is consistent with the current common law, the Committee considers that the term "tendency" should be clarified. The Committee agrees with the submissions of the Criminal Bar Association and Benjamin Lindner that current case law indicates that the term tendency means a mere possibility that the act will pervert the course of justice. The Committee also agrees that *Scholes* is not binding on the issue of tendency and that it should not be taken to indicate that inept attempts to pervert justice (which have no real or substantial tendency to pervert justice) will not constitute the offence. However, in order to clarify this position in a new legislative rendering of perverting the course of justice, the Committee agrees with the Director of Public Prosecution that the law should be clarified along these lines.

The Committee notes that other Australian jurisdictions and the Model Criminal Code do not use the word "tendency" in their legislative provisions for perverting the course of justice. The New South Wales Director of Public Prosecutions informed the Committee that the omission of the term "tendency," which is a requirement at common law, has led in that State to some debate about whether section 319 of the *Crimes Act 1900 (NSW)* requires proof of a tendency to pervert the course of justice.[211] The Court of Criminal Appeal has held that the ingredient still exists.[212]

In accordance with our aim to codify the current common law position the Committee considers that the term tendency should be used and defined in any statutory rendering of the common law offence. This would avoid the situation which has arisen in New South Wales where the position was clarified only through litigation.

[211] Greg Smith, *Minutes of Evidence,* 12 November 2003, pp. 37-38.
[212] Ibid. Mr Smith refers to the cases of *Karageorge* [1998] 103 A Crim R 157 and *Charles* CCA 23.3.1998.

Recommendation 1

That a new statutory provision be created for perverting the course of justice that incorporates the common law elements of the offence so that the new provision would make it an offence to "do an act that is capable of and has a tendency to pervert the course of justice".

That the provision define the meaning of "tendency" as meaning "a possibility or risk that the course of justice will be perverted".

"Intending to pervert"—the mental element

The next element of the offence which the prosecution must establish is that the accused did the act which had the tendency to pervert the course of justice *with the intention of* perverting the course of justice.

As we will see below, in Victoria there appears to be some doubt as to whether knowledge that an act has the potential to pervert the course of justice is sufficient to satisfy the mental element of perverting the course of justice.

MCCOC

The MCCOC provision clearly refers to intention as the mental element of the offence. Section 7.5.1(1) provides:

> A person who, by his or her conduct, intentionally perverts the course of justice is guilty of an offence.

Victoria

A person can have the intention of perverting the course of justice even if he or she does not actually have the concepts of "perverting" and "the course of justice" in mind. As a Judge in a recent Victorian Supreme Court case put it, "it is not necessary

that the alleged contemnor[213] have these concepts in mind at the relevant time; indeed it would be surprising if this were the case."[214] Rather, according to the leading High Court case of *Meissner v R*[215] the facts of which we summarise in the case study below:

> It is sufficient proof of intention that the person intended to engage in conduct for the purpose that in law constitutes the actus reus of an attempt to pervert the course of justice.[216]

Meissner v R

Virginia Perger was charged with making a false statutory declaration. In the declaration she had stated that the appellant Joseph Meissner had arranged for her to be photographed in compromising positions with various New South Wales politicians on his boat. Perger had intended to plead not guilty to the charge however Meissner sought to persuade her to change her plea to guilty. The evidence established that "it was clear that the appellant was, at least in part, motivated by a new-found concern to protect the interests of those whose reputations would be damaged if Ms Perger either contested her guilt […] or in mitigation of a plea of guilty, gave or led evidence aimed at establishing the truth of some of those statements."[217] Central to these conclusions were various tape recordings of conversations between Meissner and others which included references to "using her", that Perger was "pissed off for ever pleading guilty" and had "wanted to fight it" but that he "couldn't let that happen because that would have brought everyone undone for nothing."[218] Later in the recording, Meissner commented: "You can understand her position though, like you know, how would you like to bloody well take a rap and

[213] A contemnor is "a person who has been found to have committed a contempt of court:" *Butterworths Concise Australian Legal Dictionary*, above note 11, p. 91. *R v McLachlan* involved contempt charges but case law on perverting the course of justice was considered and applied.
[214] *R v McLachlan* [1998] 2 VR 55, at p. 67 per Byrne J, citing this part of *R v Meissner* with approval.
[215] *Meissner v R* 1994-1995 184 CLR 132.
[216] Ibid, p. 144.
[217] Ibid, p. 149.
[218] Ibid, p. 139.

then get shitted on, you know […]" and "You know, she got paid for it, so all I am interested in is that I don't become [expletive] undone out of all this 'cause, you know, to get a person to plead guilty, that's a conspiracy, you know."[219]

Further evidence relevant to the case was that on the day after Ms Perger changed her plea to guilty, Mr Meissner paid a substantial amount of money towards her legal expenses and into a joint account in the name of himself and Perger. Part of this money was used for the benefit of Ms Perger.

Held: the appellant had the requisite mental element of the offence.

Motive is not an element of the offence but it is material to ascertaining the intention the person had when engaging in the relevant conduct. In *Meissner v R*[220] the High Court noted that if the appellant's motive had purely been to assist the witness, it would have been "hard to conclude that he intended that she should enter a plea otherwise than in the exercise of a free choice in her own interests."[221] On the other hand, if the appellant's motive was to protect his political associates it is but "a short step to the inference that he intended to procure her to plead guilty when she would not or might not otherwise have done so."[222] In this case it was relevant that the appellant had clearly been at least partly motivated by a concern to protect the reputations of his associates.

Is it enough that a person acts in the knowledge that his or her act has the potential to pervert justice?

Leading criminal law text book author, Peter Gillies,[223] poses the question as to whether it is enough to satisfy the mental element of the offence that the defendant acts in the knowledge that his or her act has the potential to pervert the course of

[219] Ibid, p. 140.
[220] Ibid.
[221] Ibid, p. 144.
[222] Ibid.
[223] Gillies, above note 9.

justice. In Gillies' view the reported cases do not shed much light on this issue.[224] According to Gillies, in principle knowledge should be sufficient to establish the mental element of the offence because otherwise the scope of the offence may be unduly narrowed. He elaborates on this view as follows:

> This is because frequently D will be acting to bring about some more limited object, with the obstruction or potential for the obstruction of justice representing an incidental by-product of D's conduct. Thus, there is no doubt that where D accepts money from a party to perjure herself or himself, D incurs liability for the offence notwithstanding that D's sole object is to earn money, and he or she is unconcerned about the merits of the case or whether the court will be deflected from a proper determination by virtue of her or his perjury.[225]

Gillies cites the cases of *Hatty v Pilkinton*[226] *R v Panayioutou*[227] and *Meissner v R*[228] in support of his proposition that knowledge should suffice. *Hatty v Pilkinton,* for example*,* was cited on the grounds that this decision held that the defendant's motive in acting is irrelevant. [229] As Gillies put it "If D knew that D's conduct perverted justice, or had this potential, D's belief in the ethical propriety of his conduct will not absolve him."[230]

However, *Hatty v Pilkinton* (no. 2)[231] sheds doubt on this conclusion in the following passage:

> An intention to do an act that has a tendency to pervert the course of justice, knowing that it has that tendency, is not however necessarily the same thing as an intention to pervert the course of justice. If proof of the offence requires what may be termed a literal intention to pervert the course of justice, proof of the intentional doing of an act that is known to have that tendency may be insufficient because it may leave open the possibility that an actual perversion of the course of justice was not intended. There is a difference between intending interference and risking interference. The classic formulation of the elements of the common law offence by Baron Pollock in *Vreones* at 369, which has often been repeated, is in terms of an intention to pervert the

[224] Ibid, p. 837.
[225] Ibid.
[226] *Hatty v Pilkinton* (1992) 108 ALR 149.
[227] *R v Panayioutou* [1973] 1 WLR 1032.
[228] *Meissner v R* 1994-5 184 CLR 132. Gillies notes that "in Meissner […] it was stated that D has the intent to pervert justice where D intends to commit the actus reus of the offence (that is, D has the purpose of bringing about the occurrence of the prescribed act in circumstances disclosing that at law it is the actus reus of the offence:") Gillies, above note 9, p. 838.
[229] Ibid. In *R v Panayioutou* [1973] 1 WLR 1032, there is no passage to the effect that knowledge is enough but Gillies argues that the decision nevertheless reflects this principle. In that case two men agreed that one of them should bribe a woman who had complained to the police that one have them had raped her. It was unimportant that the purpose was to evade prosecution of rape and not specifically to pervert the course of justice.
[230] Gillies, above note 9, p. 838.
[231] *Hatty v Pilkinton (no. 2)* 108 ALR 149.

> administration of justice, not an intention to do an act that has a known tendency to pervert the administration of justice.[232]

Given that there appears to be some doubt as to whether knowledge will satisfy the mental element of perverting the course of justice, in the Discussion Paper the Committee asked whether the law in Victoria should be clarified to provide that knowledge that an act has the potential to pervert the course of justice will be sufficient to satisfy the mental element of perverting the course of justice.

Witnesses' submissions in relation to mental element

The Criminal Bar Association and Benjamin Lindner both specifically submit that the law need not be clarified on the basis that the common law is clear; intention must be proved and knowledge is not enough. However, the Criminal Bar Association expresses 'some reservations' about this view.[233] According to the Criminal Bar Association the foundational cases refer to intention rather than exclusive intention; while motive and knowledge may each constitute evidence of intention, it is intention which must be proved.[234] "The Gillies thesis, notes the submission, "seems to conflate intention with motive". Gillies would substitute a species of recklessness for the intention which all the cases stipulate."[235] While the case law stipulates intention must be proved, the Criminal Bar Association notes that the Court of Criminal Appeal recently left open the possibility that knowledge that the act has the potential to pervert the course of justice is enough when it noted:

> Reference was also made to the question whether recklessness on the part of the applicant as to truth or falsity might have been sufficient to establish the offence, but it is not necessary for the purposes of this application to decide the point.[236]

The Criminal Bar Association's view is that "should the point fall to be decided, intention (doubtless proved by knowledge) will remain the standard the Crown must meet" and notes that there are "powerful arguments" against widening the scope of the mental element:

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[232] Ibid, p. 157.
[233] Criminal Bar Association, submission no. 6, p. 4.
[234] Ibid.
[235] Ibid.
[236] Ibid. The case referred to in this quotation is *R v Coombe* [1999] VSCA 94 (10 June 1999).

> The actus reus of the offence includes acts of relatively little importance, including acts creating a mere remote possibility of the perversion of justice. In these circumstances, the mens rea ought to be expressed as "intention." It is hard to justify reforms which render liable a reckless quixotic act. Accepting Rowell and other cases, the word "attempt" must have some meaning. It imports intention as the mental state. The policy of the law in this offence is to punish and deter genuine attempts, not acts with half-foreseen consequences.[237]

Benjamin Lindner agrees with the CBA's conclusion that case law confirms that intention is the required mental element[238] and he agrees with this approach, noting that:

> If clarification of the mental element is demanded, then the law should expressly state that proof of neither recklessness nor negligence will suffice.[239]

Victoria Legal Aid also submits that intention is the appropriate mens rea, implying that the law need not be clarified.[240]

The Office of Public Prosecutions appears to take a different view of the mental element for perverting the course of justice, submitting that:

> In our view the mental element of the offence should be satisfied by the doing of an act which has a tendency to pervert the course of justice, whilst being aware of that tendency and regardless of any moral or ethical justification which might exist in the mind of the actor. For these purposes, perverting the course of justice may include improperly influencing an accused person to change his or her plea, for example from "not guilty" to "guilty," despite the actor subjectively believing the accused person to be guilty.[241]

Doing an act "whilst being aware" of a tendency to pervert the course of justice is arguably the same as doing an act *in the knowledge* that it may have the tendency to pervert the course of justice. Hence, in contrast to the other stakeholders, the Office of Public Prosecutions supports a more expansive construction of the mens rea based on knowledge rather than intention.

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[237] Ibid. The case referred to in this quotation is *R v Rowell* (1977) 65 Cr App R 174.
[238] Benjamin Lindner, submission no. 8, p. 2. Lindner argues that the mental element was adequately stated by the High Court in *Meissner v R,* namely "The intention required to constitute the offence […] is an intention to do something which, if achieved, would pervert the course of justice." – (1995) 184 CLR 132, 159.
[239] Ibid.
[240] Victoria Legal Aid, submission no. 7, p. 2. The submission further notes that "as far as knowledge relates to intention, knowledge that an act has a "real" or "substantive" potential to pervert the course of justice ought to be sufficient to satisfy the mental element of perverting the course of justice."
[241] Office of Public Prosecutions, submission no. 9, p. 2.

Committee's conclusion in relation to mental element

The Committee agrees with witnesses to this Inquiry that intention is the appropriate mens rea given the seriousness of the offence and the high penalty it carries. This will remove any doubt about whether knowledge satisfies the mental element currently.

It is therefore the Committee's recommendation that the legislative rendering of the common law offence of perverting the course of justice should refer to intention as the mental element of the offence. The MCCOC provision provides a useful model. Section 7.5.1(1) provides:

> A person who, by his or her conduct, intentionally perverts the course of justice is guilty of an offence.

Recommendation 2

That the proposed new statutory offence of perverting the course of justice specify intention as the mental element of the offence.

Influencing a person to change his or her plea

In his judgment in *Meissner v R*[242] Deane J explains why influencing a person to change his or her plea will often amount to an attempt to pervert the course of justice:

> The proper administration of criminal justice is, to no small extent, dependent upon the ability of courts to proceed on the basis that a plea of guilty or not guilty, with all that it entails, is made by an accused in the exercise of his or her own free choice. To endeavour, by intimidation, inducement or other means, to overbear the free choice of a person to plead not guilty and thereby bring about a tainted plea of guilty is clearly to attempt to pervert the course of justice in the sense of attempting adversely to interfere with the proper administration of justice. And that is so even in a case where the person whose free will is sought to be overborne is, or is thought to be, guilty.[243]

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[242] *Meissner v R* 1994-1995 184 CLR 132.

[243] Ibid, pp. 148-9. In his article 'Perverting Justice' (1996) 112 *L.Q.R* 202-205, Bernard Brown notes that the decision in *Meissner* "breaks new ground by upholding the conviction of a man who sought by wrongful means to influence a woman to plead guilty to an offence notwithstanding the assertion that he believed she was guilty. At his trial the prosecution had made no effort to show that the woman was not guilty of making a false statutory declaration:" p. 202.

However, his Honour went on to comment that circumstances may arise in which the borderline between legitimate persuasion of an accused person and what constitutes the offence will be difficult to discern.[244] In such circumstances, the relationship between the parties and the "overall perception of real criminality"[245] are likely to be significant:

> Thus, for example, a degree of pressure which would be quite legitimate if exerted by an accused's own lawyer acting solely in the accused's interests may be completely unacceptable if exerted by a stranger acting for a collateral and selfish purpose of his or her own.[246]

These passages, which have been cited with approval in subsequent decisions,[247] illustrate the importance of the intention of the accused in exerting the pressure on the witness to change his or her plea (which is often discernable from the motive, as we saw above).[248]

"Course of public justice"

The next element of the offence of perverting the course of justice is the requirement that the acts represented an interference (or potential interference) with the "course of justice." What is meant by the "course of justice?" The High Court of Australia has explained the term as follows:

> The course of justice consists in the due exercise by a court or competent judicial authority of its jurisdiction to enforce, adjust or declare the rights and liabilities of persons subject to the law in accordance with the law and the actual circumstances of

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[244] *Meissner v R* 1994-1995 184 CLR 132.
[245] Ibid, p. 149.
[246] Ibid.
[247] In *R v Ard* [2000] NSWCCA 443, after referring to a passage from the trial judge's directions, the Supreme Court of the New South Wales Court of Criminal Appeal noted: "Although there is some ambiguity, this passage seems to suggest that dishonest evidence given for the purpose of ensuring an innocent person is not convicted does not constitute the crime of attempting to pervert the course of justice. This is wrong. Any attempt to induce a witness to give false evidence on oath or refrain from speaking the truth will constitute the offence, as will any bribery of a witness, even for the purpose of inducing him or her to tell the truth: *Meissner v The Queen:* para 210. In *Soteriou v Police* [2000] SASC 256 some of these and other relevant passages from *Meissner* were cited with apparent approval.
[248] See generally Phillip Priest, 'Review of Judgements of the High Court,' *LIJ* (1995) 69 No. 11 Nov, 1150, who notes that in *Meissner* "it was held that when the conduct has tended to deprive a person of free choice, the offence is not made out unless the conduct was accompanied by an intention to pervert the course of justice." See also Peter MacMillan, 'Criminal Law Survey,' *Brief* 22 1995, 22-24. Commenting on *Meissner,* he notes that the essence of the matter is "whether the conduct […] is designed to protect the interests of others as opposed to those of the accused:" p. 22.

> the case […] The course of justice is perverted (or obstructed) by impairing (or preventing the exercise of) the capacity of a court or competent judicial authority to do justice.[249]

In this Chapter the Committee examines in what sense the "course of justice" must have been embarked upon to satisfy this element of the crime.[250] The following two case studies, *R v Rafique*[251] and *R v Selvage*,[252] are instructive because they give us an example of one case where this element was satisfied and another case where it was not.[253]

R v Rafique

The three appellants, Rafique, Sajid and Rajah, had been with the deceased in a London public park at night where the deceased planned to test a new double-barrelled shotgun. While one of the men was holding the gun it accidentally discharged, killing the deceased. The group left the scene in panic. After driving another person who had been present home, Rafique, Sajid and Rajah each committed acts at the centre of the charge: one of the men broke open the gun and a second one removed the spent and live cartridges which were thrown out. The third man threw the gun into the bushes. They then abandoned the car and went to Birmingham for 12 days. Upon their return and after consulting a solicitor Rafique, Sajid and Rajah gave themselves up to the police. They were subsequently charged and convicted with doing acts which had a tendency to pervert the course of public justice.

Their conviction was upheld on appeal.

[249] *R v Rogerson* (1992) 174 CLR 268, p. 280.
[250] Freckelton, *Criminal Law Investigations and Procedure*, above note 28, para 1.9.400.
[251] *R v Rafique* [1993] QB 843.
[252] *R v Selvage* [1982] 1 QB 372.
[253] Although the High Court of Australia has found fault with some of the reasoning in these decisions, it agreed with the results: *R v Rogerson* (1992) 174 CLR 268, p. 283.

R v Selvage

The two defendants, Mrs Selvage and Mr Morgan had agreed that Selvage would use her position as a clerical assistant at a Driver and Vehicle Licensing Centre to remove the endorsements from Morgan's licence. Her attempts to do so failed, were discovered and both Selvage and Morgan were charged with conspiracy to pervert the course of justice. At the time the attempt to remove the endorsements was made, no proceedings or investigations relating to the licence or any other issue were in progress or imminent.

Selvage and Morgan were acquitted of the offence.

In the first case study *(R v Rafique*[254]*)* it was held that the acts fulfilled this element of the crime. Here, one of the appellants, with the knowledge of the others, had discharged a gun, killing another man. It was, as the Court put it:

> open to the jury to conclude that, to put it no higher, the possibility of judicial proceedings must have been in the contemplation of the appellants. An act had occurred which was likely to lead to a specific charge in judicial proceedings, as indeed it did. At the very least there was bound to be an inquest. In those circumstances, the disposal of the shotgun and the cartridges had a tendency to pervert the course of justice.[255]

In *R v Selvage,*[256] on the other hand, it was held that there was not the "slightest suggestion"[257] that criminal proceedings were pending or imminent or being investigated or that they were within the contemplation of the defendants.[258] It was held that, in these circumstances, the mere act of altering the records of endorsements on licences could not in itself be said to be an interference with the "course of justice."[259]

[254] *R v Rafique* [1993] QB 843.
[255] Ibid, p 851.
[256] *R v Selvage* [1982] QB 372.
[257] Ibid, p. 381.
[258] Ibid.
[259] Ibid.

Are police investigations part of the "course of justice?"— clarification of the law in Australia: *R v Rogerson*

There appears to be some distinction between English and Australian cases as to whether the "course of justice" extends to police investigations. Cases such as *R v Selvage* and *R v Rafique* indicate that English courts have adopted a wider definition of the course of justice than the High Court of Australia.[260] In *R v Rogerson*[261] the High Court noted that in some cases (and *R v Selvage* was cited as a prominent example), the course of justice has been held to extend to misleading the police in the course of their investigations with the result that police investigations have been treated as part of the course of justice.[262] Their Honours noted that, although they agreed with the result in such cases, they did not accept the reasoning.[263] The High Court was particularly critical of the extension of the "course of justice" in *R v Selvage*[264] which indicated that police investigations could be within the course of justice. According to the Judges, the course of justice does not commence until the "jurisdiction of some court or competent judicial authority is invoked."[265] It was held that "neither the police nor other investigative agencies administer justice in any relevant sense."[266]

On the other hand, the High Court held that, although police investigations into possible offences against the criminal law or a disciplinary code do not form part of the course of justice, "an act calculated to mislead the police during investigations may amount to an attempt to pervert the course of justice."[267] The Court summarised the position as follows:

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[260] This is confirmed by Archbold who expresses the view that the question of whether conduct had the capacity to pervert the course of justice could not depend on whether investigations into the matter had begun. The author cites the case of *R v Kiffin* [1994] Crim L.R. 449, CA as authority for the following statement: "Even if a police investigation establishes that no offence has been committed, the inquiry is still part of the administration of justice. The concealment or destruction of evidence relevant to an investigation is clearly an act which has the tendency to pervert an investigation by turning it from its right course. To hold otherwise would mean that a person who destroyed the only evidence of a crime before an investigation had begun would not commit the offence:" Archbold, above note 106, para 28-22.
[261] *R v Rogerson* (1992) 174 CLR 268.
[262] Ibid, p. 283.
[263] Ibid.
[264] *R v Selvage* [1982] 1 QB 372.
[265] *R v Rogerson* (1992) 174 CLR 268, p. 283.
[266] Ibid.
[267] Ibid, p. 284.

> An act which has a tendency to deflect the police from prosecuting a criminal offence or instituting disciplinary proceedings before a judicial tribunal or from adducing evidence of the true facts is an act which tends to pervert the course of justice and, if done with intent to achieve that result, amounts to an attempt to pervert the course of justice.[268]

The following statement summarising the meaning of the "course of justice" is worth quoting in full:

> The gravamen[269] of the offence of an attempt to pervert the course of justice is an interference with the due exercise of jurisdiction by courts and other competent judicial authorities. As the courts exercise their necessary and salutary jurisdiction to hear and determine charges of offences against the criminal law only when their jurisdiction is invoked, an act which has a tendency to deflect the police from invoking that jurisdiction when it is their duty to do so is an act which tends to pervert the course of justice. Subject to a limited discretion not to prosecute, it is the duty of the police to prosecute when offences are committed.[270]

Thus, an act which tends to deflect the police from prosecuting a criminal offence or finding out the true facts of a case can be an act which tends to pervert the "course of justice."[271]

Committal proceedings—part of the course of justice

The High Court case of *R v Murphy*[272] has clarified that committal proceedings[273] are considered to be part of the course of justice:

> Whatever the limits of the offence there can be no doubt that at common law, and in jurisdictions where the offence has been defined by statute, "the course of justice" would include the conduct of committal proceedings.[274]

The Committee did not pose a specific question in relation to the term the "course of justice" in the Discussion Paper and therefore did not outline possible arguments for

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[268] Ibid.
[269] Gravamen means "the main thrust or crux of the thing complained against; the substantial aspect of a charge against the accused; the core act against which a prohibition has been imposed:" *Butterworths Concise Australian Legal Dictionary*, above note 11, p. 196.
[270] *R v Rogerson* 1991-1992 174 CLR 268, p. 284.
[271] MCCOC Discussion Paper, above note 5, p. 57.
[272] *R v Murphy (*1985) 158 CLR 596.
[273] A committal hearing is a hearing to decide whether there is enough evidence to justify the person charged with the offence to be required to stand trial: see *Butterworths Concise Australian Legal Dictionary*, above note 11, p. 75.
[274] *R v Murphy* (1985) 158 CLR 596.

and against clarification of this phrase. Despite this, the Committee received a number of comments in relation to this term which we examine below.

Witnesses' submissions on the "course of public justice"

The stakeholders who specifically commented on this issue expressed support for the formulation of the "course of justice" in the High Court case of *R v Rogerson.*[275] In particular, witnesses support a definition of the "course of justice" which excludes police investigations. As Victoria Legal Aid put this view:

> On the issue of the interpretation of the "course of public justice," VLA supports the view that police investigations do not form part of the "course of justice," which does not commence until the "jurisdiction of some court or competent judicial authority is invoked" (*R v Rogerson*.) If this offence is codified, VLA recommends that the codification reflect this interpretation of the law. VLA also supports the position that an act that tends to deflect the police from prosecuting a criminal offence or finding the facts of a case can be, but not necessarily, an act seen to be perverting the "course of justice."[276]

The Criminal Bar Association takes the same view of the appropriate approach to this element of the offence:

> There are occasionally efforts made to bring police or other investigations within the term "the course of justice" (for instance, the submission of the New South Wales government to MCCOC). We think that the position articulated by Mason CJ in *R v Rogerson* ought to continue to apply, and efforts to interfere with police investigations should still be excluded. Naturally, some attempts to derail investigations plainly fall within the offence (as in *Rogerson),* but they should not necessarily do so.[277]

Dr Neal, representing the Victorian Bar, agreed that the existing law should be retained—in other words police investigations should not be considered to be part of the "course of justice."[278]

Writing on behalf of constituents of the East Yarra Province electorate, John Pesutto argues that the law surrounding this phrase is not clear, and noted that:

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[275] *R v Rogerson* 1881-1992 174 CLR 268.
[276] Victoria Legal Aid, submission no. 7, p. 2.
[277] Criminal Bar Association, submission no. 6, p. 4.
[278] Dr David Neal, *Minutes of Evidence*, 24 November 2003, p. 22.

> Some discussion took place about whether police investigations should form part of the course of justice. While members note that the Discussion Paper considers this, the arguments for and against clarifying this area of the law remain unclear.[279]

Extended definition of "course of justice" in New South Wales

The Director of Public Prosecutions in New South Wales informed the Committee that the ambit of section 319 of the *Crimes Act 1900 (NSW*) is wider than the common law in relation to the meaning of the "course of justice."[280] This conclusion is based on the extended definition of perverting the course of justice in section 312 of that Act which provides:

> A reference in this Part to perverting the course of justice is a reference to obstructing, preventing, perverting or defeating the course of justice of the administration of law.

The recent New South Wales Court of Appeal case of *R v Subramanian*[281] made it clear that the extended definition resulted in a wider meaning of the "course of justice" in New South Wales.

Committee's conclusions on the "course of public justice"

The Committee supports the meaning of the "course of justice" as defined in the High Court decision of *R v Rogerson.*[282] The law on this point appears to be clear and those stakeholders who commented on this issue support it. Accordingly, the Committee makes no recommendation to clarify or change the meaning of the "course of justice." However, the Committee is concerned to note that the legislative rendering of the general common law offence in New South Wales has resulted in a definition of the course of justice which extends beyond the scope of the term as defined by *R v Rogerson.* The Committee therefore calls for careful drafting of the recommended statutory offence to avoid judicial interpretations of the kind which have occurred in New South Wales. In particular, the Committee believes that, in the light of the New South Wales experience, drafters should exercise particular caution in formulating any extended definition of the offence similar to section 312 of the *Crimes Act 1900 (NSW).*

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[279] East Yarra Province, submission no. 5, pp. 3-4.
[280] Greg Smith, *Minutes of Evidence,* 12 November 2003, p. 38.
[281] *R v Subramanian* [2002] NSWCCA 372.
[282] *R v Rogerson* (1992) 174 CLR 268.

Sentencing

Victoria

Providing for a maximum sentence of 25 years,[283] the Victorian *Crimes Act 1958* undoubtedly represents the high-water mark in sentencing among the Australian jurisdictions.

MCCOC

MCCOC in its report recommends that the maximum sentence for the general offence of perverting the course of justice should be 5 years imprisonment. [284]

Other jurisdictions

In Queensland the maximum sentences for conspiring to defeat justice and attempting to pervert justice are 7 years and 2 years respectively.[285] In Western Australia these offences both attract a maximum term of imprisonment of 7 years.[286] The two sections in the Commonwealth Act provide for maximum terms of 5 years[287] and in South Australia the maximum sentence for attempting to obstruct or pervert the course of justice or the due administration of law is 4 years.[288] The New South Wales offence attracts the second highest penalty of 14 years[289] whereas the Northern Territory Code provides for a low penalty of 2 years.[290]

It is difficult to account for the discrepancy between the maximum sentence in Victoria and that imposed in other States. It might be thought that it is attributable to the fact that the general common law offence of perverting the course of justice must apply to an indefinite number of fact situations encompassed by an offence which may vary greatly in seriousness. In most other jurisdictions some of the more serious

[283] Pursuant to section 320 of the *Crimes Act 1958 (Vic).*
[284] MCCOC Report, above note 6, p. 88.
[285] *Criminal Code Act 1899 (Qld),* s. 132(1) and s. 140.
[286] *Criminal Code 1913 (WA),* s. 135 and 143.
[287] *Crimes Act 1914 (Cth),* s. 42 and 43.
[288] *Criminal Law Consolidation Act 1935 (SA),* s. 256(1).
[289] *Crimes Act 1900 (NSW),* s. 319.
[290] *Criminal Code Act (NT),* s. 109.

forms of perverting the course of justice have been made into separate offences. On the other hand, the review of the specific sections in other jurisdictions relating to interference with evidence and witnesses reveals that the maximum sentences fall well short of 25 years.

Sentencing in practice

The most recent Victorian Higher Courts Sentencing Statistics do not indicate the lengths of sentences given for the offence.[291] However it is clear from the case law on sentencing that the offence is viewed very seriously.[292] In the words of one Judge:

> [T]here are few more serious offences possible in the present day […] than those which tend to distort the course of public justice and prevent the Courts from producing true and just results in the cases before them.[293]

On the other hand, it has been noted that the gravity of the offence can vary greatly due to the "infinitely variable" nature of the conduct which may constitute the offence.[294]

The Victorian Sentencing Manual indicates that the following examples of the crime will be viewed particularly seriously: interfering with bail processes, making false accusations of crimes, making false alibi statements, cases involving police officers, judicial officers or legal practitioners and assisting an offender or witness to abscond.[295]

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[291] This is because, unlike perjury, perverting the course of justice (together with related offences) is not one of the 50 most common offences for which comprehensive statistics have been compiled. In relation to perverting the course of justice and the variations of this offence (e.g. conspiracy to pervert the course of justice, act tending and intending to pervert the course of public justice and so on), the document lists only the number of principal proven offences between 1997/8 and 2001/02: above note 102, Volume 1, p. 154.

[292] Victorian Sentencing Manual, above note 47, p. 547.

[293] *Andrews* (1972) 57 CR App R 254 as cited in ibid.

[294] *Victorian Sentencing Manual*, above note 47, p. 547. For example in *R v Farquhar* (unreported, NSW CCA, 29 May 1985), it was noted that "[…] the offences of attempting to pervert the course of justice is one in which there can be countless gradations of gravity requiring in some instances trifling or minor punishment and in others punishment of great severity. All the circumstances of the particular case under consideration must be taken into account."

[295] *Victorian Sentencing Manual*, above note 47, para 26.102.

Sentencing of Maritza Wales

Not surprisingly given the seriousness with which the offence is viewed and the high maximum penalty in Victoria immediate custodial sentences are common. However, there is some precedent for suspending the sentence in certain circumstances. The most recent and well-known example of this was in the sentencing of Maritza Wales for attempting to pervert the course of justice in making false statements to the police about her husband's murder of his mother and his mother's partner. Despite describing the offence as one which strikes at the due administration of justice and stating that the need to deter others was a necessary consideration, Coldrey J opted to wholly suspend the 2 year sentence in that case.[296] Mitigating factors which led to this decision included concern for her mental health and her son's development, her lack of prior convictions, her guilty plea and remorse, her suffering through publicity generated by the case and the fact that going to the police spelt the end of her marriage.[297]

In the Discussion Paper the Committee asked for stakeholders' views as to whether the current 25 year maximum sentence for perverting the course of justice is appropriate or whether it should be revised.

Witnesses' submissions on the maximum sentence for perverting the course of justice

The majority of stakeholders believed that the current maximum sentence for perverting the course of justice is too high. The Criminal Bar Association sums up the sentiment common to most witnesses in its written submission when it says:

> […] 25 years is a massive maximum. We are aware of no sentence which approached this. In jurisdictions where the bad examples of the offence form separate offence, none have 25 year maximum penalties.[298]

Victoria Legal Aid also points out the discrepancy between the current maximum sentence and the maximum sentence in other jurisdictions, and its severity compared to other offences:

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[296] *R v Wales* [2003] VSC 115 (11 April 2003), para 138.
[297] Ibid, para 131-137.
[298] Criminal Bar Association, submission no. 6, p. 4.

> The maximum sentence for this offence should be revised downwards as the current maximum is clearly too high and inconsistent with the maximum sentences that operate in other jurisdictions. It is also peculiar to have a sentence for this offence that is equivalent to sentences for the most serious offences against the person (homicide, robbery, etc).[299]

Benjamin Lindner also refers to the "unjustifiable" discrepancy between Victoria's maximum sentence and that which operates in other Australian jurisdiction and to the fact that, currently, the offence is on a par with offences such as rape, armed robbery, arson causing death and trafficking in a commercial quantity of a drug of dependence.[300]

The submission of constituents of the East Yarra province noted that there had been some debate about the maximum sentences for both perverting the course of justice and perjury, with some members wishing to maintain the current maximums and others considering these current maximums "to be inconsistent with other jurisdictions and, even without inter-jurisdictional comparisons, high."[301] The submission did not outline any concluded view as to what the precise maximum should be but provided the following comments for the guidance of policy-makers:

> On balance, members accept that sentences for these classes of offence must entail substantial penalties (with or without custodial order) having regard to the circumstances of the case and also the imperative to protect the integrity of the judicial process.
>
> Consequently, if maximum sentences for these classes of offence are to be reviewed, they should remain high and be on the higher side when compared with other jurisdictions to:
>
> - reflect community attitudes; and
> - more importantly, serve the public interest by maintaining a significant deterrent.[302]

[299] Victoria Legal Aid, submission no. 7, p. 2.
[300] Benjamin Lindner, submission no 8, p. 2. Lester Fernandez, representing the Legal Aid New South Wales, made a similar comment, noting the seriousness of New South Wales offences carrying a maximum penalty of 25 years: "Our offences which carry equivalent sentences of 25 years – this is a selective example – are manslaughter; conspiracy to commit murder; wound or inflict grievous bodily harm or shoot with intent to inflict grievous bodily harm; chock, suffocate or strangle with intent to commit an indictable offence; sexual intercourse with a child under the age of 10, persistent sexual abuse of a child; armed robbery with a dangerous weapon; robbery whilst armed with wounding or inflicting grievous bodily harm; and especially aggravated break an enter. These are the kinds of offences for which in New South Wales are Parliament has seen fit to put a maximum penalty of 25 years:" *Minutes of Evidence,* 11 November 2003, pp. 20-21.
[301] East Yarra Province, submission no. 5, p. 3.
[302] Ibid.

The Director of Public Prosecutions stands alone in submitting that the 25 year maximum for perverting the course of justice remains appropriate. The DPP acknowledges that the maximum is the highest of any Australian jurisdiction and that in practice most sentences imposed are only a fraction of the available maximum. However, it concludes that:

> Although rare, there may be cases in which the attempt to pervert the course of justice is extremely serious and displays a very high level of culpability and might therefore attract a realistic proportion of the available 25 years maximum.[303]

The submission outlines examples where such a high maximum sentence might be justified. One example is an attempt to pervert the course of justice which results in the wrongful conviction of an innocent person and the avoidance of a conviction by the guilty party, who may continue to offend. On the basis that there "will be rare cases in which the level of culpability, and liability for lengthy condign punishment, far exceed that existing in the majority of cases involving this offence" the DPP opposes any significant lowering of the current maximum penalty.[304]

If the maximum sentence were to be reduced, as advocated by the majority of witnesses, what would an appropriate revised maximum sentence be? There was some divergence in the views on this point. The Criminal Bar Association and Benjamin Lindner advocated bringing the maximum sentence for perverting the course of justice in line with the maximum sentence for perjury, namely 15 years' imprisonment. The CBA noted that given the "multiplicity of potential crimes" covered by the offence, a high maximum penalty is warranted and that a 15 year penalty, aside from matching the sentence for perjury, would "provide ample scope for a sentencing court."[305] Lindner agrees, arguing that:

> […] the most serious examples of the offence of perverting the course of justice would be on a par with the most serious example of the offence of perjury. That attracts a maximum term of 15 years. That maximum enables a very wide sentencing discretion, with a sufficiently high maximum which is better positioned within the 'calendar' of codified crimes in this State.[306]

In contrast, Victoria Legal Aid submits that a "maximum sentence of between 7 and 10 years would provide ample scope for sentencing."[307] This suggestion is closer to

[303] Office of the Director of Public Prosecutions, submission no. 9, p. 3.
[304] Ibid.
[305] Criminal Bar Association, submission no. 6, p. 5.
[306] Benjamin Lindner, submission no, 8, p. 2.
[307] Victoria Legal Aid, submission no. 7, p. 2.

the maximum sentence in the MCCOC Code, namely 5 years (with sentences varying between 5 and 7 years for the various specific offences relating to evidence and witnesses).

Committee's conclusions on the maximum sentence for perverting the course of justice

An examination of interstate legislation and most submissions to this Inquiry indicate that the current sentence for perverting the course of justice is too high. The Committee is particularly impressed by the argument that the current maximum sentence appears to suggest that the offence is on the same level of seriousness as serious offences against the person, including rape, armed robbery and trafficking in a commercial quantity of a drug of dependence. Serious though perverting the course of justice may be, the Committee sees little justification in retaining the offence in the same category as serious offences of this nature. The Committee also agrees with the submission made by a number of witnesses that the current maximum penalty is considerably higher than that imposed by any other Australian jurisdiction and that, in the interests of national harmonisation of laws in this area, the maximum should therefore be revised downwards. However the Committee believes that perverting the course of justice should continue to be regarded as a serious indictable offence which can only be heard by superior courts.

The Committee believes that perverting the course of justice and perjury are of a similar level of seriousness and should carry the same penalty. On this point, the Committee notes that several witnesses advocated bringing the maximum penalty into line with that for perjury, that is 15 years. Because the Committee has opted to retain the current maximum penalty for perjury, the Committee agrees that this would be an appropriate penalty for perverting the course of justice.

Recommendation 3

That the Crimes Act 1958 (Vic) be amended to change the maximum penalty for the offence of perverting the course of justice to 15 years imprisonment.

Perverting the course of justice as a statutory offence—comparison with other jurisdictions

In most Australian jurisdictions, the common law offence of perverting the course of justice has been replaced by statutory offences. The specific offences of falsifying, destroying or concealing evidence and the protection of witnesses and others (and similar offences) will be discussed in the next Chapter of this Report. In this Chapter, we discuss the statutory offence of perverting the course of justice.

MCCOC recommended that the general offence should be retained but should be in statutory form as follows:

> A person who, by his or her conduct, intentionally perverts the course of justice is guilty of an offence.
>
> Maximum penalty: imprisonment for 3 years. [This was increased to 5 years in the Final Report].
>
> This section does not apply to conduct that constitutes the publication of any matter.
>
> In this section, perverts includes obstructs, prevents or defeats.[308]

The Court in *Healy v R,*[309] a decision of the Supreme Court of Western Australia Court of Criminal Appeal, commented on the link between the common law jurisprudence discussed in the first part of this Chapter and the statutory offence of perverting the course of justice:

> Although a number of the reported decisions in this area have been based on the common law offence, it may be accepted that the substance of the common law offence and of the statutory offences, as usually enacted, is the same […].[310]

The New South Wales Court of Criminal Appeal in *Murphy*[311] also reached the view that the substance of the statutory offence is the same as the common law offence.[312]

The Queensland Code contains two sections which can be seen to reflect the common law offence of perverting the course of justice. These are sections 132 and 140 which are extracted below.

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[308] Ibid, p. 88.
[309] *Healy v R* (1995) 15 WAR 104.
[310] Ibid, p. 112.
[311] *R v Murphy* (1985) 4 NSWLR 42.
[312] Ibid, p. 49.

> Section 132 Conspiring to defeat justice
>
> (1) Any person who conspires with another to obstruct, prevent, pervert, or defeat, the course of justice is guilty of a crime, and is liable to imprisonment for 7 years.
>
> […]
>
> Section 140 Attempting to pervert justice
>
> A person who attempts to obstruct, prevent, pervert, or defeat, the course of justice is guilty of a crime.
>
> Maximum penalty – 7 years imprisonment.[313]

The law is broadly similar in Western Australia with the exception that there is no qualifier that the conduct relate to attempting to pervert the course of justice "in any way not specially defined in this Code."[314] The Tasmanian Code's offence for perverting justice similarly omits that qualifier and contains no equivalent for "conspiring to defeat justice."[315] The Commonwealth Act contains two lengthy sections relating to conspiracies to defeat justice and attempting to pervert justice.[316]

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[313] This provision was amended between the time of the publication of the Committee's Discussion Paper and the time of writing this Report. The amending Act was the *Justice (Miscellaneous Provisions) Bill 2003*. The Act received Royal Assent on 6 November 2003. Section 140 was amended to remove the line "not specially defined in this Code" and increase the penalty from 2 to 7 years.' In his Second Reading Speech the Attorney-General the Hon. R.J. Welford noted in relation to section 140: "This proscribes the offence of attempting to pervert justice to remove the necessity for the prosecution to prove that no other offence in the Criminal Code applies before a person can be convicted of attempting to pervert the course of justice. The section is further amended to redefine the offence as a crime and to increase the maximum penalty from two years to seven years. This brings the punishment for this offence into line with other administration of justice offences contained in the Code such as retaliation against witnesses, corruption of jurors, fabricating evidence and corruption of witnesses, and conspiring to defeat justice, all of which already carry a maximum penalty of seven years:" Queensland, *Parliamentary Debates,* Legislative Assembly, 21 August 2003, 3178, (Hon. R.J Welford, Attorney-General and Minister for Justice.)

[314] *Criminal Code 1913 (WA)* sections 143 and 135. The Code formerly contained these words but they were deleted in 1987 on the recommendation of the Murray Report which took the view that this was "an unnecessary restriction on the operation of the section not found in other areas where there are comparable general offences:" Murray Report, above note 53, p. 99.

[315] *Criminal Code Act 1924 (Tas),* s. 105 Perverting Justice: "Any person who does any act or makes any omission with intent in any way whatever to obstruct, prevent, pervert, or defeat the due course of justice or the administration of law is guilty of a crime."

[316] *Crimes Act 1914 (Cth),* s. 42 Conspiracy to defeat justice. The main provision is section 42(1): "Any person who conspires with another to obstruct, prevent, pervert, or defeat, the course of justice in relation to the judicial power of the Commonwealth, shall be guilty of an indictable offence. (Penalty – imprisonment for 5 years)." Subsection (3) sets out the elements of conspiracy which must be present, covering an agreement with one or more persons, intention to pervert the course of justice and the commission of an overt act for the offence to be proven. Subsection (4) provides that a person may be found guilty of an offence even if obstructing (etc) justice pursuant to the agreement is impossible, the other party is a body corporate or all other parties have been acquitted of the offence (unless a finding of guilt would be inconsistent with their acquittal – subsection (5).) Section 43 (1) provides "Any

New South Wales and South Australia also have offences which are broadly equivalent to section 140 of the Queensland Code.[317] Section 319 of the New South Wales *Crimes Act* simply refers to perverting the course of justice rather than the alternatives set out in the Queensland and other legislation:

> A person who does any act, or makes any omission, intending in any way to pervert the course of justice, is liable to imprisonment for 14 years.

The South Australian Act refers to attempting to "obstruct or pervert the course of justice or the due administration of law in a manner not otherwise dealt with in the preceding provisions of this Part."[318] Unlike the other Codes, the Northern Territory Criminal Code contains only a very brief provision which provides that "any person who attempts, in any way not specially defined by this Code, to obstruct, prevent, pervert or defeat the course of justice, is guilty of a crime and is liable to imprisonment for 2 years."[319]

Thus, the only Australian jurisdictions which do not have a statutory offence of perverting the course of justice are Victoria and the ACT.

In overseas jurisdictions New Zealand and Canada have statutory offences for "conspiring to defeat justice" and "obstructing justice" respectively[320] whereas in England, despite the recommendations of the UK Law Commission discussed below, the common law continues to apply.

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person who attempts, in any way not specially defined in this Act, to obstruct, prevent, pervert or defeat, the course of justice in relation to the judicial power of the Commonwealth, shall be guilty of an offence. (Penalty – imprisonment for 5 years). The subsections elaborate on this. Subsection (3) provides that the person's conduct must have been more than "merely preparatory to the commission of the offence" which is a question of fact. Subsection (4) provides that a person can be found guilty of attempting to pervert justice "even if doing the thing attempted is impossible."

[317] *Crimes Act 1900 (NSW)* s. 319; *Criminal Law Consolidation Act 1935 (SA),* s. 256.

[318] *Criminal Law Consolidation Act 1935 (SA),* s. 256.

[319] *Criminal Code (NT),* s. 109.

[320] *Crimes Act 1961 (NZ),* s. 116 Conspiring to defeat justice: "Every one is liable to imprisonment for a term not exceeding 7 years who conspires to obstruct, prevent, pervert, or defeat the course of justice [in New Zealand or the course of justice in an overseas jurisdiction.]" *Criminal Code Canada,* s. 139 Obstructing Justice: this is a detailed section which divides the offence into those involving the indemnification of a surety or accepting a fee or indemnity as a surety in respect of a person who is (or is to be) released from custody and perverting the course of justice in other matters. Subsection 3 sets out situations in which a person is deemed to have obstructed (perverted etc) justice (without limiting the generality of subsection (2).) These include dissuading by threats, bribes or other corrupt means persons from giving evidence, influencing a juror (again by threats, bribes or other corrupt means) and agreeing to abstain from giving evidence or from doing anything as a juror (in consideration of a bribe or other corrupt consideration.)

General offence versus specific offences

In the Discussion Paper, the Committee identified three broad options for reform of the offence of perverting the course of justice, namely:

a) abolishing the common law offence and replacing it with more specific offences (such as those which will be discussed in the next Chapter of this Report);

b) retaining the general offence but enshrining it in legislation, while also enacting specific offences; and

c) retaining the status quo (in other words, leaving the offence as a common law offence and introducing no new offences).

In general, law reform agencies have considered and recommended one of the first two options, with most recommending the second option.

MCCOC

MCCOC considered the UK Law Commission's proposals and accepted "the desirability in broad principle of minimising the use of general offences of wide and imprecise ambit such as perverting the course of justice."[321] However, MCCOC referred to the difficulty of anticipating in legislation every possible form of conduct which could amount to the common law offence and expressed concern that some conduct would not therefore be covered by the new offences:

> However, no matter how many different specific offences are created, MCCOC has concluded that the possibility cannot be removed that, in circumstances not now foreseeable, conduct that amounts to perversion or attempted perversion of the course of justice but falling outside the specific offences, will come to notice.[322]

Accordingly, MCCOC recommended that the general offence should be retained but should be in statutory form as follows:

> A person who, by his or her conduct, intentionally perverts the course of justice is guilty of an offence.

[321] MCCOC Discussion Paper, above note 5, p. 93.
[322] Ibid.

> Maximum penalty: imprisonment for 3 years. [This was increased to 5 years in the Final Report].
>
> This section does not apply to conduct that constitutes the publication of any matter.
>
> In this section, perverts includes obstructs, prevents or defeats.[323]

The MCCOC proposal found support from some stakeholders but gave rise to reservations from others.[324]

Other Law Reform Agencies

UK Law Commission

The UK Law Commission is the most prominent proponent of the first option.[325] It recommended that the general common law offence be abolished and replaced by specific offences.[326] In the following passage outlining its reasons for this approach, the Commission emphasised the uncertainty of the ambit of the common law offence:

> We stated in the Working Paper that our main objective was to provide a series of specific and relatively tightly defined offences, rather than a general offence which was open to extension by judicial interpretation, with the uncertainty that this entails. Few of our commentators disagreed with this policy although some regretted that it would not allow courts flexibility to adapt the law to deal with new conditions and new types of misconduct. This may well be true, but we think that today it is generally accepted that such alteration of the criminal law should, when required, be made by the legislature. As we have already pointed out, it was only in 1968 in *R v Grimes* that the offence of perverting the course of justice was recognised as a substantive offence independent of conspiracy. Since then, increasing use of this offence has been paralleled by increasing uncertainty as to its ambit.[327]

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[323] Ibid, p. 88.
[324] The proposal found support from the Institute of Criminology, the DPP Commonwealth (with certain additions) and the DPP WA. The DPP NSW suggested that the proposal would create problems. For example, it should make clear that pre-trial police investigations are within the course of justice in the circumstances described in *R v Rogerson.* It also felt that the maximum penalty of 3 years was too low and had concerns about the exclusion of publications. MCCOC's response to this submission was that the proposal would clash with the High Court decision in *R v Rogerson* because it would effectively extend the "course of justice" to police investigations. It noted that in the creation of new offences, MCCOC had been at "some pains" to avoid any clash: MCCOC Report, above note 6, p. 115.
[325] UK Law Commission, above note 38.
[326] Ibid, para 3.19.
[327] Ibid.

Gibbs Committee, "Review of Commonwealth Criminal Law"

In its Discussion Paper the Review of Commonwealth Criminal Law chaired by Sir Harry Gibbs (the Gibbs Committee) considered whether common law offences should be abolished and replaced by statutory offences.[328] Like MCCOC the Committee considered that it would be "preferable in principle that the vague and general offences"[329] created by the relevant sections of the Commonwealth *Crimes Act* "should be replaced by specific offences […]."[330] On the other hand, the Gibbs Committee recognised that there remained a possibility that justice may be perverted in ways not currently foreseen and questioned whether this possibility was sufficiently great to justify the retention of the general offences.[331]

In the Final Report, the Gibbs Committee again referred to the option of abolishing the general offences, concluding that there were objections to this course.[332] In the view of the Committee, experience had not shown that the present provisions were unsatisfactory in practice or that it was necessary to provide specifically for every form of conduct which could constitute perverting the course of justice.[333] Secondly it referred to the danger that the creation of specific offences would not cover the field, concluding that "the possibility would remain that the administration of justice might be perverted in ways not presently foreseen […]."[334]

Although the Gibbs Committee opted to retain the offence of perverting the course of justice, it also considered that "it would nevertheless be desirable to provide for certain specific offences that would otherwise be caught by that general offence or by the offences of attempting or conspiring to pervert justice."[335]

Murray Report (Western Australia)

The Western Australian Murray Report considered the operation of sections 135 and 143 of the Western Australian Criminal Code. It recommended the repeal of section 135 ("conspiring to defeat justice") despite its "quite frequent use" on the grounds that amendments to section 143 ("attempting to pervert justice") would capture section

[328] Gibbs Committee Discussion Paper, above note 38, para 10.17.
[329] Ibid, para 10.17.
[330] Ibid.
[331] Ibid.
[332] Gibbs Committee Report, above note 85, para 9.10.
[333] Ibid.
[334] Ibid.
[335] Ibid, para 9.140.

135 offences.[336] The Murray Report recommended the retention of section 143 (with some amendments, including the increase of the penalty from 2 to 7 years) on the grounds that it was a "[…] useful and much used provision, and is capable of covering a variety of evils."[337]

O'Regan Report (Queensland)

The Queensland O'Regan Report also recommended the retention of the general offence.[338] However, as MCCOC states, "its intentions as to the retention or otherwise of the conspiracy offence are not clear."[339]

Legal Commentator: "Perverting Justice"

Like MCCOC and the Gibbs Committee, Bernard Brown, author of one of the few articles dealing with the legal elements of the offence, also acknowledges the dangers of convicting persons of offences the definitions of which "are not easily accessible or readily ascertainable […]"[340] On the other hand, the author leaves little doubt that the offence is an important one and should be retained (whether in common law or statutory form), particularly given the breadth of potential offences it covers.[341]

In the Discussion Paper the Committee sought submissions on this issue, which it considers to be pivotal to the future of the offence of perverting the course of justice in this State.

Witnesses' submissions in relation to general or specific offences

Witnesses to this Inquiry were almost unanimous in their rejection of option (a), namely the abolition of the general common law offence of perverting the course of justice and its replacement with specific offences. The danger of unanticipated

[336] Murray Report, above note 53, p. 95. The Committee noted that the repeal of this section would also have the added advantage of deleting individual conspiracies from the Criminal Code.
[337] Ibid, p. 99.
[338] O'Regan Report, above note 78, p. 80.
[339] MCCOC Discussion Paper, above note 5, p. 93.
[340] Brown, above note 169, p. 204.
[341] "Obviously interferences and threats to public justice endanger the very foundations of a society ordered by law. Such molestations may come […] in many forms—some of which are almost impossible to predict. Like contempt, its historical host, the offence —or an enacted one of comparable breadth —proves likely to prove indispensable:" ibid, p. 205.

criminal behaviour "falling between the cracks" of specific offences was the main reason for the misgivings expressed about option (a). The Director of Public Prosecutions put this concern particularly clearly:

> We share the concern expressed by the MCCOC Committee, the Gibbs Committee and others, namely that the simple abolition of the common law offence and its replacement with a series of specific statutory offences raises the very real risk that the statutory offences will be insufficiently comprehensive to cover forms of behaviour not anticipated by the draftsperson but which could properly have been dealt with under the common law offence. A review of the factual scenarios behind many of the reported and unreported cases dealing with this offence reveals a wide variety of fact situations, not all of which would necessarily be encompassed by a statutory scheme involving a series of specific offences intended to be largely if not wholly mutually exclusive.[342]

The comments of other witnesses echo these concerns. For instance in his written submission Benjamin Lindner states:

> I agree that the great benefit of a general provision is that it may apply to all manner of ways that the administration of justice might be perverted; and that includes ways that are not presently foreseen. The Internet or other new technology might be used in the future to pervert the course of justice, and would be caught by a general provision of the type described above.[343]

The Criminal Bar Association also supports the retention of the general offence, citing its breadth as a virtue:

> The current offence is broad. This is appropriate. Many as-yet-unimagined ways of perverting the course of justice are likely to emerge. Information technology may permit new and better interference with court lists, court documents, witnesses and jurors.[344]

Dr David Neal who appeared on behalf of the Victorian Bar expressed a "general disfavour" for general offences such as perverting the course of justice, although he concluded that he would probably have to compromise on this issue:

> My real ideal position would be just to have the specific offences and not to have the general catch all type of provision, but I do not believe that is acceptable generally — that is a view that I am going to have to make the principled compromise on, I think. But I would much rather have a series of offences that were directly saying to someone "If you tamper with a witness or if you conceal, fabricate evidence that is

[342] Director of Public Prosecutions, submission no. 9, p. 3.
[343] Benjamin Lindner, submission no. 8, p. 3.
[344] Criminal Bar Association, submission no. 9, p. 2.

> what you must not do." Rather than tell people "you must not attempt to pervert the course of justice," whatever that might mean.[345]

Interstate witnesses also warned the Committee against option (a) (completely abolishing the general offence of perverting the course of justice). For instance the New South Wales Director of Public Prosecutions told the Committee that "it would be a mistake to abolish the general offence, in the sense that there are some things that are caught by perverting the course of justice that you have not dreamt of […]"[346] Acting Deputy Solicitor for Public Prosecutions (Legal), Stephen Kavanagh, commented on the virtues of having a "foot in both camps"—that is retaining the general offence but enacting specific offences as well (option (b)), noting that:

> Fundamentally it may be that those who are responsible for making these decisions take the view that it is better to have a foot in both camps. Do not let go of the common law entirely—hang on to it—but try to create greater certainty by providing for specific statutory provisions that are going to cover the multitude of offences.[347]

In fact, option (b) is the option favoured by most witnesses to this Inquiry. The Criminal Bar Association, the Director of Public Prosecutions, Victoria Legal Aid and Benjamin Lindner all express support for this option. However, despite this avowal of support, all of these witnesses express reservations and in most cases specifically oppose the creation of separate offences relating to interference with evidence and witnesses, as we shall see in the next Chapter of this Report. In this way, these witnesses can perhaps be seen to be supporting a hybrid option between option (a) and option (b)—namely the codification of the general offence but only selective support for the creation of specific offences. However, it should be noted that the Director of Public Prosecutions expresses doubt even about the need for the codification of the common law offence. The DPP made the following observation:

> Accordingly, with respect to the three options in Question 4, it is our view that Option (a) would be undesirable for the reasons discussed above; that if legislative amendment is to be undertaken, Option (b) is to be preferred, but that careful consideration should be given to identifying and articulating the advantages of the abolition of the common law offence at all, given that doing so would not constitute a codification and would not obviate the need for interpretative case law to evolve.[348]

Most interstate witnesses supported option (b) which is the option that their respective jurisdictions have adopted. However, one interstate witness felt that a general

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[345] Dr David Neal, *Minutes of Evidence,* 24 November 2003, p. 19.
[346] Greg Smith, *Minutes of Evidence,* 12 November 2003, p. 40.
[347] Stephen Kavanagh, *Minutes of Evidence,* 12 November 2003, p. 42.
[348] Director of Public Prosecutions, submission no. 9, p. 4.

codified offence would be more appropriate than a general codified offence coupled with an array of specific offences. Howard Posner who appeared before the Committee on behalf of Legal Aid Queensland, referred to the following pitfalls with creating specific legislation:

> […] The problem with writing specific legislation – and I know it will happen – is that the more specific legislation you write the less implied generality you give to your base provision. If your base provision is supposed to cover all examples of perverting the course of justice, then it can be drawn widely. It is a legitimate expectation that it is intended to find perversions of justice. The moment you start putting in specifics —'It is an offence to do this,' 'It is an offence to do that'—you run the danger of impliedly narrowing the base for perverting the course of justice.[349]

Later he reiterated the point:

> As long as the elements in the offence of perverting the course of justice are properly thought through when you codify it, it seems to me it would make more sense to have a general one than a whole lot of specifics, because the moment you have the specifics you can then fall through the cracks.[350]

Committee's conclusion in relation to general or specific offences

In accordance with the majority of submissions received by this Inquiry, the Committee supports option (b) outlined in the Discussion Paper, namely that the general offence of perverting the course of justice should be retained and enshrined in legislation and that various specific offences should also be enacted. The Committee agrees with witnesses to this Inquiry that the general "catch-all" offence needs to be retained in order to cover ingenious examples of perverting the course of justice which have not yet been anticipated by legislatures.

The Committee is aware that, while most Victorian witnesses indicate support for option (b), they oppose the creation of many of the statutory offences relating to interference with witnesses and evidence reviewed in the next Chapter of this Report. Their specific objections to these offences will be noted in the relevant sections of the next Chapter. Despite this general opposition, the Committee has decided to recommend the creation of many of the specific offences proposed in the Discussion

[349] Howard Posner, *Minutes of Evidence,* 13 November 2003, p. 105.
[350] Ibid, p. 106.

Paper. This is in line with our general recommendation for the codification of administration of justice offences which the Committee outlined in Chapter 1.

Readers will recall that the Committee wishes to make a contribution to the Model Criminal Code process by adopting, in so far as possible, the recommendations of MCCOC. The Committee reasoned that the fact that MCCOC and every other Australian State and Territory, with the exception of the ACT, have adopted separate offences relating to interference with witnesses and evidence is, in our view, a powerful argument for Victoria to follow suit.

Also, the Committee accepts the common argument advanced in favour of Codes which again the Committee referred to in the first Chapter of this Report, namely that a delineation of the main ways in which justice can be perverted in the form of statutory offences will assist the layperson's, the lawyer's and police officer's understanding of these offences. As the Committee indicated in Chapter 1, improving transparency and accessibility are guiding concepts the Committee has adopted in formulating the recommendations in this Report, and particularly in this and the following Chapter of this Report.

The Committee supports the creation of separate offences relating to interference with evidence and witnesses with two important caveats. As outlined in Chapter 1, the Committee believes that there is the potential for unintended consequences flowing from codification and hence makes recommendations which seek to anticipate and avoid these consequences. In particular, the experience of other jurisdictions has provided relevant examples. In recommending the creation of separate offences, the Committee's goal is to clarify the current law and make it more transparent and accessible. It is not to create novel offences which would not have been considered under the old common law.

The foregoing conclusion informs our approach to the rest of the issues posed in this Chapter and the next. As will be clear from the preceding recommendations and those that follow, the Committee proposes that the common law offence of perverting the course of justice be put into statutory form.

False accusation of offence

In Victoria deflecting the police from prosecuting a criminal offence may be an act which falls within the scope of the common law offence of perverting the course of justice, but the act of making a false report to police may also fall within a different category of offence pursuant to section 53 of the *Summary Offences Act 1966.* Section 53 is too lengthy to set out in full here but the main sub-section (1) provides as follows:

> Any person who falsely and with knowledge of the falsity of the report voluntarily reports or causes to be reported to any member of the police force that an act has been done or an event has occurred, which act or event as so reported is such as calls for an investigation by a member of the police force shall be guilty of an offence.
>
> Penalty: 120 penalty units or imprisonment for 1 year.

In evaluating law reform options for the offence of perverting the course of justice, consideration should be given to the operation of this section. For instance, is it appropriate that making a false report to the police could constitute either a serious indictable offence carrying a maximum of 25 years' imprisonment (if charged as an attempt to pervert the course of justice) or alternatively a less serious summary offence (charged under the *Summary Offences Act)* carrying a maximum sentence of 1 year's imprisonment?

The Victorian Parliament Scrutiny of Acts and Regulations Committee (SARC) considered the operation of section 53 in its Report on the *Summary Offences Act 1966*.[351] Submissions to that inquiry indicated strong support for the retention of this summary offence to deal with less serious instances of making false reports.[352] It was pointed out that the existence of section 53 did not prevent prosecution for perverting the course of justice in more serious cases of false reporting to the police. The Report summarises:

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[351] Victorian Parliament Scrutiny of Acts and Regulations Committee, *Inquiry into the Summary Offences Act 1966 Final Report,* November 2001.

[352] Ibid, p. 70. See also introduction at p. 3 where SARC outlined some of the benefits of maintaining the same or similar offences in both the *Crimes Act* and the *Summary Offences Act:* "The Committee received extensive evidence which suggested that, where an indictable and summary offence may apply to the same conduct, summary offences can provide an expeditious means to resolve less serious cases. They also provide significant benefits to defendants because summary proceedings are less formal than indictable proceedings and normally heard and determined in a shorter period of time. As a result, defendants may find that the hearing of summary offences is less stressful or protracted compared to indictable offences. The lesser stigma associated with a conviction for a summary offence may also provide a more appropriate consequence for less serious offences."

> Many submissions acknowledged that false reports cause problems for the administration of the law, but noted that most cases were relatively minor and did not warrant trial on indictment. Some submissions noted that the people who made false reports were often young and/or vulnerable. Such people can and should be dealt with effectively by s. 53. In should be noted that retaining s 53 does not prevent the use of other provisions for more serious cases of false reporting, e.g. perjury, attempting to pervert the course of justice.[353]

MCCOC

Acknowledging that the act of falsely accusing someone of an offence would probably also amount to attempting to pervert the course of justice, MCCOC nevertheless argued that a separate offence should be created so as not to leave "the slightest doubt that this conduct represents a serious offence."[354] MCCOC also concluded that there appeared to be no sufficient reason why the offence should be confined to conspiracies (involving two or more people).[355]

In terms of the mental element of the offence, MCCOC recommended that the accused should intend the other person should be charged while knowing or believing that he or she had not committed an offence. Mere intention that the police should pursue an investigation, however, should not suffice.[356] The recommended offence is as follows:

> False accusation of offence
>
> A person who makes an accusation to a police officer or other prosecuting authority that another person has committed an offence:
>
> (a) believing that the other person did not commit the offence,
>
> and
>
> (b) intending that the other person will be charged with committing the offence,
>
> is guilty of an offence.
>
> Maximum penalty: Imprisonment for 3 years.

[353] Ibid, p. 70.
[354] MCCOC Discussion Paper, above note 5, p 105.
[355] Ibid.
[356] Ibid, p. 107. MCCOC does not elaborate on this view.

Other Law Reform Agencies

The UK Law Reform Commission took the view that the false implication of an innocent person in an offence is serious enough to warrant criminal sanctions when the accuser has the requisite intent.[357] As the Commission noted:

> Such conduct can have serious consequences for the person falsely implicated, even if the truth is discovered in time to prevent the proceedings from being instituted against him: he may be subjected to long interrogation and even arrest.[358]

The Commission found the lesser offence of "wasteful employment of the police" was not an appropriate way of dealing with conduct of this nature.[359] Accordingly the Commission recommended the creation of a new offence of giving a false indication with the knowledge it is false, and with the intention that another will wrongly suspect that a person other than the person giving the indication is guilty of the offence and will pursue a criminal investigation against the person.[360]

The Gibbs Committee also recommended the creation of a substantive offence of this nature.[361] The accusers should intend that the person against whom the accusation is made should be charged or that criminal investigations be pursued but it should not be an element of the offence that the person was actually charged.[362] Further, according to the Gibbs Committee the accusers should have either the knowledge or belief that the person had not committed the offence; mere recklessness should not be enough.[363] Finally, the Gibbs Committee Report provided that no one should be convicted under the proposed section on the uncorroborated evidence of one witness.[364]

The Murray Report on the Western Australian Code recommended the retention of the existing offence of conspiracy to have a person falsely charged with an offence but argued that it should be "reframed so as to enable an individual acting alone to be

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[357] UK Law Commission, above note 38, para 3.97.
[358] Ibid.
[359] Ibid.
[360] Ibid, para. 3.102.
[361] At the time of the Gibbs Committee Report, above note 85, section 41 was much briefer than its current form, merely providing "any person who conspires with another to charge any person falsely or cause any person to be falsely charged with any offence against the law of the Commonwealth or of a Territory, shall be guilty of an indictable offence:" see ibid, p. 75. The section was amended to its current form by Act no. 24 of 2001.
[362] Gibbs Committee Report, above note 85, para 9.7.
[363] Ibid.
[364] Ibid.

charged with an offence of bringing a false accusation."[365] Murray recommended this amendment because he could see no real ground for differentiating between false accusations when committed by two or more persons who have formed a conspiracy on the one hand, and a person acting alone on the other.[366] The Report also took issue with the intention element of the offence ("knowing that such person is innocent of the alleged offence, or not believing him to be guilty of the alleged offence"), stating that it should be enough that the offender *believed* the person to be innocent of the alleged offence.[367]

Other jurisdictions

Five Australian jurisdictions make it a specific offence in their criminal legislation to falsely accuse someone else of having committed an offence. The relevant sections of the Queensland and Western Australian Codes and the Commonwealth *Crimes Act* are couched in the language of conspiracy—that is they apply only to a person acting in concert rather than to individuals who make a false accusation that somebody else has committed an offence.[368] The Queensland section provides as follows:

> 131 Conspiracy to bring a false accusation
>
> (1) Any person who conspires with another to charge any person or cause any person to be charged with any offence, whether alleged to have been committed in Queensland, or elsewhere, knowing that such person is innocent of the alleged offence, or not believing the person to be guilty of the alleged offence, is guilty of a crime.
>
> (2) If the offence is such that a person convicted of it is liable to be sentenced to imprisonment for life, the offender is liable to imprisonment for life.
>
> (3) If the offence is such that a person convicted of it is liable to be sentenced to imprisonment, but for a term less than life, the offender is liable to imprisonment for 14 years.
>
> (4) In any other case the offender is liable to imprisonment for 7 years.
>
> (5) The offender cannot be arrested without warrant.

[365] Murray Report, above note 53, p. 94 and see MCCOC Discussion Paper, above note 5, p. 105.
[366] Murray Report, above note 53, p. 94.
[367] Ibid, p. 95.
[368] *Criminal Code Act 1899 (Qld),* s. 131; *Criminal Code 1913 (WA),* s. 134; *Crimes Act 1914 (Cth), s*. 41.

> (6) A prosecution for an offence defined in this section shall not be instituted without the consent of the Attorney-General.

The Western Australian offence is very similar[369] whereas the Commonwealth offence contains more detail about the nature of the conspiracy, the necessary intention and so on. It provides for a penalty of imprisonment for 10 years.[370] The New Zealand *Crimes Act 1961* also makes it an offence to conspire to bring a false accusation.[371]

In contrast, the New South Wales provision is not limited to conspiracies but rather also applies to individuals who make a false accusation of an offence. Section 314 of the *Crimes Act 1900 (NSW)* provides:

> A person who makes an accusation intending a person to be the subject of an investigation of an offence, knowing that other person to be innocent of the offence, is liable to imprisonment for 7 years.

Section 179 of the *Crimes Act 1900 (ACT*) similarly provides that:

> A person who charges another person falsely, or causes another person to be charged falsely, with an offence against a Territory law is guilty of an offence punishable, on conviction, by imprisonment for 10 years.

Discussion Paper question

In the Discussion Paper the Committee sought submissions from stakeholders on the following questions:

- Should there be a separate offence for false accusations of offences or is this adequately covered by section 53 of the *Summary Offences Act?*
- If so, should the offence be confined to conspiracies or should it also apply to individuals who make false accusations?
- What should the mental element of the offence be? Should a person who merely intends that the police should pursue investigations not fall within the ambit of this offence (as recommended by MCCOC)?

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[369] *Criminal Code 1913 (WA),* s. 134: this section provides that if the false accusation relates to an offence subject to life imprisonment, the offender is liable to 20 years' imprisonment (c.f. Queensland Code which provides for life imprisonment in such cases.)
[370] *Crimes Act 1900 (Cth),* s. 41.
[371] *Crimes Act 1961 (NZ),* s. 115.

Witnesses' submissions in relation to false accusation of offence

Should a new offence be created?

Most Victorian witnesses agree that false accusation of offence should not be a separate offence. Benjamin Lindner opposes the creation of a new offence covering false accusations principally on the basis that this conduct would be covered by the general offence. As Lindner observed:

> […] one does not need to codify an offence such as "false accusation of offence" so as not to leave the slightest doubt that this conduct is considered a serious offence. The general maximum available at sentence for the indictable offence will accomplish that object.[372]

Victoria Legal Aid advanced a similar argument in support of its opposition to the creation of a new offence:

> It is our view that there should not be a separate offence created for false accusations of offences. We are of the view that falsely accusing someone of an offence is containable within a legislative rendering of attempting to pervert the course of justice.[373]

Legal Aid Queensland also felt that this section is superfluous because people could be charged under the general extortion provision in the Queensland Code.[374]

The Criminal Bar Association sees no need to create a new offence, not on the basis that such conduct would normally be covered by the general offence, but rather because false accusations do not necessarily involve the same level of criminality as attempting to pervert the course of justice:

> False accusations per se are not currently criminal. The offence is concerned to deter and punish the abuse of the course of justice. False accusations made to embarrass or humiliate would not be Attempts to Pervert; they do not "strike at the heart" of justice. Should they be a crime at all? Notwithstanding the UK Law Reform Commission's stern words, we think that, if the conduct is not serious enough to charge as an Attempt to Pervert, it is best left to the civil courts.[375]

In contrast, the Office of Public Prosecutions argues that "there is merit in the suggestion that the making of a false allegation of criminality against a particular

[372] Benjamin Lindner, submission no. 8, p. 3.
[373] Victoria Legal Aid, submission no. 7, p. 3.
[374] Howard Posner, *Minutes of Evidence*, 13 November 2003, p. 107.
[375] Criminal Bar Association, submission no. 6, p. 6.

individual merits the creation of a separate offence, as found by the UK Law Reform Commission, the Gibbs Committee and the MCCOC,"[376] and comments further:

> We generally support the MCCOC model offence, with the exception that we do not see why the offence should be limited to an intention that the wrongly accused person be charged; the mere institution of investigation (which of course may be onerous, time-consuming and expensive for the suspect) should suffice as the mental element of the offence. It is our view that in practice, the differing levels of culpability of the actor according to whether the falsely accused person is merely investigated, or is investigated and charged, may be reflected in the sentence imposed for the proposed offence.[377]

The Criminal Bar Association disagrees with this statement, arguing that:

> the mental element should be an intention that the victim of the offence be charged, not merely investigated. An intention to have the victim investigated presumes a definition of "investigation" and raises questions without obvious answers as to precisely what the accused must mean to occur before he intends to cause an investigation. Investigations are not part of the course of justice as yet.[378]

Are false accusations of offences adequately covered by section 53 of the Summary Offences Act (and should this be retained?)

Responses to this question tended to revolve around the question of the utility of section 53 of the *Summary Offences Act 1966* and whether it should be retained. All Victorian witnesses who responded to this issue submitted that section 53 of the *Summary Offences Act 1966* is a useful provision which should be retained. The Criminal Bar Association acknowledged "an abstract sentencing inelegance in the overlap between this offence and attempt to pervert in certain fact situations"[379] but supported the retention of the section on the basis that:

- "In practice, it is the experience of barristers that police generally use the section 53 charge with appropriate discretion;"[380]
- "The section is useful to allow the summary disposition of irritating but insignificant false reports"[381]; and

[376] Director of Public Prosecutions Victoria, submission no. 9, p. 4.
[377] Ibid.
[378] Criminal Bar Association, submission no. 6, p. 6.
[379] Criminal Bar Association, submission no. 6, p. 6.
[380] Ibid.
[381] Ibid.

- the section "has a wider purpose than attempting to pervert, because it makes criminal false reports which may fall outside the "course of justice" defined in *Rogerson*."[382]

In Benjamin Lindner's view, the main advantage of section 53 is the lower penalty and ease of disposition it allows for relevant examples of perverting the course of justice which are at the lower end of the range of seriousness.[383] Victoria Legal Aid also supports retention on the grounds that it deals with "the less serious instances of making false reports and for circumstances that fall outside the "course of justice" defined by *Rogerson."*[384] The Director of Public Prosecutions likewise supports the continued existence of section 53 "as being the appropriate offence to deal with relatively minor false reports, which may of course include the making of a report that a crime has occurred when in fact no crime has occurred."[385]

If a new offence were created, should it cover individuals as well as conspiracies?

Only the Director of Public Prosecutions and the Criminal Bar Association commented on whom the offence should cover. Both witnesses submitted that, if an offence for making false accusations were to be created it should apply to individuals as well as conspirators.[386] As the DPP puts it:

> We see no reason to limit liability for this offence to the conspiracy situation; there should be provision for charging individuals with the proposed offence.[387]

Committee's conclusions in relation to false accusation of offence

The Committee concludes that:

- a new offence for false accusation of offence should not be created; and
- section 53A of the *Summary Offences Act (Vic) 1966* should be retained.

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[382] Ibid.
[383] Benjamin Lindner, submission no. 8, p. 3. Lindner notes: "That offence [section 53] has the dual advantages of specifying a [relatively] low maximum penalty, and it enables minor examples of this conduct to be dealt with expeditiously in the Magistrates' Courts."
[384] Victoria Legal Aid, submission no. 7, p. 3.
[385] Director of Public Prosecutions, submission no. 9, p. 4.
[386] Criminal Bar Association, submission no. 6, p. 6.
[387] Director of Public Prosecutions, submission no. 9, p. 5.

The Committee opposes the creation of a new offence for false accusation of offence, despite MCCOC's recommendation to the contrary, for a number of reasons. First, most Victorian stakeholders oppose the creation of a separate offence for this conduct. The Committee agrees with these stakeholders that false accusations are already caught by the general offence of attempting to pervert the course of justice and / or the summary offence of making false reports to the police.

While the Committee has recommended the creation of several offences relating to interference with evidence and witnesses, it considers false accusations of offence to be in a different category due to the existence of section 53 of the *Summary Offences Act* which would cover most false accusations. The Committee accepts the evidence the Committee has received that this section has been a useful provision which allows less serious cases of false reports to be disposed of more easily than serious "indictable only" offences such as perverting the course of justice. The Committee has also been influenced by the argument that some false accusations which would be caught by section 53 would not be caught by the general offence of perverting the course of justice because such accusations may not occur within the "course of justice."

Recommendation 4

That there be no change to the current law in Victoria concerning false accusation of offences.

CHAPTER THREE - SPECIFIC OFFENCES RELATING TO EVIDENCE AND WITNESSES

In recommending that a new offence of fabricating or tampering with evidence be enacted, the UK Law Commission drew a distinction between this type of evidence and testimonial evidence (which is covered by the law of perjury):

> This evidence is aimed at interference with what has been called "real" evidence as distinct from "testimonial" evidence, which includes testimony and hearsay.[388]

"Real" evidence would include objects such as weapons or blood stained clothing.

In this Chapter we consider offences relating to interference with real evidence such as falsifying, destroying, concealing or fabricating evidence as well as offences relating to interference with witnesses such as protecting, corrupting, deceiving, preventing witnesses and reprisals against witnesses. We will first consider offences relating to real evidence and later in the Chapter we consider offences relating to witnesses.

[388] UK Law Commission, above note 38, para 3.29. The Commission went on to say: "real evidence is not a precise term of art, but we use it here to mean anything other than testimony, admissible hearsay or a document the contents of which are offered as testimonial evidence which may be examined by a tribunal as a means of proof, or which could be so examined if it could be preserved. This may consist of material objects, the appearance of persons, a site which may be viewed by the court, and includes not only a thing itself but the context in which it is found. Thus there will be "fabrication" of evidence if in order to create the impression that there has been a struggle chairs and tables in a room are overturned, and there will be destruction of evidence if to conceal that there has been a struggle a room is put back into normal order. We think that the prohibited conduct is best defined as fabricating, concealing or destroying evidence; these terms cover all types of interference."

Offences relating to interference with evidence

In Victoria as we have seen offences relating to interference with evidence, such as falsifying, destroying or concealing evidence would fall within the ambit of the general common law offence of perverting or attempting to pervert the course of justice.

The threshold question for Victoria is whether separate offences for misusing evidence should be created or whether we should continue to rely on the common law offence of perverting the course of justice which currently covers these acts.

General offence or several?

As we saw in the previous Chapter, MCCOC concluded that separate offences should be created—including separate offences for the misuse of evidence.[389] The arguments advanced by other law reform agencies on this issue were also reviewed in that Chapter.

Apart from Victoria and the ACT all other Australian jurisdictions, including those which are regarded as common law jurisdictions such as New South Wales and South Australia, have separate statutory offences dealing with this conduct.

In the Discussion Paper, the Committee asked whether separate offences should be created in relation to conduct relating to real evidence.

Witnesses' submissions in relation to the creation of separate offences

As foreshadowed in the previous Chapter (in relation to witnesses' views on general or specific offences) most Victorian witnesses generally oppose the creation of separate offences for conduct relating to evidence. Victoria Legal Aid outlined the following reasons for its opposition to the creation of such offences:

> A legislatively rendered general offence of attempting to pervert ought to contain falsifying, etc. In fact, a legislative definition ought to be devised to accompany the

[389] Ibid.

> proposed general legislative offence specifying that the actus reus of the general offence includes fabrication, etc.
>
> VLA is concerned that the creation of several offences will lead to the laying of alternative charges, which flies in the face of making the law easier to understand and reducing the costs of justice.[390]

Benjamin Lindner also opposes the creation of new offences on the basis that "any conduct intended to manipulate the evidence to be adduced at trial should be regarded as serious and be dealt with as an indictable offence."[391]

The Criminal Bar Association (CBA) is more vehement in its opposition to the creation of new offences for conduct relating to real evidence, arguing that such an exercise would be unnecessary and would create confusion rather than clarity:

> Turning to the proposed specific new offences, the CBA is strongly opposed to the hair-splitting creation of several specific offences where there is no doubt that the general offence covers each one of the proposed new offences. The creation of offences of fabrication, concealment, alteration or destruction of evidence adds nothing to the law. The rationale offered by MCCOC was twofold: first there should be no doubt of the seriousness of such conduct; and second everyone is doing it!
>
> We oppose it because it is unnecessary, and because it will create confusion.
>
> It is unnecessary because almost every imaginable act of fabrication etc plainly constitutes an Attempt to Pervert. Should there be any doubt about this, a definition may be devised specifying that the actus reus of the general offence includes fabrication etc.[392]

In relation to the point that the creation of new offences would make the law more confusing, the CBA states:

> […] The very debates reveal as much. How to define "fabrication"? How does a prosecutor elect the specific category of Attempting to Pervert to charge in messy factual circumstances? Are the specific offences to be pleaded as alternatives? If so, how are persons acting in concert or pursuant to a common purpose (or worse, an extended common purpose) to be charged?[393]

The CBA proceeds to give an example of how codification can lead to confusion and create the need for further amendments to the law to "clarify" the situation:

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[390] Victoria Legal Aid, submission no. 7, p. 3.
[391] Benjamin Lindner, submission no. 2, p. 3. Presumably the indictable offence being referred to here is attempting to pervert the course of justice.
[392] Criminal Bar Association, submission no. 6, p. 6.
[393] Ibid, p. 7.

> By way of illustration, the conduct proved in *Vreones* was a blatant example of Attempting to Pervert—deliberately swapping samples of potential evidentiary significance. In the UK the Law Reform Commission determined to replace the common law covering this fact situation with a new tampering/fabricating/destroying section. Yet this created a new difficulty. Because the mens rea of the new offence did not necessarily coincide with the traditional mens rea, it seemed necessary to create a limited exemption for tamperers whose acts were reasonable. Needless to say refinement begat needless refinement.[394]

In contrast to the other Victorian witnesses, the Director of Public Prosecutions states that they "generally support the creation of a separate offence directed specifically at falsifying, destroying, concealing or fabricating evidence."[395] However, this statement must be read in the context of the DPP's doubts about the efficacy of codification referred to in the first Chapter of this Report. The DPP also foreshadows some overlap between the proposed new offence and perjury, "because corrupt witnesses often give evidence on oath consistent with other material evidence which is known to them to be false or to have been fabricated."[396]

Committee's conclusion in relation to the creation of separate offences

As we discussed in Chapter 1, the Committee supports the creation of many of the specific offences proposed in the Discussion Paper in line with the Committee's goal to clarify the law and make it more transparent and accessible. The Committee is of the view that criminal behaviour should be stated as clearly as possible and that this can be achieved through the creation of separate offences which clearly state the elements of each offence.

Also, as we have previously discussed, the Committee wishes to make a contribution to the Model Criminal Code process by adopting, where possible, the recommendations of MCCOC. The fact that MCCOC have recommended that separate offences be created for misusing evidence is a strong argument for Victoria to consider creating separate offences.

On this threshold question the Committee therefore supports the creation of separate offences relating to misusing evidence rather than continuing to rely on the general common law offence of perverting the course of justice. We will now consider what

[394] Ibid.
[395] Director of Public Prosecutions, submission no. 9, p. 5.
[396] Ibid.

form the specific offence provisions should take. The Committee will deal separately with the act of interfering with the evidence and the act of knowingly using such evidence.

Falsifying, destroying, fabricating or concealing evidence

Some jurisdictions use different terms in their legislation when referring to these offences and as we will see, there is some debate about the most appropriate wording that should be used.

MCCOC

MCCOC took the view that the provision should refer to "making, using or altering evidence". [397]

Other jurisdictions

Some jurisdictions have created more separate offences than others. For example, Queensland, Western Australia, the Northern Territory, Tasmania and the Commonwealth all have separate offences for destroying evidence and fabricating evidence,[398] whereas New South Wales and South Australia deal with both these types of conduct (as well as others) in the same provision. [399] Some states also have offences for concealing, altering or suppressing evidence. Below is a summary of the provisions in other jurisdictions.

All Australian Codes and the Commonwealth contain offences to the effect that it is an offence for a person to destroy evidence.[400] The Queensland Code provides:

[397] MCCOC Discussion Paper, above note 5, p. 53.
[398] *Criminal Code Act 1899 (Qld),* sections 126 and 129; *Criminal Code 1913 (WA),* sections 129 and 132; *Criminal Code Act (NT)*, sections 99 and 102; *Criminal Code Act 1924 (Tas),* sections 97 and 99; *Crimes Act 1914 (Cth),* sections 36 and 39.
[399] *Crimes Act 1900 (NSW)* s. 317; *Criminal Law Consolidation Act 1935 (SA)* s. 243.
[400] MCCOC Discussion Paper, above note 5, p. 55.

> Any person who, knowing that any book, document, or other thing of any kind, is or may be required in evidence in a judicial proceeding, wilfully destroys it or renders it illegible or undecipherable or incapable of identification, with intent thereby to prevent it from being used in evidence, is guilty of a misdemeanour, and is liable to imprisonment for 3 years.[401]

The Western Australian provision is worded identically to the Queensland provision[402] and the Northern Territory and Commonwealth provisions contain very similar wording, although they are not identical.[403]

The Tasmanian section extends to concealing and altering evidence[404] but is otherwise of similar effect to the other provisions. It provides:

> Any person who, with intent to mislead any tribunal in any judicial proceeding, or to pervert or defeat the course of justice, wilfully destroys, alters or conceals any evidence, or anything likely to be required as evidence in any judicial proceeding, is guilty of a crime.[405]

The relevant New South Wales and South Australian provisions also extend to concealing evidence and the New South Wales Act also extends to suppressing evidence. Section 317 of the New South Wales *Crimes Act* provides:

> Tampering etc with evidence
>
> A person who, with intent to mislead any judicial tribunal in any judicial proceeding:
>
> (a) suppresses, conceals, destroys, alters or falsifies anything knowing that it is or may be required as evidence in any judicial proceeding; or
>
> (b) fabricates false evidence (Other than by perjury or suborning perjury), or
>
> (c) knowingly makes use of fabricated false evidence,
>
> is liable to imprisonment for 10 years.

The South Australian Act also makes it an offence to fabricate, alter, conceal or destroy anything which may be required in evidence or to use anything knowing it to have been fabricated or altered.

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[401] *Criminal Code Act 1899 (Qld),* s. 129.
[402] *Criminal Code 1913 (WA),* s. 132.
[403] *Criminal Code Act (NT),* s. 102; *Crimes Act 1914 (Cth),* s. 39.
[404] s. 99 is entitled "suppressing evidence" although there term "suppressing" does not appear in the body of the section.
[405] *Criminal Code Act 1924 (Tas),* s. 99.

Fabricating evidence and knowingly using such evidence in judicial proceedings is a separate offence in most Australian jurisdictions. Section 126 of the Queensland Code provides:

> (1) Any person who, with intent to mislead any tribunal in any judicial proceeding—
>
> (a) fabricates evidence by any means other than perjury or counselling or procuring the commission of perjury; or
>
> (b) knowingly makes use of such fabricated evidence;
>
> is guilty of a crime, and is liable to imprisonment for 7 years.

The provisions in the Western Australian and Northern Territory Codes are identical.[406] The Tasmanian provision is similar but it does not specifically exclude perjury.[407] It is similar to the Commonwealth offence which provides:

> Any person who, with intent to mislead any tribunal in any judicial proceeding, intentionally:
>
> (a) fabricates evidence; or
>
> (b) makes use of fabricated evidence;
>
> shall be guilty of an offence.[408]

Fabricating evidence is encompassed in the New South Wales section entitled "Tampering etc with evidence"[409] and in the South Australian section "Fabricating, altering or concealing evidence" (quoted above).[410] New Zealand and Canada both have provisions relating to fabricating evidence.[411] Once again, Victoria and the ACT have no provision to this effect.

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[406] *Criminal Code 1913 (WA),* s. 129; *Criminal Code Act (NT),* s. 99.
[407] *Criminal Code Act 1924 (Tas*), s. 97.
[408] *Crimes Act 1914 (Cth),* s. 36.
[409] *Crimes Act 1900 (NSW),* s. 317.
[410] *Criminal Law Consolidation Act 1935 (SA),* s. 243.
[411] *Crimes Act 1961 (NZ),* s. 113, "Fabricating evidence" provides: "Every one is liable to imprisonment for a term not exceeding 7 years who, with intent to mislead any tribunal holding any judicial proceeding to which section 108 applies, fabricates evidence by any means other than perjury." *Criminal Code Canada,* s. 137, "Fabricating evidence" provides: "every one who, with intent to mislead, fabricates anything with intent that it shall be used as evidence in a judicial proceeding, existing or proposed, by any means other than perjury or incitement to perjury is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years."

Which terms should be used?

MCCOC was concerned by the interpretation of the word "fabricated" in *R v Love*.[412] In that case it was held that the word "fabricate" has a dual meaning so that it does not necessarily mean that evidence is devised or contrived (dishonest connotation) but rather could mean "make up" or "get together" without this dishonest connotation.[413] Given this dual meaning and the confusion it could cause, MCCOC took the view that the word "fabricating" should be avoided and that instead the phrase "making or using false evidence" should be used.[414]

Three Australian jurisdictions refer to "altering" evidence.[415] The Gibbs Committee considered that the offence should extend to "altering" evidence as the term seemed clearer than "tampering."[416] MCCOC agreed that the offence should specifically refer to "altering" evidence to remove any doubt as to the application of the provision to altering.[417]

The UK Law Commission recommended the creation of a new offence of tampering with or fabricating or destroying real evidence which was designed to cover the type of conduct committed in *R v Vreones*.[418]

The Committee will now consider witnesses submission on which terms should be used.

Fabrication and altering

The Director of Public Prosecutions submitted that any new offence:

> should be capable of encompassing two distinctively different situations, namely the creation of an entirely false piece of evidence or secondly, the interference with or alteration of an existing item of evidence in order to corruptly alter its apparent probative significance.[419]

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[412] *R v Love* (1983) 9 A Crim R 1 at p. 5.
[413] MCCOC Discussion Paper, above note 5, p. 53.
[414] Ibid.
[415] *Criminal Law Consolidation Act 1935 (SA),* s. 243; *Crimes Act 1900 (NSW),* s. 317; *Criminal Code Act 1924 (Tas)*, s. 99 (in the section on suppressing evidence).
[416] Gibbs Committee Report, above note 85, para 7.12.
[417] MCCOC Discussion Paper, above note 5, p. 59.
[418] UK Law Commission, above note 38, para 3.29.
[419] Ibid, p. 7.

The submission noted that there may be a problem with adopting the phrase "making and using false evidence," because in Victoria an analogy may be drawn with the existing offence of "making or using a false document"—a phrase which has been held to have a specific and relatively narrow meaning.[420] As the submission points out, the phrase has been interpreted to mean "the creation of a document which is deceptive as to its overall nature or identity, as distinct from making corrupt amendments to an existing and otherwise innocuous document."[421] This means that, if the phrase "making and using false evidence" where adopted there would be a risk "that such offence would be interpreted not to encompass the corrupt alteration or defacing of an existing piece of evidence."[422]

Victoria Legal Aid opposed the creation of this offence but went on to comment on the drafting of the provision. The VLA submitted that "making and using false evidence" should be used instead of "fabricating" evidence. [423]

The question as to whether the word "altering" evidence should be included in the definition (particularly if the term "fabricating" is retained) was considered by two interstate witnesses, namely the Queensland Director of Public Prosecutions, Leanne Clare, and Ralph Devlin, a senior barrister appearing on behalf of the Queensland Bar Association. Leanne Clare told the Committee that, in her view, the term "fabricating" evidence also incorporates "altering" evidence "because you are changing the evidence and you are making it into something else."[424] After noting other offences which could be considered for such behaviour, Ms Clare concluded: "Personally, I would be quite comfortable with charging fabricating evidence in relation to someone who altered a document."[425]

Ralph Devlin, on the other hand, submitted that altering is different from fabricating and told the Committee that there have been cases where altering evidence has not been considered a fabrication of evidence for the purposes of the Queensland Criminal Code:

[420] Director of Public Prosecutions, submission no. 9, p. 6.
[421] Ibid.
[422] Ibid.
[423] Victoria Legal Aid, submission no. 7, p. 3.
[424] Leanne Clare, *Minutes of Evidence,* 13 November 2003, p. 67.
[425] Ibid.

> I have often thought it is a gap in the Code because they are pretty definite words, are they not, 'destroying' and 'fabricating'? 'Altering suggests something different.[426]

Mr Devlin's colleague Tony Glynn SC was "not as convinced that altering does not amount to fabrication" but told the Committee: "when in doubt, clarify. I would not see there is any objection to amending to cover that."[427]

Concealment and suppression of evidence

If a separate offence or offences are created in Victoria, should concealing and or suppressing evidence be included? MCCOC acknowledged that an attempt to conceal evidence could be charged as an attempt to pervert the course of justice but concluded that "the practical significance of the conduct suggests that a specific offence should be created."[428]

As noted in the review of Australian legislation, New South Wales, Tasmania and South Australia have extended the offence to concealing (and in the case of New South Wales suppressing) evidence.

The Gibbs Committee noted that objection could be raised to an extension of the offence to "concealment" on the grounds that an accused person should not be required to assist in convicting him or herself.[429] However that Committee concluded that the rules relating to the requisite intention would "confine it within sufficient bounds" and therefore recommended the extension of the offence to concealment.[430]

As to whether the offence should extend to the "suppression" of evidence (as is the case in New South Wales), MCCOC took the view that the term suppression was of less certain meaning than concealment and that most cases of suppressing would be encompassed by concealing. It therefore doubted the necessity of referring to

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[426] Ralph Devlin, *Minutes of Evidence,* 24 November 2003, p. 93. The experience Devlin was referring to related to framing charges against someone who had tinkered with an exhibit but which "never went to court because we did not have enough on the facts to fit it into either one of the two available tools [fabricating or destroying evidence] […] We had some evidence and knew someone who was altering something, and it was neither destroying nor fabricating. That was the view taken at the time:" p. 94.
[427] Tony Glynn SC, *Minutes of Evidence*, 13 November 2003, p. 93.
[428] MCCOC Discussion Paper, above note 5, p. 59.
[429] Gibbs Committee Report, above note 85, para 7.12. The Gibbs Committee did not elaborate any further on this view in the Report.
[430] Ibid and see MCCOC Discussion Paper, above note 5, p. 59.

suppressing as well as concealing.[431] Several submissions supported this conclusion and it was not altered in the Final Report.[432]

The Director of Public Prosecutions addressed the issue as to whether there may be situations in which a "suppression" of evidence does not amount to the "concealment" of evidence, concluding that:

> On one view, the concept of concealment is more absolute than that of suppression and accordingly there may be instances in which evidence is "suppressed" but not (entirely or successfully) "concealed." On that basis, we see no particular disadvantage in referring to suppression as well as concealment.[433]

Destroying Evidence

The Director of Public Prosecutions noted that while in practice it may make little difference whether the offence of destroying evidence is a separate offence or one limb of a wider offence encompassing destruction, alteration and so on, "for the sake of clarity it may be desirable that it be drafted as a separate offence."[434] On the other hand, the DPP points out that if destruction is considered more serious than altering or damaging existing evidence thereby warranting a greater penalty, then "as a matter of construction it would be desirable to create a separate offence with its own higher penalty."[435]

The Committee's conclusions on which terms should be used are discussed after we have considered whether the knowing use of fabricated evidence should also be an offence. The Committee also considers the mental element required for the offence before discussing its conclusions.

Use of fabricated evidence

All Australian jurisdictions except Victoria and the ACT make it an offence to *knowingly use* fabricated evidence in a judicial proceeding.[436] Both the Gibbs

[431] Ibid.
[432] The ACT Committee and the DPP Commonwealth were named as supporting this conclusion: MCCOC Report, above note 6, p. 75.
[433] Director of Public Prosecutions, submission no. 9, p. 7
[434] Director of Public Prosecutions, submission no. 9, p. 5 (response to Discussion Paper question no. 5).
[435] Ibid.
[436] See above comparison of Australian jurisdictions.

Committee and MCCOC recommended that the offence should not be confined to those who actually fabricate the evidence but rather should also be extended to those who knowingly use such evidence.[437]

In the Discussion Paper, the Committee invited submissions as to whether any new offence in Victoria should extend to those who knowingly use fabricated evidence in judicial proceedings. The Criminal Bar Association was opposed to the creation of this offence on the ground that the extension to those who "use" fabricated evidence will beget numerous exceptions and exemptions. [438]

However the DPP expressed general support for the creation of a statutory criminal liability for the use of fabricated evidence in judicial proceedings. He also noted that a question may arise as to whether there should be one offence which refers to both the making and using of such material or whether it would be preferable to create two separate offences for each form of conduct. The DPP submitted:

> Obviously, fact situations may arise in which one party is responsible for the making of the fabricated evidence and a second party is responsible for its "use" in judicial proceedings. In such cases, the Crown may have the option in charging each party with a separate offence, or possibly charging both parties with a statutory conspiracy to commit the second offence.[439]

The DPP did not express a concluded view on whether making and using fabricated evidence should be a single offence or two separate offences.

Mental element

It will be recalled that the mental element of the statutory offences discussed in this Chapter varies in Australian jurisdictions.[440] The UK Law Commission recommended that the relevant mental element should be "intent to prevent the bringing of judicial proceedings or to influence the outcome of current or future judicial proceedings."[441] MCCOC noted that this formula was not inconsistent with the High Court's decision

[437] Gibbs Committee Report, above note 85, para 7.13. MCCOC Discussion Paper, above note 5, p. 61. Neither Committee elaborates further on this point.
[438] Criminal Bar, submission no.6, p. 8.
[439] Ibid.
[440] See discussion above under heading 'Fabricating evidence and to knowingly use evidence in judicial proceedings.'
[441] UK Law Commission, above note 38, para 3.33.

in *R v Rogerson*[442] and that it clarified the law. On this basis, MCCOC recommended its adoption. The Gibbs Committee also agreed with this formulation of the mental element.[443]

In the Discussion Paper the Committee asked interested parties to express their views as to the appropriate mental element of any new statutory offence relating to interference with real evidence. In particular, the Committee asked whether the recommendation of the UK Law Commission (as endorsed by MCCOC) was appropriate (in other words, "intent to prevent the bringing of judicial proceedings or to influence the outcome of current or future judicial proceedings") or whether some other formulation would be preferable.

All submissions the Inquiry received stated that intention is the appropriate mens rea for these offences. Benjamin Lindner submitted that "the mental element of any new offence should be careful to exclude any reference to recklessness or negligence, whatever the nature of the evidence that is interfered with."[444] The Criminal Bar Association submitted that, if the creation of new offences relating to interference with real evidence were to proceed the mens rea should be common to all offences, noting that:

> We are wary of the introduction of differential mental states for offences within this sub-category of evidentiary abuses. The mens rea of the common law offence is clear […]. It has produced no injustice. There is no call for its abolition.[445]

In a similar vein Victoria Legal Aid submitted that:

> The sub-category of evidence related offences pertaining to attempting to pervert the course of justice do not require a different mental state to the general offence. The mens rea of a legislatively rendered common law offence should require proof that the accused intended to pervert the course of justice.[446]

The Director of Public Prosecutions generally agreed with the approach of the UK Law Commission and MCCOC which endorsed the following mens rea—"intent to prevent the bringing of judicial proceedings or to influence the outcome of current or future judicial proceedings." However it observed that there may be fact situations where the intention of the accused was not to "influence the outcome" but rather, to

[442] *R v Rogerson* (1992) 174 CLR 268.
[443] Gibbs Committee Report, above note 85, para 7.12.
[444] Benjamin Lindner, submission no. 8, p. 4.
[445] Criminal Bar Association, submission no. 6, p. 8.
[446] Victoria Legal Aid, submission no. 7, p. 4.

use the example presented by the DPP, "to improperly use the judicial proceeding as a forum to put forward false evidence intended to impugn or vilify the accused person."[447] "Assuming that such behaviour is regarded as deserving of criminal liability," continues the DPP submission, "the formula of words recited in the question would be insufficient."[448]

A Limited Exception

The UK Law Commission suggested that there should be a limited exception in certain cases and gave the following example:

> For example, in giving emergency treatment to a victim of a serious assault a person may destroy evidence by removing fragments of a weapon from a wound. It would clearly be wrong that he should be guilty of an offence. We therefore recommend that it should not be an offence to destroy evidence if to do so is reasonable in all the circumstances.[449]

The Gibbs Committee did not think it necessary to provide that it should not be an offence to alter or destroy evidence if the destruction was reasonable in all the circumstances.[450] The Committee reached this conclusion on the basis that, if the mental element of the offence required a specific intention to prevent the bringing of judicial proceedings or to influence their outcome (as it recommended), it would not be necessary to insert such an exception.[451] MCCOC agreed with this conclusion on the grounds that intention would be part of the offence.[452]

The Criminal Bar Association and Benjamin Lindner both viewed this exception as an example of one of the key disadvantages in codifying offences—namely, the unanticipated consequences which can flow from codification resulting in the need for exceptions to the codified offence. The Criminal Bar Association takes the view that "the need for limited exceptions is symptomatic," observing that "the proposed exception is unnecessary in any event, as the Crown must prove intention."[453]

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[447] Director of Public Prosecutions, submission no. 9, p. 7.
[448] Ibid.
[449] Ibid, para 3.33.
[450] Gibbs Committee Report, above note 85, para 7.12.
[451] Gibbs Committee Discussion Paper, above note 38, para 8.9.
[452] MCCOC Discussion Paper, above note 5, p. 59.
[453] Criminal Bar Association, submission no. 6, p. 7.

Victoria Legal Aid agreed with this latter point regarding intention, noting that:

> If, as VLA suggests, the general offence of attempting to pervert is legislatively rendered and defined as including falsifying, etc, a limited exception is unnecessary, as the onus of proof is on the Crown to prove intention.[454]

The Director of Public Prosecutions reached a similar conclusion about the limited exception, stating that:

> On this issue we agree with the Gibbs Committee, namely that if the act of destruction is done for a proper and lawful purpose then, axiomatically, it could not be accompanied by the necessary criminal intent and would thus not attract prosecution in the first place. The same concept applies to many existing offences, in relation to which it is implicit that if an act is done lawfully and therefore in the absence of the necessary criminal intent, liability cannot arise and there is thus no need for a specific excepting provision.[455]

Committee's conclusions on specific offences relating to evidence

The Committee recommends the creation of separate offences for fabricating or altering evidence, destroying, concealing or suppressing evidence and knowingly using fabricated or altered evidence in line with the Committee's goal to clarify the law and make it more transparent and accessible. As we have previously discussed the Committee wishes to make a contribution to the Model Criminal Code process by adopting, where the Committee considers appropriate, the MCCOC provisions. In light of submissions to the Committee, the Committee has decided not to adopt the exact wording of the MCCOC provisions. The Committee's reasons are set out below.

The fabricating or altering evidence provision recommended by the Committee would make it an offence to fabricate or alter evidence with the intention of:

(a) preventing the bringing of judicial proceedings; or

(b) influencing the outcome of current or future judicial proceedings; or

(c) improperly using the judicial proceedings for the purpose of impugning or vilifying the accused person or other witnesses.

[454] Victoria Legal Aid, submission no. 7, p. 3.
[455] Director of Public Prosecutions, submission no. 9, p. 6.

In making this recommendation the Committee has not followed the MCCOC provision which refers to "making or using false evidence". Instead the Committee agrees with the submission of the Director of Public Prosecutions that the provision should refer to "fabricating or altering evidence" as the phrase "making and using false evidence" should be avoided due to the possibility that judicial interpretation could give the phrase the same specific and relatively narrow meaning used in the offence of *making or using* a false document. The Committee also takes the view that the offence provision should also refer to "altering" to avoid any doubt that altering evidence is as much an offence as either fabricating evidence or destroying evidence.

The Committee agrees with the unanimous view of our stakeholders that intention is the appropriate mens rea for all offence provisions relating to evidence. The Committee sees merit in the submission of the Director of Public Prosecutions that the wording endorsed by MCCOC (incorporated in paragraphs (a) and (b) above) would not encompass fact situations where the relevant intention is not to "influence the outcome" of proceedings but rather to put forward false evidence designed to impugn or vilify the accused or some such similar design. Accordingly the Committee recommends the inclusion of paragraph (c) above to cover situations where the intention is to impugn or vilify, for all the provisions dealing with offences relating to the misuse of evidence.

The Committee has adopted the MCCOC "destroying or concealing evidence" provision with one minor amendment. The Committee agrees with the DPP submission that there may be situations in which a "suppression" of evidence does not amount to a successful "concealment" of evidence and the Committee therefore recommends the insertion of the term "suppression" into the offence provision.

The Committee does not support the "limited exception" recommended by the UK Law Commission to the effect that evidence can be destroyed if the destruction was reasonable in all the circumstances. Instead, the Committee agrees with the conclusion of witnesses to this Inquiry and MCCOC that such an exception is unnecessary because, to borrow the words of the Director of Public Prosecutions, "if the act of destruction is done for a proper and lawful purpose then, axiomatically, it could not be accompanied by the necessary criminal intent and would thus not attract prosecution in the first place."[456]

[456] Director of Public Prosecutions, submission no. 9, p. 6.

The 'knowingly using false evidence' provision is similar to the MCCOC provision.

MCCOC's recommended maximum penalty of 7 years imprisonment is endorsed by the Committee.

Recommendation 5

That statutory offences be created in Victoria for the misuse of evidence, making it an offence to:

(a) fabricate or alter evidence;

(b) destroy, conceal or suppress evidence; and

(c) knowingly use fabricated or altered evidence.

where the intention is to:

(a) prevent the bringing of judicial proceedings; or

(b) influence the outcome of current or future judicial proceedings; or

(c) improperly use the judicial proceedings for the purpose of impugning or vilifying the accused person or other witnesses.

That the maximum sentence for this offence be 7 years imprisonment.

Specific offences relating to interference with witnesses

This group of offences covers a wide range of acts relating to witnesses, including:

- deceiving witnesses;
- corrupting witnesses;
- threatening witnesses;
- preventing witnesses from giving evidence;
- preventing witnesses from producing physical evidence; and
- reprisals against witnesses.[457]

[457] These are some of the offences covered in the MCCOC Discussion Paper and Report.

As we discussed earlier in the Chapter, in Victoria these acts are currently covered by the common law offence of perverting the course of justice.

The law reform agencies which have considered these offences, including MCCOC, the UK Law Commission and the Gibbs Committee, all came to the view that separate statutory offences should be created rather than placing reliance on the common law offence of perverting the course of justice.[458] MCCOC concluded that offences relating to interference with witnesses "are of such practical significance in the administration of justice that MCCOC is of the view that the course taken in most Australian jurisdictions should be followed, that is, specific offences should be provided."[459]

In relation to the question of which specific offences should be created, MCCOC recommended that all of the above listed acts were of sufficient significance to the administration of justice to warrant the creation of separate specific offences.

We will now look separately at each of these offences relating to witnesses.

Deceiving witnesses

MCCOC recommended the inclusion of this offence but with the proviso that it should not be an offence to deceive another person to ensure that the person tells the truth as a witness.[460] MCCOC's recommended offence provides as follows:

> Deceiving witnesses
>
> A person who deceives another person with the intention that the other person or a third person will
>
> (a) give false evidence at legal proceedings; or
>
> (b) withhold true evidence at legal proceedings,
>
> is guilty of an offence.
>
> Maximum penalty: imprisonment for 5 years.[461]

[458] UK Law Commission, above note 38, para 3.19; Gibbs Committee Report, above note 85, para 9.14.
[459] MCCOC Discussion Paper, above note 5, p. 69.
[460] Ibid, p. 71.
[461] Ibid, p. 70.

Other jurisdictions

This type of conduct is made a specific offence in the criminal legislation of Queensland, Western Australia, the Northern Territory and the Commonwealth. [462] The relevant Queensland provision provides:

> s. 128 Deceiving witnesses
>
> Any person who practises any fraud or deceit, or knowingly makes or exhibits any false statement, representation, token, or writing, to any person called or to be called as a witness in any judicial proceeding, with intent to affect the testimony of such person as a witness, is guilty of a misdemeanour, and is liable to imprisonment for 3 years. [463]

There is no equivalent provision in Tasmania, New South Wales, South Australia or the ACT.

Witnesses' submissions on the form of the offence

In relation to deceiving witnesses the Director of Public Prosecutions expresses general agreement with the drafting of the MCCOC proposed formulation of the offence whereas all the other Victorian witnesses generally opposed the creation of specific offences such as deceiving witnesses and did not consider what form the offence should take. [464]

Committee's conclusion

The Committee in line with its general recommendation of codification of administration of justice offences, supports the creation of a specific statutory offence for deceiving witnesses and endorses the MCCOC provision and suggested maximum penalty.

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[462] *Criminal Code 1913 (WA),* s. 131 (identical to s. 128 of the Queensland Code); *Criminal Code Act (NT)* s. 101 (re deceiving witnesses – identical to s. 128 of the Queensland Code except the reference is to "crime" instead of "misdemeanour"); *Crimes Act 1914 (Cth)*, s. 38 ; largely corresponds with s. 128 of the Queensland Code (but provides for 2 years' imprisonment).

[463] *Criminal Code Act 1899 (QLD)s. 128.*

[464] This was discussed earlier in the Chapter.

Recommendation 6

That a specific statutory offence of deceiving witnesses be created in Victoria, making it an offence to deceive another person with the intention that the other person or a third person will:

(a) give false evidence at legal proceedings; or

(b) withhold true evidence at legal proceedings.

That the maximum sentence for this offence be 5 years imprisonment.

Corruption of witnesses

Once again, MCCOC considered the offence of corruption of a witness to be "of sufficient practical significance in the administration of justice to call for a specific offence."[465] MCCOC advocated that the essence of the offence should be providing a benefit with the intention that the briber will do something. There is no requirement for any agreement between the parties. In contrast, the Queensland Code requires the giving of a benefit upon an agreement or understanding.[466] MCCOC's suggested offence is in the following terms:

> 73.2 Corrupting Witnesses
>
> (1) A person who provides, or offers or promises to provide, a benefit to another person with the intention that the other person or a third person will:
>
> (a) not attend as a witness at legal proceedings; or
>
> (b) give false evidence at legal proceedings; or
>
> (c) withhold true evidence at legal proceedings,
>
> is guilty of an offence.
>
> Maximum penalty: imprisonment for 7 years.
>
> (2) A person who asks for, or receives or agrees to receive, a benefit for himself, herself or another person with the intention that he, she or another person will:

[465] Ibid, p. 73.
[466] Ibid.

(a) not attend as a witness at legal proceedings; or

(b) give false evidence at legal proceedings; or

(c) withhold true evidence at legal proceedings,

is guilty of an offence.

Maximum penalty: imprisonment for 7 years. [467]

Other jurisdictions

Corruption of a witness is a specific offence in all jurisdictions except Victoria and the ACT. As the Queensland Code serves as a template for Western Australia, the Northern Territory and the Commonwealth, [468] the Queensland provision is set out in full below.

s. 127 Corruption of witnesses

(1) Any person who—

(a) gives, confers, or procures, or promises or offers to give or confer, or to procure or attempt to procure, any property or benefit of any kind to, upon, or for any person upon any agreement or understanding that any person called or to be called as a witness in any judicial proceeding shall give false testimony or withhold true testimony; or

(b) attempts by any other means to induce a person called or to be called as a witness in any judicial proceeding to give false testimony or to withhold true testimony; or

(c) asks for, receives, or obtains, or agrees or attempts to receive or obtain, any property or benefit of any kind for himself, herself or any other person, upon any agreement or understanding that any person shall as a witness in any judicial proceeding give false testimony or withhold true testimony;

is guilty of a crime, and is liable to imprisonment for 7 years.

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[467] Ibid, p. 72.

[468] *Criminal Code 1913 (WA)*, s. 130 – identical to s. 127 of the Queensland Code; *Criminal Code Act (NT),* s. 100 (re corruption of witnesses – identical to s. 127 of the Queensland Code); *Crimes Act 1914* (Cth), s. 37 largely corresponds with s. 127 of the Queensland Code (but provides for 5 years' imprisonment)

Tasmania and New South Wales also have broad equivalents of the Queensland section 127 (corruption of witnesses).

Section 98 of the Tasmanian Criminal Code is entitled "corruption of witnesses" and provides:

> Any person who –
>
> (a) solicits, receives, or obtains, or agrees to receive or obtain, any property or benefit of any kind for himself or any other person, in consideration for any agreement or understanding that any person shall as a witness in any judicial proceeding give false evidence; or
>
> (b) gives, confers, or procures, or offers to give, confer, procure, or attempt to procure, any property or benefit of any kind to, upon, or for any person, as a consideration for any agreement or understanding that any person called or to be called as a witness in any judicial proceeding shall give false evidence –
>
> is guilty of a crime.

The equivalent New South Wales provision is more detailed than its Tasmanian counterpart and specifically extends to the corruption of jurors [469] while the South Australian Act also contains general provisions entitled "offences relating to witnesses"[470] and "offences relating to jurors"[471] which cover corruption of witnesses and jurors.

Witnesses' submissions on the form of the offence

In relation to corruption of a witness, the Director of Public Prosecutions again expresses general agreement with the MCCOC formulation of the offence however VLA supports the creation of an offence modelled on the Queensland Code because the offence requires an understanding to be reached between the witnesses and the accused. [472] No other witnesses commented on the form of the offence as they were generally opposed to the creation of separate offences.

[469] *Crimes Act 1900 (NSW),* s. 321.
[470] *Criminal Law Consolidation Act 1935 (SA),* s. 244.
[471] Ibid, s. 245.
[472] Victoria Legal Aid, submission no. 7 , p. 4-5.

Committee's conclusion

The Committee in line with its general recommendation of codification of administration of justice offences supports the creation of a specific statutory offence for corruption of a witness. The Committee prefers to adopt the wording and penalty of the MCCOC provision rather than the Queensland provision, in order to promote consistency in the criminal laws in Australia.

Recommendation 7

That a specific statutory offence of corruption of a witness be created in Victoria, making it an offence to:

provide, or offer or promise to provide, a benefit to another person with the intention that the other person or a third person will:

(a) not attend as a witness at legal proceedings; or

(b) give false evidence at legal proceedings; or

(c) withhold true evidence at legal proceedings.

That the provision also makes it an offence to ask for, or receive or agree to receive, a benefit for themselves or another person with the intention that they or another person will:

(a) not attend as a witness at legal proceedings; or

(b) give false evidence at legal proceedings; or

(c) withhold true evidence at legal proceedings.

That the maximum penalty for this offence be 7 years imprisonment.

Threatening witnesses

MCCOC advocates the creation of such an offence in the Model Criminal Code. However, in MCCOC's view the offence should not extend to persons who threaten

witnesses with the intention that the person threatened should give truthful evidence.[473] The recommended offence is as follows:

> Threatening witnesses
>
> A person who causes or threatens to cause any detriment to another person with the intention that the other person or a third person will
>
> (a) not attend as a witness at legal proceedings; or
>
> (b) give false evidence at legal proceedings; or
>
> (c) withhold true evidence at legal proceedings,
>
> is guilty of an offence.
>
> Maximum penalty: imprisonment for 5 years.

Other jurisdictions

Legislation in the Commonwealth, New South Wales and South Australia specifically extends to threatening witnesses while no specific provision is made for this conduct in the Code jurisdictions. [474]

Witnesses' submissions on the form of the offence

Victoria Legal Aid considered that the creation of the new offences of threatening witnesses was justified. VLA notes that "anecdotal evidence suggests that this practice [threatening witnesses] is widespread and ought to be addressed."[475] However VLA did not comment on the particular form that the offence provision should take.

The only other witness to comment on the form of the offence was the DPP who agreed that the MCCOC draft offence is generally appropriate. However the submission alludes to possible difficulties arising out of the phrase "to cause any detriment," noting that a witness may feel threatened without being able to say what particular "detriment," if any, was intended:

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[473] MCCOC Discussion Paper, above note 5, p. 75.
[474] Ibid, p. 75. *Crimes Act 1914 (Cth),* s. 36A; *Crimes Act 1900 (NSW),* s. 322; *Criminal Law Consolidation Act 1935 (SA),* s. 248.
[475] Victoria Legal Aid, submission no. 7, p. 5.

> Non-specific threats are commonplace and indeed it is often the uncertainty of the threat which makes it more intimidating to a witness. If it is thought that the proposed form of words would oblige the Crown to prove, as an element of the offence, the "detriment" in question, then we query whether that element should be included.[476]

The DPP also notes that it may also be necessary to clarify that "attending as a witness at legal proceedings" includes attendance at a venue for a video link-up.

Committee's Conclusion

The Committee agrees with Victoria Legal Aid that a specific offence of threatening a witness should be created in Victoria. The Committee proposes to endorse the MCCOC provision, with some modification, in light of concerns regarding the wording of that provision.

On the question of the form of the offence, the Committee takes note of the DPP's submission on the issue of the MCCOC phrase "threat to cause any detriment". The Committee is of the opinion that it would be helpful if the statutory provision provided a definition of "threat". On this drafting note the Committee refers to the frequently cited definition of the expression "threat" in the judgment of Lush J in *Wood v Bowron*: [477]

> After the decisions that have been given upon this statute, it is too late to say that the word "threat" is limited to the declaration of an intention to do those acts with which it stands in intimate connection, viz acts of violence to the property or person of another. The cases that have been decided show that the word must have a wider sense; namely, a threat by act or words of doing some injury to another person. But I apprehend that it is the very essence of a threat that it should be made for the purpose of intimidating or overcoming the will of the person to whom it is addressed.[478]

The Committee also notes that the Australian Federal Police (AFP) in its submission to MCCOC had similar concerns regarding the proposed definition of threat. [479] The AFP argued that the offence should be extended to include intimidation because "an individual can influence the conduct of others, including witnesses without necessarily issuing a threat; stalking and gestures are contemporary examples of this".

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[476] Director of Public Prosecutions, submission no. 9, p. 9.
[477] *Wood v Bowron* (1866) LR 2 QB 21
[478] Ibid at 30.
[479] MCCOC Report, above note 6, p. 95,

MCCOC agreed with this view and in its final report decided to define "threat" as including "a threat made by any conduct whether explicit or implicit and whether conditional or unconditional". [480]

The Committee considers that this is not necessary to clarify that 'witnesses' includes witnesses who give evidence by video link-up as the *Evidence Act (1958) Vic* provides that the venue where a witness gives evidence by video link-up is deemed to be part of the court premises. [481]

Recommendation 8

That a specific statutory offence of threatening a witness be created in Victoria, making it an offence to cause or threaten to cause any detriment to a person (who intends to attend as a witness at proceedings) with the intention that the person or another will:

a) not attend as a witness at legal proceedings; or

b) give false evidence at the legal proceedings; or

c) withhold truthful evidence at the legal proceedings.

That "threat" be defined to include a threat made by any conduct whether explicit or implicit and whether conditional or unconditional.

That the maximum penalty for this offence be 5 years imprisonment.

Preventing witnesses from attending

MCCOC recommended that there should be a provision to this effect in the Model Criminal Code however MCCOC concluded that there was not sufficient reason to require, that for the operation of the section, the witness has been duly summoned to attend. [482] Rather, according to MCCOC, the provision should also extend to a

[480] Ibid.
[481] *Evidence Act* 1958 (Vic), s. 42W.
[482] MCCOC Discussion Paper, above note 5, p. 71.

situation where a person, who intended to attend as a witness but was not summoned, was prevented from attending. [483] MCCOC's provision provides:

Preventing witnesses

(1) A person who, by his or her conduct, intentionally prevents another person from attending as a witness at legal proceedings is guilty of an offence.

Maximum penalty: imprisonment for 5 years.

(2) This section does not apply to conduct that constitutes an offence against another provision of this Division.[484]

Other jurisdictions

Preventing witnesses from attending is currently an offence in Queensland, Western Australian and Northern Territory Codes and in the Commonwealth provision. [485] Unlike the MCCOC formulation, these provisions only cover witnesses who have been duly summoned to attend.

> s.130 Preventing witnesses from attending
>
> Any person who wilfully prevents or attempts to prevent any person who has been duly summoned to attend as a witness before any court or tribunal from attending as a witness, or from producing anything in evidence pursuant to the subpoena or summons, is guilty of a misdemeanour, and is liable to imprisonment for 1 year.

Tasmania, New South Wales and South Australia have broad equivalents of the Queensland provisions. [486]

[483] Ibid.
[484] Ibid, p. 76.
[485] *Criminal Code 1913 (WA);* s. 133 – preventing witnesses from attending (identical to s. 130 of the Queensland Code); *Criminal Code Act (NT*); s. 103 (re preventing witnesses from attending – identical to s. 130 of the Queensland Code except the reference is to crime rather than misdemeanour.); *Crimes Act 1914 (Cth);* s. 40—largely corresponds with s. 130 of the Queensland Code (but provides for 1 year imprisonment.)
[486] MCCOC Discussion Paper, above note 5, p. 65.

Witnesses' submissions on the form of the offence

The Committee received three submissions addressing this issue. The DPP's submission raised a drafting issue concerning the wording of the MCCOC provision. The DPP submitted that there may be difficulty caused by the decision not to include the words "duly summoned to attend" in the MCCOC provision. As the DPP asks:

> Without such qualification, what defines a person as "a witness" for the purpose of the offence? Clarification is required as to whether the offence as drafted is intended to apply to acts of prevention which occur prior to "the witness" in fact being summonsed.[487]

According to the Victoria Legal Aid submission, this offence "lacks practical significance to the administration of justice". [488] Instead, VLA thought that this kind of behaviour would be better covered by the general offence of perverting the course of justice.[489]

As we have previously noted, the Criminal Bar Association is generally opposed to the creation of offences relating to interference with witnesses. In relation to this specific offence, the CBA was critical of the drafting of the MCCOC provision because, under the MCCOC proposal it is not necessary for the Crown to prove an intention to pervert the course of justice."[490] According to the CBA, an accused who acted in the belief that the prevented witness was irrelevant to the proceeding would not necessarily be guilty of attempting to pervert, but would be guilty under the MCCOC proposals.[491] Thus, on the CBA analysis, the proposed offence can be seen as an extension, rather than a mere codification, of the current general offence of attempting to pervert the course of justice.

Committee's Conclusion

The Committee also endorses this MCCOC provision, with some modification. While the Committee accepts that on the CBA analysis the proposed offence could be seen as an extension of the general offence of attempting to pervert the course of justice, on

[487] Director of Public Prosecutions, submission no. 9, p. 9.
[488] Victoria Legal Aid, submission no. 7. p. 5.
[489] Ibid.
[490] Criminal Bar Association, submission no. 6, p. 8.
[491] Ibid.

balance, the Committee believes that it should be a criminal offence to intentionally prevent or attempt to prevent a witness from attending court, regardless of whether the accused believed the witness was irrelevant to the proceedings.

In relation to the DPP's concern regarding the definition of "witness", the Committee takes the view that the MCCOC provision is intended to extend to situations where a person intended to attend as a witness but was not summoned. On this point, the Committee recommends as a drafting note that the MCCOC provision should be expressed with more clarity. The Committee suggests that the provision include a definition of "witness" to include witnesses who have not been summoned.

Recommendation 9

That a specific statutory offence of preventing a witness from attending legal proceedings be created in Victoria, making it an offence to intentionally prevent (by conduct) a person from attending as a witness at legal proceedings.

That the maximum sentence for this offence be 5 years imprisonment.

Preventing witnesses from producing physical evidence

MCCOC recommended the creation of the separate offence of preventing the production of "things in evidence".[492] "Things" refers to physical evidence such as clothing, medical records, bank statements, diaries, video tapes, letters and photos—any object that may later be used as evidence. MCCOC concluded that the offence is not intended to apply to preventing a person producing a thing that the person is under no legal compulsion to produce. [493] This means that the offence would only apply to a situation where a person intentionally prevents a witness from bringing an item with them to court, where the item was the subject of a subpoena or a witness summons. [494]

MCCOC's provision provides:

[492] Ibid, p. 79.
[493] MCCOC Discussion Paper, above note 5, p. 79.
[494] A subpoena is a court order which compels a person to attend court as a witness and, if it is specified in the document, to bring with them to court all the items listed in the subpoena. A witness summons is similar.

> Preventing production of things in evidence
>
> A person who, by his or her conduct, intentionally prevents another person from producing in evidence at legal proceedings a thing that is legally required to be produced is guilty of an offence.
>
> Maximum penalty: imprisonment for 5 years.

Other jurisdictions

In Queensland this offence is part of the 'preventing witnesses' provision:

> s.130 Preventing witnesses from attending
>
> Any person who wilfully prevents or attempts to prevent any person who has been duly summoned to attend as a witness before any court or tribunal from attending as a witness, or from producing anything in evidence pursuant to the subpoena or summons, is guilty of a misdemeanour, and is liable to imprisonment for 1 year.

Tasmania, New South Wales and South Australia have broad equivalents of the Queensland provision. [495]

Witnesses submissions on the form of the offence

The Director of Public Prosecutions was the only witness to specifically comment on this provision. The DPP noted that there may be a need to define "a thing that is legally required to be produced" as "presumably, this could apply only to subpoenas requiring the attendance of the witness and, in terms, requiring the witness to produce nominated items."[496]

Committee's conclusion

Again, the Committee supports the creation of this specific offence along the lines suggested by MCCOC. The Committee notes the comment by the DPP in relation to

[495] MCCOC Discussion Paper, above note 5, p. 65.
[496] Ibid, p. 9.

the drafting of the MCCOC provision and agrees that a clearer definition of "a thing that is legally required to be produced" is required.

Recommendation 10

That a specific statutory offence of preventing a witness from producing an item in evidence be created in Victoria, making it an offence to intentionally prevent a witness from producing an item in evidence where the item is required to be produced by subpoena or summons.

That the maximum sentence for this offence be 5 years imprisonment.

Reprisals against witnesses

Should there be a separate offence?

We now move on to consider the situation when a witness has actually given his or her evidence. Should witnesses and others associated with legal proceedings have some form of statutory protection against reprisals? First we briefly examine the current law in Victoria before considering the MCCOC provision and the position in other Australian jurisdictions. We then consider the views of other law reform agencies before looking at our witnesses' submissions on this issue.

Victoria

Unlike other states such as Queensland and New South Wales, Victoria has no statutory provision in the *Crimes Act* relating to reprisals against witnesses.[497] Instead offences of this nature are covered by the common law offence of contempt of court where it can be shown that the act or omission in question is calculated to interfere with the due administration of justice. [498] The circumstances which have been held to amount to contempt are varied and include intimidating or victimising witnesses

[497] *Criminal Code Act 1899 (Qld),* sections 119B, 120 and 122; *Crimes Act 1900 (NSW)* section 326.
[498] *Archbold: Criminal Pleading, Evidence and Practice* 1998, p. 2160, citing *Att.-Gen v. Butterworth* [1963] 1 QB 696.

before, during or after proceedings, [499] and threatening a Crown Prosecutor. [500] Criminal contempt charges, unlike other serious criminal offence charges which are triable before a judge and jury, are heard directly before a single judge of the Supreme Court without a preliminary examination of the evidence before a Magistrate.[501] Also, there is no maximum penalty for criminal contempt [502] whereas statutory offences specify a maximum penalty for each offence.

As we will discuss in the next section of this chapter, less serious offences can also be prosecuted under section 52A of the *Summary Offences Act 1966*. Under that section it is an offence to harass a person because that person took part in a criminal proceeding either as a witness or in some other capacity. The maximum penalty for the offence is 12 months imprisonment.

MCCOC

In 1998 MCCOC concluded that specific offences as to reprisals and threats against witnesses should be created, rather than merely relying on the powers of a court to punish for contempt "because there should not be the slightest doubt that this conduct is a serious breach of the law".[503]

The MCCOC provision is as follows:

> 73.6 Reprisals against witnesses
>
> (1) A person who causes or threatens to cause any detriment to a witness in any legal proceedings:
>
> (a) because of anything done by the witness in or for the purposes of the proceedings; and
>
> (b) in the belief that the person was a witness who had done that thing,
>
> is guilty of an offence
>
> Maximum penalty: imprisonment for 5 years.

[499] Fox, *Victorian Criminal Procedure,* 10th ed, 2000, p. 89, citing *Wright (No. 1)* [1968] VR 164.
[500] *Attorney-General for the State of Victoria v Rich* [1998] VSC 41.
[501] *Supreme Court (General Civil Procedure) Rules 199 Vic* Order 75.
[502] *Ibid.*
[503] MCCOC Discussion Paper, above note 5, p. 83.

(2) It is a defence to a prosecution for an offence against this section if the defendant proves that:

(a) the detriment to the witness was not (apart for this section) an offence; and

(b) the witness committed perjury in the legal proceedings.

(3) In this section, witness includes:

(a) a person who attends at legal proceedings as a witness but is not called as a witness, or

(b) an interpreter

Other jurisdictions

Queensland: 2002 Changes to the Criminal Code

The *Criminal Law Amendment Act 2002* effected various changes to the Queensland Criminal Code (among other Acts). One of the objectives of the legislation according to the Explanatory Note was to improve the responsiveness of the criminal justice system to the needs of persons, including jurors and witnesses.[504]

Changes included the introduction of a new offence, section 119B "Retaliation against a judicial officer, juror, witness or family," and changes to section 120 (judicial corruption) and section 122 (corrupting or threatening jurors) which are also in Chapter 16 entitled "Offences relating to the administration of justice."

Section 119B has been the subject of considerable media attention following the conviction of former Chief Magistrate, Diane Fingleton.[505]

Section 119B provides:

A person who, without reasonable cause, causes, or threatens to cause, any injury or detriment to a judicial officer, juror, witness or a member of the family of a judicial officer, juror or witness in retaliation because of:

(a) anything lawfully done by the judicial officer as a judicial officer; or

[504] *Criminal Law Amendment Bill* 2002 (QLD) Explanatory Note, p. 1.
[505] The numerous press reports include: 'Magistrate faces year in jail for disloyalty claim,' *The Age* June 5 2003, p. 2; 'Magistrates a Law unto themselves,' *The Australian,* 13 June 2003, p. 13; 'Queensland Chief Magistrate to face Court,' *PM*, 20 December 2002.

(b) anything lawfully done by the juror or witness in any judicial proceeding;

is guilty of a crime.

Maximum penalty – 7 years imprisonment.

The Attorney-General and Minister for Justice illuminated the reasons behind the insertion of this provision in his Second Reading Speech:

> The Criminal Code contains provisions which 'protect' witnesses before and during a civil or criminal proceeding, and jurors after the conclusion of judicial proceedings. However, there is no specific offence that deals with people who take revenge or reprisals against witnesses after a proceeding because of what the witness has said or done as a witness. There is also no protection for judicial officers against revenge or reprisals. This bill addresses community concerns about the lack of protection afforded to witnesses, jurors and judicial officers after that person has exercised his or her function or duty.
>
> Our government believes people who are good enough to come forward to give evidence as witnesses or perform their civic duty as jurors should have the full protection of the criminal law against any vengeful acts. Judicial officers must also be protected from those who would target them for vengeance because of what they have lawfully done in their capacity as a judicial officer.[506]

The Attorney-General goes on to state that offenders should be dealt with severely "because this behaviour strikes at the heart of both the civil and criminal justice systems." He drew a distinction between criticism (including robust criticism) of the function of the criminal justice system and a court's decision on the one hand and the type of activity contemplated by this section on the other hand:

> For example, a complaint that a witness committed perjury or gave false information to police may not breach this section. However, a threat to inflict violence on a person would be 'without reasonable cause,' even if the accused believed that the person had acted unlawfully. Similarly, an act that is otherwise lawful may be a retaliation if it is done with intent to punish a person for what he or she has done in court – for example, sacking a witness because of their testimony in court.[507]

The case of *R v Fingleton*[508] provides a recent and controversial example of how the new section has been interpreted.

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[506] Queensland, *Parliamentary Debates*, Legislative Assembly, 6 March 2002, 376 (the Hon R. J. Welford, Attorney-General and Minister for Justice), p. 377.
[507] Ibid.
[508] *R v Fingleton* [2003] QCA 266.

R v Fingleton

The appellant, Diane Fingleton, was the Chief Magistrate of Queensland. Under the Magistrates' Act of that state, the Chief Magistrate has the power to appoint and remove co-ordinating Magistrates.[509] One Co-ordinating Magistrate, Mr Gribbin, had supplied an affidavit to the Judicial Committee which was reviewing a decision by the Chief Magistrate to transfer another Magistrate. In the affidavit Gribbin was allegedly critical of Ms Fingleton's handling of transfer matters.[510] The subject of the charge was an email Fingleton sent to Mr Gribbin (two months after the introduction of the new offence provision) questioning his decision to provide an affidavit. In the email Fingleton also expressed the view that she did not have Mr Gribbin's confidence in her leadership abilities. After raising another matter, Fingleton stated:

"This and the other example I refer to above, manifest to me a clear lack of confidence by you in me as Chief Magistrate. In the circumstances, I ask you to show cause, within seven days, as to why you should remain in the position [of Co-ordinating Magistrate.]"[511]

Fingleton was convicted of an offence pursuant to section 119B of the Criminal Code and sentenced to 12 months' imprisonment. In her appeal Fingleton contended that no reasonable jury could have found beyond reasonable doubt an absence of reasonable cause, as required by section 119B.[512] She argued that the reason why she had threatened Gribbin with demotion was that she had a reasonable belief that they could no longer work together satisfactorily.

The Queensland Court of Appeal held that the threat to remove Gribbin from the position of Co-ordinating Magistrate if he did not show cause within 7 days amounted to a "threat within the meaning of s. 119B, and it would be a threat of a detriment within the section if that was what would result from his removal from that office."[513] Following an analysis of Fingleton's motivation for making the threat and other matters, the Court of Appeal held that, on the evidence, "it was objectively open to the

[509] Ibid, para 5.
[510] Ibid, para 6.
[511] Ibid.
[512] Ibid, para 9.
[513] Ibid, para 7.

jury to decide that the appellant acted as she did with a view to punishing Mr Gribbin rather than resolving any difficulty supposed to exist between them of working together in performing their respective functions."[514] Accordingly, Fingleton's appeal failed.

On sentencing, the Court commented that the offence was a serious one, stating:

"Threatening a witness, whatever means is used, for giving evidence has always been regarded as serious because of its potential to deter the witness in question, as well as others, from giving evidence before courts and tribunals, which is central to the way in which justice is administered. […] Unless witnesses retain confidence that they will not be victimised or penalised for giving evidence freely and voluntarily many of them will not be prepared to do so, and the ends of justice will be defeated."[515]

The seriousness of the offence in this case was held to be "exacerbated by the senior position which she holds in the judicial system"[516] and her duty to uphold the law and protect witnesses against this kind of conduct. Therefore, despite her previously unblemished record, it was held that a prison sentence should be imposed.[517] However, after considering other factors such as the loss of her career in the law, the fact that she would be kept in protective custody and that there was no realistic prospect of her re-offending, the Court of Appeal varied the sentence imposed on Fingleton at trial by suspending it for two years after she had served six months.[518]

Ms Fingleton has sought special leave from the High Court to appeal against her conviction.[519]

[514] Ibid, para 22.
[515] Ibid, para 26.
[516] Ibid, para 28.
[517] Ibid, see discussion in paragraphs 28-31.
[518] Ibid, see paragraphs 31-33.
[519] 'Fingleton backed in High Court bid,' *The Australian,* 24 July 2003, p. 5. It is anticipated that the High Court will hear the special leave application in the later part of 2004.

Similar offences in New South Wales, the Commonwealth, South Australia, Tasmania and the Northern Territory

In *R v Fingleton*[520] the Court of Appeal commented that the legislative model for section 119B was a "similar but not quite identical provision in s 326 of the *Crimes Act 1900* of New South Wales."[521]

Section 326 of the New South Wales *Crimes Act 1900* provides:

> (1) A person who threatens to do or cause, or who does cause, any injury or detriment to any person on account of anything lawfully done by a person
>
> (a) As a witness or juror in any judicial proceeding, or
>
> (b) As a judicial officer, or
>
> (c) As a public justice official in or in connection with any judicial proceeding,
>
> is liable to imprisonment for 10 years.
>
> (2) A person who threatens to do or cause, or who does or causes, any injury or detriment to another person because the person believes the other person will or may be or may have been called as a witness, or will or may serve or may have served as a juror, in any judicial proceeding is liable to imprisonment for 10 years.
>
> (3) For the purpose of this section, it is immaterial whether the accused acted wholly or partly for a reason specified in subsection (1) or (2).

One important difference between this section and the newer section 119B of the *Queensland Criminal Code* is that in New South Wales there is no requirement that the threat to the witness with detriment be "without reasonable cause."[522]

The Commonwealth Act also contains an offence directed at the intimidation of witnesses who have appeared or are about to appear as witnesses in judicial proceedings[523] but the Gibbs Committee took the view that this section does not adequately cover reprisals against witnesses.[524] Similarly, the Northern Territory has a section relating to intimidating witnesses.[525] The South Australian Act contains a section entitled 'threats or reprisals relating to duties or functions in judicial

[520] *R v Fingleton* [2003] QCA 266.
[521] Ibid, para 3.
[522] *R v Fingleton* [2003] QCA 266, para 9.
[523] *Crimes Act 1914 (Cth),* s. 36A.
[524] See section entitled 'Law reform bodies on reprisals against witnesses' below.
[525] *Criminal Code Act (NT),* s. 103A entitled "intimidation of witnesses."

proceedings'[526] and the Tasmanian section on interfering with witnesses also relates to threats and similar behaviour towards persons who have given evidence.[527] There is no equivalent offence in the remaining Australian jurisdictions.[528]

Other Law Reform Agencies on reprisals against witnesses

The UK Law Commission and Gibbs Committee along with MCCOC have all recommended that a specific offence in relation to reprisals and threats against witnesses should be created. The UK Law Committee recommended that it should be an offence "to take or threaten to take reprisals against a witness, a judge, or a member of a jury or tribunal, intending to punish him for anything which he has done in that capacity in judicial proceedings."[529] In its reasoning for adopting such an offence, it borrowed heavily from an earlier report which had found (inter alia) that reprisals against witnesses could interfere with the administration of justice because they could deter the witness from giving evidence and could discourage future witnesses from giving evidence.[530]

The Gibbs Committee agreed with the view expressed by the UK Law Commission, namely that "to take reprisals against someone because that person was a witness could interfere with the administration of justice and is itself offensive to justice."[531] The Gibbs Committee took the view that section 36A of the Commonwealth *Crimes Act 1914* was not a satisfactory model for dealing with reprisals and recommended the adoption of a specific offence in relation to reprisals and threats against witnesses.

In the Discussion Paper the Committee called for submissions in relation to whether Victoria should have a specific offence directed at reprisals against witnesses (and if

[526] *Criminal Law Consolidation Act 1935 (SA),* s. 248(2).
[527] *Criminal Code Act 1924 (Tas),* s. 124.
[528] MCCOC Discussion Paper, above note 5, p. 65 states that there is no equivalent offence in existing Australian Codes but this was written before the *Criminal Law Amendment Act 2002 (Qld*) and Act no. 63 of 2001 which amended section 100 of the Tasmanian Code relating to interfering with witnesses. At p. 81 MCCOC reflected on the absence of this provision in the Criminal Codes and stated "presumably it was thought that the conduct could be dealt with as a contempt of court."
[529] UK Law Commission, above note 38, para 3.63.
[530] Ibid, para 3.58. The Law Commission also quoted the following from the Phillimore Committee: "It is also offensive to justice that a man should suffer in consequence of performing a public duty which may have been burdensome to him."
[531] Gibbs Committee Report, above note 85, para 8.19.

so, the form it should take) or whether such conduct is better covered by existing law (for example, perverting the course of justice and contempt of court).

Witnesses' submissions in relation to the offence of reprisals against witnesses

The issue of reprisals against witnesses generated a considerable level of interest among stakeholders, in no small part due to the *Fingleton* case which drew much comment. In fact the *Fingleton* case was cited as an argument both in favour of and against the codification of the general offence of perverting the course of justice.[532]

Turning first to the Victorian stakeholders, Victoria Legal Aid, the Director of Public Prosecutions and the Victorian Bar all agree with MCCOC that a separate offence for reprisals against witnesses should be created in Victoria.

After noting that the bringing of proceedings for contempt is procedurally complex and the limitations of section 52A of the *Summary Offences Act 1966,* the Director of Public Prosecutions concludes:

> There may thus be some merit in the creation of a new statutory offence dealing with "reprisals" against former witnesses, judicial officers, (possibly) "public justice officials" and ex-jurors.[533]

At the public hearings Paul Coghlan QC observed that it is "questionable" whether an interference with a witness of the kind at the centre of the *Fingleton* case would constitute an attempt to pervert the course of justice, and that "if the legislature decided that we did want to punish such conduct, then it is better to have done it by a clear provision."[534]

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[532] For instance, David Neal of the Victorian Bar argued that the *Fingleton* case showed that there is a real need for creating a separate offence because there would be doubt about whether the conduct would fall within the general offence due to the vagueness of that offence: *Minutes of Evidence,* 24 November 2003, p. 19. Benjamin Lindner on the other hand cites *Fingleton* as "probably the best example of my argument that specific offences ought not to be created, and the reason for this is that it incorporates factual situations which were probably not conceived by the legislature at the time of the introduction of these offences:" *Minutes of Evidence*, 24 November 2003, p. 54.

[533] Director of Public Prosecutions, submission no. 9, p. 10. The submission notes that the MCCOC provision is appropriate subject to expanding the reference to witness (see following section) and to the reservations about the phrase "threatens to cause any detriment" referred to above. The DPP takes the view that the making of a non-specific threat should suffice.

[534] Paul Coghlan QC, *Minutes of Evidence,* 24 November 2003, p. 31.

Victoria Legal Aid also supports the creation of a new offence for reprisals against witnesses on the grounds that the existing law in relation to perverting the course of justice "would probably not cover all types of threats and reprisals and there is therefore a need for a specific offence in Victoria for reprisals against witnesses, with a separate mens rea to attempting to pervert. It is sound public policy to deter reprisals against witnesses in order to protect the justice system."[535]

In line with its general support for the Model Criminal Code, the Victorian Bar and its representative, Dr David Neal, also supports the creation of a reprisals offence. At the public hearing Dr Neal cited the *Fingleton* case as an example of why specific offences are needed. As he told the Committee:

> There is reasonable debate about whether or not the conduct that Ms Fingleton engaged in ought to be criminal. And why is that? It is of the certain vagueness about the notion of the law of attempt to pervert the course of justice. If she is going to be punished for criminal conduct then the nature of that conduct ought to be clearly specified.[536]

In contrast, the Criminal Bar Association and Benjamin Lindner express opposition to— or at least reservations about—the introduction of an offence relating to reprisals against witnesses. In its written submission the Criminal Bar Association opposes the offence, while noting it raises "more difficult issues" than the other offences being considered in this Chapter.[537] Why is this a difficult issue? As the CBA points out, there is a potential "strike at the heart" of the justice system where a witness is threatened, even in cases where the threatener has no intention to pervert the course of justice. Accordingly:

> It is rational for the legislature to forbid such threats to protect the system of justice regardless of the threatener's intention. The general offence of Attempting to Pervert may not cover all such threats.[538]

Although some threats may constitute a crime under the *Crimes Act* (for instance, they may come within the assault or threat provisions), other threats are not covered.[539] "If there is a public interest in prosecuting such acts," the submission continues, "a provision akin to Queensland's *Criminal Law Amendment Act* s. 119B (the

[535] Victoria Legal Aid, submission no. 7, p. 5.
[536] Dr David Neal, *Minutes of Evidence,* 24 November 2003, p. 19.
[537] Criminal Bar Association, submission no. 6, p. 9.
[538] Ibid.
[539] Ibid. As stated in the submission, "An employer might say "You testified against Big Rosie back in 1988. You're fired." This may strike at the heart of justice by legitimating reprisals."

"Fingleton" provision) could be justified."[540] Later, at the public hearing, Peter Morrissey acknowledged that "there is no reason in principle why there should not be an offence [relating to reprisals against witnesses]".[541]

Benjamin Lindner also expresses reservations about introducing an offence for reprisals against witnesses. Lindner argues that, where such conduct falls within the ambit of the general offence of attempting to pervert the course of justice, it should be prosecuted under that offence.[542] In the *Fingleton* case, notes Lindner, it was not clear that the relevant conduct would have been caught by the general offence. However, this does not mean that creating a new offence for this form of conduct is justifiable. On the contrary, Lindner cites the *Fingleton* case as an example of an unexpected consequence flowing from the creation of a new provision, commenting that had the Minister for Justice been given the fact scenario in *Fingleton* before giving his Second Reading Speech to introduce the new section 119B he would probably have stated that it would not fall within the new provision.[543] As Lindner concludes:

> All it needs is a very close reading of the case of *Fingleton* to really come fairly firmly I think to the view that there is real dangers in specifying offences, and on the other hand there are real advantages to maintaining the general offence, but codifying it.[544]

Committee's conclusions in relation to the offence of reprisals against witnesses

The Committee agrees with the majority of our Victorian stakeholders who support the creation of a statutory offence of reprisals against witnesses. The Committee bases its conclusion on several grounds. Firstly it is in line with the Committee's general support for the codification of administration of justice offences. By clearly stating in statutory form the ways in which acts or omissions amount to the criminal offence of reprisals against witnesses it will make it easier to understand what the crime actually is. The creation of a "knowable and accessible" statutory offence may also give reassurance to reluctant or fearful witnesses that they will not be victimised for giving evidence.

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[540] Ibid.
[541] Peter Morrissey, *Minutes of Evidence,* 24 November, 2003, p. 42,
[542] Benjamin Lindner, submission no. 8, p. 5.
[543] Benjamin Lindner, *Minutes of Evidence,* 24 November 2003, p. 57.
[544] Ibid.

Secondly it would seem somewhat artificial if the Committee was to recommend a statutory provision protecting witnesses before they give evidence and to then make no corresponding recommendation to protect witnesses *after* they have given that evidence. The Committee considers that reprisals taken after a witness has given evidence are as detrimental to the administration of justice as threats to prevent a witness from giving that evidence in the first place.

Also, the Committee sees merit in creating a statutory provision to overcome procedural issues with the common law offence of contempt. The Committee agrees with the Director of Public Prosecutions submission that the proceedings for the common law offence of contempt are complex—usually by way of "originating motion" to a single judge of the Supreme Court.[545] Procedural complexity could be overcome by creating a statutory offence in the *Crimes Act* so that the same rules of procedure that currently apply to other serious offences in the *Crimes Act* would then also apply to the statutory offence of reprisals against witnesses.

We will now consider the form that any new statutory offence should take. We look at four questions relating to this—namely whether the statutory offence should contain a "perjury" defence, and a "without reasonable cause" defence, the issue of what group of people should be protected against reprisals and also the suggested maximum penalty for this offence.

Should the statutory offence have a "perjury defence"

MCCOC took the view that it should be a defence to a charge of taking reprisals against witnesses if that witness had committed perjury in the proceedings but with an important proviso—that the detriment to the witness must not, apart from the operation of the new provision, constitute an offence.[546] In other words, if the offence constitutes another crime (such as assault or murder) this exception will not apply, and a person would be guilty of the offence of reprisal against a witness.

Other law reform agencies have also considered this issue. The UK Law Commission recommended that taking reprisals should not constitute an offence where a witness

[545] *Supreme Court (General Civil Procedure) Rules 1996,* Order 75.
[546] MCCOC Discussion Paper, above note 5, p. 85.

knowingly gives (objectively) false evidence.[547] The Gibbs Committee agreed with the UK Commission on this point.[548] In such circumstances, and despite difficulties of proof, the Committee considered that "it would seem unjust to penalise a person who had suffered from the falsity for taking reprisals against the perjured witness."[549]

In the Discussion Paper the Committee asked whether it should be a defence that the witness had committed perjury in the proceedings in question and whether there should be an additional requirement that the detriment or the reprisals do not, apart from the operation of the new provision, constitute an offence.

Witnesses' submissions in relation to the "perjury" defence

Most stakeholders who commented on this issue rejected the idea of a "perjury defence" to any new provision for reprisals against witnesses. This course, according to the submission of the Criminal Bar Association, "would be irrational in the extreme," arguing further that: "It would be unjust and impractical to permit an accused to strike at justice because an individual witness was a perjuring rat."[550] The Director of Public Prosecutions takes a similar view: "To allow such a defence," states the DPP, "would be to encourage a form of vigilantism which should not be tolerated, whether or not the "reprisal" itself would otherwise constitute a criminal offence."[551] Victoria Legal Aid agrees that:

> There should not be a perjury defence. The "without reasonable cause" requirement as modelled in the Queensland law should be sufficient to offer a defence where the circumstances of the case permit.[552]

Even the Victorian Bar, which undoubtedly represents the high-water mark of support for the MCCOC process and draft provisions, acknowledges that the "perjury defence" seems "odd," adding that the "proper course would be to report the perjury to the police."[553]

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[547] UK Law Commission, above note 38, para 3.62.
[548] Gibbs Committee Report, above note 85, para 8.21.
[549] Ibid.
[550] Criminal Bar Association, submission no. 6, p. 9.
[551] Director of Public Prosecutions, submission no. 9, p. 4.
[552] Victoria Legal Aid, submission no. 7, p. 5.
[553] The Victorian Bar, submission no. 10, p. 5.

In contrast, Benjamin Lindner, expresses support for this defence in his written submission when he stated that "a witness who knowingly gives false evidence should not be protected such that the taking of reprisals against such a person is an offence."[554]

Committee's conclusion in relation to the "perjury" defence

The Committee opposes the idea of a "perjury" defence to a reprisals provision. The Committee agrees with the Director of Public Prosecutions on this point that such a defence would be to encourage a form of vigilantism. Are we really to allow the subjective views of an individual to decide whether a particular witness has perjured themselves in a particular case? In the Committee's view reprisals taken as the result of individual assessments of whether the evidence is perjured should not be protected by our law. As the submission of the Victorian Bar states, the appropriate course of action in this case would be to report the suspected perjury to the police. As such the Committee has not adopted this part of the MCCOC provision.

Should the new offence have a "without reasonable cause" defence?

An important question which several (particularly interstate) witnesses to this Inquiry considered is whether any new offence should contain the words "without reasonable cause." What exactly is meant by the phrase "without reasonable cause"? Is it an important defence? The question was not considered by MCCOC or the Gibbs Committee, however, in the Queensland Criminal Code it is a defence to the section 119B offence of retaliation against witnesses.

Witnesses' submissions in relation to the "without reasonable cause" defence

Queensland Director of Public Prosecutions, Leanne Clare, made some observations about the meaning of the phrase, speculating that it was probably copied from other

[554] Benjamin Lindner, submission no. 8, p. 5.

areas of the Code. Ms Clare went on to describe fact situations in which the defence might operate:

> We have had previous judgments of the Court of Appeal which have said, 'We don't really know what this means exactly,' and have been unable to define it. But thinking in terms of the context of this particular reprisal offence, I can only think of circumstances where perhaps there might be a legitimate counterclaim in law. For example, where a witness is giving evidence against you but raises other issues in relation to your civil relationship, for instance—we are talking about a civil case—and therefore you have a legitimate counterclaim against the witness, as opposed to the other party. We have settlements in civil cases all the time, and nobody sees anything improper in that. Perhaps it is along those sorts of lines that might really come into play, but it is very difficult to think how otherwise you might be justified in bringing some detriment to bear on somebody who is simply doing what it is lawful to do in giving critical evidence.[555]

Is the phrase "without reasonable cause" necessary? According to representatives of the Criminal Bar Association of Queensland it is critical. For instance, Tony Glynn SC cites the example of an employee who gives evidence against an employer and at a later date the employee begins to steal, become abusive and so on. As Mr Glynn observed:

> If you sack them theoretically you are in breach of the section. But it would seem to me, provided you are satisfied that you have reasonable cause, you have got protection.[556]

Glynn's colleague Ralph Devlin cited the example of:

> a harmless argument between an observer of a trial and a witness, where there is absolutely no intention to influence the witness in some way. A citizen, just thinking that he or she was entitled to have an argument with, say, a witness that they knew—without the phrase 'without reasonable cause'—could suddenly be a risk.[557]

On the other hand, Mark Marien SC who appeared on behalf of the Criminal Law Review Division of the New South Wales Attorney-General's Department, does not support the phrase 'without reasonable cause', on the basis that anyone who gives evidence as a witness should be completely free of any interference. Mr Marien told the Inquiry:

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[555] Leanne Clare, *Minutes of Evidence,* 13 November 2003, p. 67.
[556] Tony Glynn SC, *Minutes of Evidence,* 13 November 2003, p. 94.
[557] Ralph Devlin , *Minutes of Evidence,* 13 November 2003, p 94. Mr Byrne QC also gave the example of a person who reports a witness to the police in the honest belief that the witness had perjured himself or herself: "Without that clause in there you threaten to report them to the police, and I think you are guilty of the offence. I think it [the phrase 'without reasonable cause'] is crucial." *Minutes of Evidence,* 13 November 2003, p. 95.

> In my view if a witness gives evidence they should be completely free […] from any interference whatever as a result of having given that evidence, whether it be for a reasonable excuse or not. […] It is really hard to imagine a case where such a threat —on account of a person having given evidence as a witness—could be with reasonable excuse.[558]

Committee's conclusion in relation to the "without reasonable cause" defence

The Committee sees merit in having a "without reasonable cause" defence as it would offer a degree of protection to a person who takes a particular course of action for reasons other than retaliation, such as an employer dismissing an employee for a proper purpose. The Committee has included this defence in Recommendation 11 below.

Whom should the offence of reprisals protect?

MCCOC

MCCOC took a narrow view of the class of persons the offence should protect, noting that a distinction could reasonably be drawn between witnesses and jurors "who are forced to be part of the justice system and are thus entitled to special protection," and other participants such as judges, legal practitioners and officers of the court who are not forced to participate.[559] MCCOC stated that jurors are protected by the Juries Acts of each jurisdiction so that witnesses were in most need of protection. The draft provision reflects the focus on witnesses.

In the Discussion Paper the Committee asked whether the offence of reprisals should protect witnesses only or whether its application should be wider, extending for example to judges, jurors, legal practitioners and so on.

[558] Mark Marien SC, *Minutes of Evidence,* 12 November 2003, p. 27.
[559] MCCOC Discussion Paper, above note 5, p. 85.

Other Law Reform Agencies

The Gibbs Committee and the UK Law Commission recommended that the offence should apply to a wide group of persons associated with the legal process whereas MCCOC recommended that it apply only to witnesses.

The Gibbs Committee considered that the protection should extend to witnesses, judges, members of tribunals, jurors, legal practitioners and officers of the Court. Although reprisals against judges, jurors and witnesses may amount to a contempt of court, the Committee saw that as "no reason why an offence, specifically defined, should not be created."[560] The UK Law Commission took a similar view, recommending that the offence should extend to reprisals (or threatened reprisals) against "a witness, a judge, or a member of a jury or tribunal […]."[561]

As to whether the protection should be extended to parties, after some consideration, the Gibbs Committee recommended that parties to a criminal proceeding (the accused and the prosecutor) should be protected but that parties to civil proceeding were in a different situation and should not be protected by the offence.[562] The UK Law Commission also formed the view that different considerations apply to parties to civil proceedings.[563] The following passage from the Report is quoted in the MCCOC Discussion Paper:

> In addition it is well recognised that the bringing or defending of civil proceedings necessarily involves a party in certain legitimate pressures which may be brought to bear upon him. There may be threats to counterclaim if he proceeds with his action, threats not to do business with him in the future, and of course offers to make payments to, or to withdraw claims against, him. These considerations indicate that it is inappropriate to penalise a person who offers consideration to induce a party to undertake negotiations for a settlement of his claim, and even more inappropriate to penalise a party who accepts a consideration for a settlement. So far as threats to a party are concerned, whether from his opponent in litigation or from another quarter, there are circumstances where a threat, such as a threat to counterclaim, may clearly be permissible.[564]

[560] Gibbs Committee Report, above note 85, para 8.22.
[561] UK Law Commission, above note 38, para 3.63.
[562] For example, such a provision could cover situations which would otherwise be lawful—for example a decision by a company not to do business with another company "with which it had just fought an unsuccessful legal battle:" Gibbs Committee Report, above note 85, para 8.23.
[563] UK Law Commission, above note 38, para 3.41.
[564] Ibid, quoted in MCCOC Discussion Paper, above note 5, p. 83.

Witnesses' submissions on the breadth of protection afforded by the offence reprisals against witnesses

If a new offence for reprisals against witnesses is introduced in Victoria whom should it protect? Benjamin Lindner was the only Victorian witness who agreed with the MCCOC proposal that a reprisals offence should protect witnesses only.[565] Representatives from the Queensland Bar Association could not see the need to extend the protection afforded by a reprisals provision to them.[566] Ralph Devlin commented that the "perception [of threat] is often much greater than the reality and […] it really comes with the furniture. Surely the law should deal with protecting witnesses who are in a very vulnerable position."[567] Tony Glynn SC echoed MCCOC's rationale for limiting the protection of the provision to witnesses when he observed: "they [the witnesses] are not there by choice; we are there by choice. I see them as being in a different position to us."[568]

The Criminal Bar Association, Victoria Legal Aid and the Director of Public Prosecutions all support a broader protection. The CBA sees "no reason in principle" to limit the scope of the protection offered by the provision to witnesses only, pointing out that "threats to anyone connected with the system of justice — court staff, judicial officers etc—can have a potential to damage that system."[569] VLA agrees that "the new offence ought to protect all connected with the justice system—judges, jurors, parties to the criminal proceedings, interpreters, etc."[570]

Committee's conclusions on the breadth of protection afforded by the offence of reprisals against witnesses

The Committee sees no compelling reason why this offence should not protect all those connected with the justice system, such as judges, members of tribunals, jurors,

[565] Benjamin Lindner, submission no. 8, p. 6. Lindner does not elaborate on his comment that "the offence should protect witnesses only."
[566] For example, Tony Glynn SC told the Committee: "I do not really see any need for it, to be perfectly honest,' *Minutes of Evidence,* 13 November 2003, p. 95. The discussion on this point was arguably also relevant to the offence of threatening witnesses as well as reprisals against witnesses which was the subject of debate at the time these comments were made.
[567] Ralph Devlin, *Minutes of Evidence,* 13 November, 2003, p. 95.
[568] Tony Glynn SC, *Minutes of Evidence,* 13 November 2003, p. 95.
[569] Criminal Bar Association, submission no. 6, p. 9.
[570] Victoria Legal Aid, submission no. 7, p. 6.

legal practitioners and officers of the Court. The Committee does not believe that the administration of justice would be served by protecting only witnesses from reprisals for to do so would be to ignore the fact that others such as prosecutors and defence barristers have, in the past, been subject to threats. Also the Committee finds little merit in the justification for limiting the offence to witnesses based on the fact that witnesses are not involved in court proceedings by choice whereas other groups chose to be involved in proceedings. The Committee takes the view that other persons working in the criminal justice system such as prosecutors and defence lawyers should have the same level of protection so that they can perform their duties to the court.

On this point the Committee agrees with the Gibbs Committee recommendation that all participants in legal proceedings (other than parties in civil proceedings) should be afforded protection against reprisals.

Sentencing

As discussed earlier in the Chapter there is no maximum sentence for the common law offence of contempt of court as the length of imprisonment is at the discretion of the court.[571] Over the years there have been a number of contempt cases in Victoria involving custodial sentences for reprisals against witnesses. For example, in one case the son of a prisoner assaulted the principal prosecution witness in the foyer outside the courtroom at the conclusion of the prisoner's trial and sentence. [572] The Supreme Court found the son guilty of contempt and sentenced him to prison for a month.

In relation to the statutory offence both MCCOC and the Gibbs Committee recommended that the maximum penalty should be 5 years imprisonment.[573] In Queensland the maximum sentence is also 5 years [574] while in New South Wales the maximum term is 10 years. [575]

[571] Fox *Victorian Criminal Law Procedure* , above note 499, para 3.7.3.1. *Supreme Court (General Civil Procedure) Rules 1996,* Order 75.
[572] *R v Wright No. 1* [1968] VR 164
[573] MCCOC Discussion Paper, above note 5, p. 80. Gibbs Committee Report, above note 85 p. 72.
[574] *Criminal Code Act 1899(QLD), s.119B*
[575] *Crimes Act1900 (NSW), s.326.*

The Committee received one submission on this issue. Victoria Legal Aid suggested that the "penalty ought to be less severe than the more serious general offence of attempting to pervert" but did not specify an actual maximum term. [576]

Committee's conclusion

On this issue in the interests of national consistency the Committee has decided to follow the MCCOC recommendation that the maximum sentence be 5 years imprisonment.

Recommendation 11

That an offence relating to reprisals against witnesses and other participants in legal proceedings be enacted in Victoria making it an offence for a person without reasonable cause to procure or cause violence, injury, damage or loss to any person with the intent to punish a participant in a legal proceeding (other than a party to civil proceedings) for anything said or done in the course of, or in relation to the legal proceeding.

That the maximum sentence for this offence be 5 years imprisonment.

Separate lesser offence for interference with witnesses

The Committee has also considered the continued relevance of the lesser offence of harassing a witness contained in section in 52A of the *Summary Offences Act 1966 (Vic).* That section provides that:

> A person must not harass a person because that person has taken part, or is about to take part or is taking part in a criminal proceeding in any court as a witness or in any other capacity.
>
> Penalty: 120 penalty units or imprisonment for 12 months.

[576] Victoria Legal Aid, submission no. 7, p 5.

Would its continued existence be necessary or appropriate if new provisions dealing with this conduct were inserted into the *Crimes Act 1958 (Vic)?* The Victorian Parliament Scrutiny of Acts and Regulations Committee (SARC) recently completed a Report on the *Summary Offences Act*.[577] In its Discussion Paper SARC recommended the repeal of section 52A on the grounds that offences of this nature could be prosecuted under the *Crimes Act* (and, we might add, the common law).[578] However, in the Final Report SARC recommended the retention of section 52A, noting that it had received many submissions supporting retention:

> Many of those submissions stated that this clause provided […] a useful and effective means of dealing with the less serious instances of harassment that could be dealt with effectively by a summary offence.[579]

SARC did not consider the retention of the section in the light of the possible introduction of new offences.

Although this was not an issue considered by MCCOC, the Committee sought views as to whether section 52A should be retained in the event new offences relating to interference with witnesses are introduced in Victoria.

Witnesses' submissions on retaining section 52A of the Summary Offences Act 1966 (Vic)

There was less consensus among stakeholders in relation to the retention of section 52A than there was in relation to section 53 (which was discussed in the previous Chapter of this Report). In relation to section 52A the Criminal Bar Association and Benjamin Lindner believe the summary offence should be retained whereas Victoria Legal Aid and the Director of Public Prosecutions believe it should be repealed (or, at the very least amended, according to VLA).

The Criminal Bar Association supports the retention of section 52A on the basis that the section has a wider application than attempting to pervert the course of justice or what the CBA refers to as "its fragmentary statutory alternatives."[580] How is its application wider? First, it covers situations which may not be within the course of

[577] SARC, above note 252.
[578] Ibid, p. 69.
[579] Ibid.
[580] Criminal Bar Association, submission no. 6, p. 8 (response to Discussion Paper question 13).

justice (and may not be a "strike at the heart of justice") such as post-proceeding harassment. Secondly, the mens rea of the summary offence need not extend to an intention to pervert the course of justice.[581]

The CBA noted that, even if new specific statutory offences were to be introduced, "they are unlikely to have a mens rea of the type mentioned, and might not cover witnesses harassed years later."[582] In short, although the CBA acknowledges that "it is undesirable to preserve one summary and one indictable version of the same offence," the two offences do not wholly coincide and supports the retention of section 52A for the reasons outlined above.[583]

Benjamin Lindner also supports the retention of section 52A of the *Summary Offences Act 1966* as part of his contention that "specific offences should only be created where they represent a less serious infringement of the law, and can be dealt with summarily, with a lower penalty structure."[584]

In contrast, Victoria Legal Aid contends that section 52A should be repealed or amended on the grounds that a legislative form of the general offence should be able to catch offences of this nature.[585] VLA acknowledges that post-proceeding harassment is outside the purview of attempting to pervert (because it is not part of the "course of justice"), meaning that consequential amendments to the *Summary Offences Act* or the *Crimes Act* might be necessary, although VLA notes that "it is clearly undesirable to have closely related offences in different pieces of legislation."[586]

The undesirability of having two separate overlapping offences was behind the Director of Public Prosecutions' support for the abolition of section 52A. As the written submission explains:

> Whilst it is desirable to have the option of dealing with certain types of behaviour summarily, it is our view that this is better achieved by the creation of comprehensive indictable offences which are nevertheless permitted to be dealt with summarily in appropriate cases. The retention of summary-only offences, after the enactment of

[581] Ibid.
[582] Ibid.
[583] Ibid.
[584] Benjamin Lindner, submission no. 8, p. 1. Note that this position is in express opposition to the rationale behind the Model Criminal Code that specific offences should be created "in order to underline the fact that the law regards such conduct as particularly serious."
[585] Victoria Legal Aid, submission no. 7, p. 4.
[586] Ibid, p. 4.

> related indictable offences, or the creation of overlapping summary offences, can lead to an undesirable uncertainty as to which of the two different offences should be charged in any particular case. […]
>
> In our view, difficulties of this kind may be avoided by allowing for the existence of one comprehensive indictable offence dealing with a certain type or category of behaviour, and permitting that offence to be prosecuted summarily in fact situations of lesser seriousness. [587]

Accordingly, the DPP supports creating an indictable offence or offences which are triable summarily.[588] The new offence would need to be worded so that the elements of section 52A are encompassed (for example the harassing of a person because that person has already taken part in a criminal proceeding as a witness.)[589]

Committee's conclusions in relation to retaining section 52A of the Summary Offences Act 1966 (Vic)

The question as to whether section 52A of the *Summary Offences Act 1966 (Vic)* should be retained raises similar issues to the question as to whether section 53 of the same Act should be retained. However, the Committee notes that there was less consensus among stakeholders on section 52A than in relation to section 53. While it is acknowledged that it is generally undesirable to have a summary offence and an indictable offence or offences covering the same conduct, the Committee has decided to recommend the retention of section 52A as the offending conduct, particularly, post-proceeding harassment, may not fall within the ambit of the general offence of perverting the course of justice—hence, as pointed out by the Criminal Bar Association, the two offences do not wholly overlap.

On this issue the Committee makes no formal recommendations as it was not an issue considered by MCCOC and the Committee is not recommending any change to the law.

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[587] Director of Public Prosecutions, submission no. 9, p. 8.
[588] Ibid. "Triable summarily" means that the matter would be heard by a Magistrate rather than a trial before a judge and jury.
[589] Ibid.

CHAPTER FOUR – ACCESSORY AFTER THE FACT

The essence of the offence of accessory after the fact [590] is that the accessory performs an act after another person has committed a crime in order to assist that other person to escape the administration of justice.[591] Accessories after the fact should be distinguished from accomplices or accessories proper who are participants in the crime. The offence of accessory after the fact in Victoria is a discrete offence and can only be committed *after* the principal offender has committed a crime.[592]

Unlike most other administration of justice offences, the crime of being an accessory after the fact is defined in legislation. Section 325(1)[593] of the *Crimes Act 1958 (Vic)* provides:

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[590] The Victorian *Crimes Act 1958* uses the term "accessory" as does the *Criminal Law Consolidation Act 1935 (SA),* s. 241. In the other Australian jurisdictions the term "accessory after the fact" is used: *Crimes Act 1900 (ACT),* s. 181 (the Part is entitled "accessories;" however s. 181 is entitled "accessory after the fact.") *Crimes Act 1914 (Cth),* s. 6; *Criminal Code Act (NT),* s. 13; *Criminal Code Act 1924 (Tas),* s. 331; *Criminal Code 1913 (WA),* s. 10; *Crimes Act 1900 (NSW), s*. 347; *Criminal Code Act 1899 (Qld),* s. 10.

[591] Gillies, above note 9, pp. 818-9.

[592] Ibid. As Gillies notes, "In order to become an accessory after the fact to another's crime, D must perform an act of promotion or support of the latter before or during, but not after the commission of this offence. By way of contrast, the accessory after the fact is incriminated only by reference to an act done after the conclusion of the subject felony: p. 818. However, *R v Gibb & McKenzie* [1983] 2 VR 155, a decision of the Victorian Supreme Court, is authority for the proposition that an accessory after the fact may in some cases be an accomplice as well, but that this will not necessarily be the case: "Although an accessory after the fact may in some circumstances be an accomplice, being participles criminis in another crime does not make the participant an accomplice in the earlier one:" p. 167. Winneke P in *R v Welsh* [1999] VR 62, a Court of Appeal decision of the Victorian Supreme Court also noted, "I am conscious of the fact that an accessory after the fact, or an "assister," is not strictly an accessory after the fact to, nor is he complicit in, the principal offence:" p. 450.

[593] This section was introduced by the *Crimes (Classification of Offences) Act 1981,* s. 4 and replaced the former section 325 which had dealt only with procedural matters (rather than defining the offence): see *R v Middap* (1992) 63 A Crim R 434.

> Where a person (in this section called "the principal offender") has committed a serious indictable offence (in this section called "the principal offence"), any other person who, knowing or believing the principal offender to be guilty of the principal offence or some other serious indictable offence, without lawful authority or reasonable excuse does any act with the purpose of impeding the apprehension, prosecution, conviction or punishment of the principal offender shall be guilty of an indictable offence.[594]

In this Chapter we consider the elements of the offence and draw comparisons with other jurisdictions. In summary, these elements are:

- **Commission of the principal offence -** the principal offender has committed a "serious indictable offence;"
- **Physical element of the offence -** the relevant act by the accessory after the fact must assist the principal offender to escape the administration of justice (or have this potential) and must be a positive act;[595]
- **Mental element of the offence** - the accessory after the fact knows or believes that the principal offender is guilty of the principal offence or another serious indictable offence
- **Defence of lawful authority or reasonable** - there must be no "lawful authority or reasonable excuse" for the act (this operates as a defence in Victoria).

In this Chapter we also consider the following issues:

- **Application to the disposal of proceeds of an offence** - whether the offence of accessory after the fact should specifically apply to the disposal of the proceeds of an offence;
- **Scope of the purpose of the accessory's act** - whether the current requirement that the accessory after the fact act with the purpose of impeding "the apprehension, prosecution, conviction or punishment of the principal offender" is appropriate;

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[594] Gillies, above note 9, p. 829 paraphrases the remaining subsections of the offence well: "Section 325, subss (2)-(5) make provision in relation to the procedural aspects of the offence of impeding and its punishment. Subsection (2) deals with the conviction of a person for impeding, in the circumstances where he or she has been put on trial for a serious indictable offence. Subsection (3) provides that a person charged with impeding may be indicted and convicted together with or before or after the principal offender and whether or not the principal offender is amenable to justice. Subsection (4) deals with punishment."

[595] Freckelton, *Criminal Law Investigations and Procedure*, above note 28, para 1.1.3410. We will also discuss the current wording of s. 325 of the *Crimes Act 1958 (Vic)*, namely "any act with the purpose of impeding the apprehension, prosecution, conviction or punishment:"

- **Penalties**; and
- The related offence of **concealing offences for benefit.**

Before considering the elements of the offence we will look at which principal offences the offence of accessory after the fact applies to.

Principal offences to which the offence applies

As the definition in section 325(1) makes clear, the offence of accessory after the fact only applies in Victoria where the principal offender has committed a "serious indictable offence." "Serious indictable offence" is defined in section 325(6) as:

> an indictable offence which, by virtue of any enactment, is punishable on first conviction with imprisonment for life or for a term of five years or more.

MCCOC recommended that the offence "should not be limited to particular classes of offences and it should apply in relation to any offence."[596] MCCOC did not elaborate on the reasoning behind this recommendation.[597]

Other Australian jurisdictions are split between providing that the offence applies only to serious indictable offences (or similar) and providing that it applies to all offences.

The New South Wales Act also refers to "serious indictable offences"[598] and in the UK Act (which the Victorian provisions largely follow) the reference is to "arrestable offences."[599] The Tasmanian Code states that accessories after the fact "may be joined in the same indictment" which indicates the offence applies only to indictable offences.[600] However, in the remaining Australian jurisdictions the offence applies to any offence.[601]

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[596] MCCOC Discussion Paper, above note 5, p. 123.
[597] The Final Report noted that several submissions supported this view and that no submission argued a contrary view. On this basis, the recommendation remained the same: see MCCOC Report, above note 6, p. 155 and 157.
[598] *Crimes Act 1900 (NSW),* s. 347.
[599] *Criminal Law Act 1967 (UK),* s. 4(1).
[600] MCCOC takes this view, stating that "in Tasmania it [the offence] applies only in relation to indictable offences:" MCCOC Discussion Paper, above note 5, p. 123.
[601] *Crimes Act 1914 (Cth),* s. 6; *Criminal Code Act (NT),* s. 13; *Criminal Code 1913 (WA),* s. 10; *Criminal Code Act 1899 (Qld),* s. 10; *Crimes Act 1900 (ACT),* s. 181; *Criminal Law Consolidation Act 1935 (SA*), s. 241.

In the Discussion Paper the Committee asked interested parties for their submissions as to whether the current Victorian provision should be amended so that the offence of accessory after the fact applies to all principal offences.

Witnesses' submissions in relation to principal offences to which the offence of accessory after the fact applies

Victorian witnesses

Stakeholders were unanimous in their view that the offence of accessory after the fact in Victoria should continue to apply only to cases where the principal offence was a serious indictable offence. Witnesses to the Inquiry submitted that there were no persuasive policy reasons for altering the current position.[602] For instance, the Criminal Bar Association submitted that this element of the offence was clear and that "reform proposals must justify themselves by reference to policy."[603] While the CBA does not expressly oppose a change to the law, even acknowledging that "there is no reason in principle why s.325 should not apply to all principal offences," it seems clear that the CBA does not believe that sufficient reasons have been identified to justify reform. Moreover, the CBA refers to a number of reasons why the current position should be retained:

- "the summary offences of hindering and obstructing police already cover the gap (see *Summary Offences Act 1966* s. 52(1));[604]

- the current restriction of section 325 to serious indictable offences is "doubtless a concern to prevent a multiplicity of derivative offences;[605]

- a change might give rise to the following jurisdictional difficulty:

> In practice, inchoate offences such as attempt and incitement are now triable summarily (*Magistrates Court Act 1989* s 53(1) & Schedule 4). So too are offences under s. 325. If s. 325 is extended to all principal offences, alleged accessories after a crime might choose a jury trial where the principal offender could not – for instance,

[602] For instance this point is made by Victoria Legal Aid which states "it is VLA's view that section 325 of the *Crimes Act* does not need to be changed and no persuasive policy reasons have been set out in the Discussion Paper: submission no. 7, p. 6.
[603] Criminal Bar Association, submission no. 6, p. 9.
[604] Ibid.
[605] Ibid, p.10.

> where the principal offence was Assault Police under the Summary Offences Act 1966.[606]

The Director of Public Prosecutions also opposes any extension of the offence to non-serious indictable offences or to summary offences, although it does not elaborate on this view.[607]

Interstate witnesses

Those interstate witnesses who commented on this question generally agreed that the offence of accessory after the fact should only apply to serious indictable offences. Readers will recall that this is currently the case in New South Wales but not in Queensland.

Mark Marien SC, the representative from the Criminal Law Review Division of the New South Wales Attorney-General's Department, observed that the restriction to serious indictable offences is not particularly limiting because offences carrying a maximum sentence of 5 years or more encompass most offences in the *Crimes Act 1900 (NSW).*[608] In Mr Marien's view, the policy reason for restricting the offence this way is that:

> [T]here has to be some finality to prosecutions. If it is a less serious matter then is it warranted taking up court time because in an accessory after the fact prosecution you have to prove not only the act of being an accessory after the fact but the commission of the original offence. If we are talking about a less serious offence, is it worth taking up the time of the courts and the resources on these kinds of prosecutions?[609]

Mark Marien SC also pointed out that the concept of serious indictable offences is so entrenched in the *Crimes Act 1900 (NSW)* that any reform of the accessory after the fact provision would involve a re-writing of the *Crimes Act* in many respects.[610] No doubt the same could be said of the Victorian *Crimes Act* in which the term 'serious indictable offence' is ubiquitous.

The representatives of Legal Aid New South Wales also supported the continued application of the accessory after the fact provision to serious indictable offences. As

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[606] Ibid.
[607] Director of Public Prosecutions, submission no. 9, p. 11.
[608] Mark Marien SC, *Minutes of Evidence,* 12 November 2003, p. 32.
[609] Ibid.
[610] Ibid.

Director of Criminal Law, Brian Sandland, pointed out that Legal Aid is not "in the business of advocating an extension of the offence for fear of the net widening."[611] In addition, the offence is really aimed at those who assist criminals in relation to serious crimes. Brian Sandland pointed to the problem of detection in relation to less serious matters, asking:

> What do you do if a sibling tells you they have been involved in shoplifting or an offence of a less serious nature? The purpose of the legislation seems to be aimed at those more serious matters and I agree with that purpose.[612]

Pauline Wright, Vice-President of the New South Council for Civil Liberties, agreed with this rationale, stating that, if a case of accessory after the fact to a summary offence amounted to a perversion of the course of justice, then the offender could be prosecuted under the general indictable offence of perverting the course of justice.[613]

Queensland Director of Public Prosecutions, Leanne Clare, did not express a concluded view in relation to this issue but did note that, despite the fact that the provision in Queensland allows prosecution for accessories to "any offence," in practice this provision is rarely prosecuted and when it is it almost invariably relates to homicides.[614]

Committee's conclusion in relation to principal offences to which the offence of accessory after the fact applies

Mindful of the overriding goal of improving uniformity among Australian jurisdictions, the Committee has seriously considered the conclusion of MCCOC that the offence of accessory after the fact should apply to all offences. However, the Committee considers that a departure from the MCCOC position is justified in this case for the reasons outlined below. Accordingly, the Committee makes no recommendation for changing the current law on this point.

First, the Committee notes that MCCOC did not provide any compelling policy reasons for its recommendation and none were brought to our attention in the course of this Inquiry. Secondly, all witnesses to this Inquiry who expressed a view favoured

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[611] Brian Sandland, *Minutes of Evidence,* 11 November 2003, p. 22.
[612] Ibid.
[613] Pauline Wright, *Minutes of Evidence*, 12 November 2003, p. 57.
[614] Leanne Clare, *Minutes of Evidence,* 13 November 2003, p. 65.

retaining the current Victorian position. Thirdly, there are policy reasons for retaining the current law that the offence of accessory after the fact only applies to serious indictable offences. The Committee is persuaded by the argument presented by the Criminal Bar Association and the New South Wales Attorney-General's Department that the current restriction of section 325 to serious indictable offences assists to prevent a plethora of lesser derivative offences. The Committee considers accessory after the fact to be a serious offence against the administration of justice on a par with perjury and perverting the course of justice. If the offence were to apply to accessories to minor crimes the serious nature of the offence would be diluted and valuable resources could be spent on lesser examples of the offence.

The Committee also accepts the argument advanced by witnesses such as the New South Wales Council for Civil Liberties and the Criminal Bar Association that alternative remedies can be used in appropriate cases of accessory after the fact to lesser offences. These include the offence of attempting to pervert the course of justice and the summary offence of hindering and obstructing police.

Recommendation 12

That in Victoria the offence of accessory after the fact continue to apply only to serious indictable offences.

Commission of principal offence

While the crime of accessory after the fact is separate from the offence committed by the principal offender,[615] liability as an accessory after the fact is only possible if the principal offence has been committed.[616] Exactly what amounts to proof that the principal offence has been committed has been the subject of considerable debate in

[615] Freckelton, *Criminal Law Investigations and Procedure*, above note 28, para 1.1.3400.
[616] *R v Dawson* [1961] VR 773. The subsequent appeal to the High Court (*Dawson v R* (1961) 106 CLR 1) did not overrule the Full Court of the Victorian Supreme Court on this general principle of law. This is because it was not the subject of the appeal. Coldrey J confirmed this in *Welsh* (1998) 100 Crim R 484, when he said that *R v Dawson* "was the subject of appeal to the High Court but not on this point."

the reported cases. MCCOC did not consider this issue in its Discussion Paper or in its Report.

The current position in Victoria can be summarised as follows: proof of an actual judgment against the principal offender will constitute prima facie evidence at the trial of the accessory that the principal offence has been committed but, where the principal has only made an out of court admission that he or she committed the offence, that admission generally cannot be used in evidence against the accessory to prove the commission of the principal offence.

It used to be the case at common law that at the trial of the accessory the conviction of the principal offender could not be admitted in evidence as part of the prosecution case to establish the truth of the allegation. [617] The rationale for this rule of evidence was that it was considered unfair to an accused person if the evidence of someone else's conviction was admitted in evidence because the accused was not a party at the other trial and was unable to challenge hearsay evidence or appeal that decision. [618]

However arguably there is an exception to the rule in relation to trials of accessories after the fact— that proof of the conviction of the principal offender *is* admissible and is prima facie evidence that the principal offence was committed by the principal offender. [619] The Victorian case of *R v Dawson*[620] is now used as authority for the proposition that in Victoria proof of the conviction of the principal offender is admissible at the trial of the accessory and constitutes prima facie evidence that the principal offence was committed.[621]

It is, however, possible for an accused to rebut the prima facie evidence. For example in a Queensland case which considered the principle established in *R v Dawson,* it was held that it was open to the accused to rebut the prima facie evidence "by showing that [the principal offender] did not do the acts necessary to constitute the offence of

[617] Heydon, *Cross on Evidence,* Above note **, para 5210 citing *R v Shepherd* (1980) 71 Cr App R 120 at 124. See also *Hollington v F Hewthorn & Co Ltd* 1943 1 KB 787.
[618]See discussion Ibid para 1620. The rule of evidence was based on the maxim *res inter alios acta* ("no one should be prejudiced by a transaction between strangers").
[619] Ibid para 5210 citing Smith's case (1783) 1 Leach 288; Prosser's Case (1784) 1 Leach 290 n, *R v Dawson* [1961] VR 773 and others. The author of the text also notes that *R v Dawson* was dissented from *in R v Triffett* (1992) 1 Tas SR 293.
[620] *R v Dawson* [1961] VR 773.
[621] Ibid, p. 774: "[…] It is a rule long established that upon the trial of a person on a charge of having been an accessory after the fact to the commission of a felony, proof of the conviction of the alleged principal offender is admissible, and constitutes prima facie evidence that the felony was committed by him."

murder or that his acts did not constitute the offence of murder but the offence of manslaughter, in which latter event they would have been liable to a lesser punishment."[622]

Will an admission of guilt on the part of the principal offender be sufficient to satisfy this requirement?

In *R v Dawson*[623] the Court indicated that the fact that the principal offender had pleaded guilty to the principal offence was sufficient evidence of this element pursuant to the long-established rule that "upon the trial of a felony, proof of the conviction of the alleged principal offender is admissible, and constitutes prima facie evidence that the felony was committed by him."[624] There has since been debate about whether the scope of the rule in *R v Dawson* can be extended so that out of court admissions made by a principal offender could be used in evidence at the trial of the accessory to prove that the principal offence had taken place.

Subsequent cases have adopted a restrictive interpretation of *R v Dawson* by making it clear that out of court admissions made by a principal offender (where the alleged accessory did not witness the admission) cannot be used in evidence against the accessory after the fact, as this would be contrary to a fundamental rule of evidence—the rule against hearsay evidence.

The principle of this rule is that the evidence of a fact to be proved may never consist of an assertion made by any person otherwise than as a witness in the case. [625] In *R v Carter and Savage*[626] it was expressly stated that *Dawson* and current case law did not have the effect of overriding this general principle:

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[622] *R v Carter and Savage; Ex parte Attorney-General* (1990) 47 A Crim R 55, p. 64. *Mahadeo v The King* [1936] 2 All ER 813 (PC) also held that counsel for the accessory after the fact was entitled to argue whether a murder had taken place or not "and this would be so even if the prisoner had pleaded guilty:" p. 813. See also Freckelton, *Criminal Law Investigations and Procedure*, above note 28, para 1.1.3400.

[623] *R v Dawson* [1961] VR 773.

[624] Ibid, p. 774. In response to the contention that there was no evidence that the principal offender had committed the principal offence, the Court noted: "But it appears to be a sufficient answer to this that the Crown called evidence before the jury that [the principal offender] […] had pleaded guilty to the felony charged against him […]." The judgment then states the long-established rule quoted above.

[625] Stone, Julius and Wells, WAN, *Evidence: Its History and Policies,* Butterworths, 1991, p. 307.

[626] *R v Carter and Savage; ex parte Attorney-General* (1990) 47 A Crim R 55.

> This is certainly not in question and it follows that on the trial of the accessory after the fact proof of the commission of the offence by the principal offender cannot be provided by proof of a confession made out of court by him.[627]

Welsh,[628] a decision of the Court of Appeal of the Supreme Court of Victoria, went even further by holding that the applicant accused of being an accessory after the fact in that case had no case to answer "because the essential evidence led by the Crown to prove the first element of the charge […] was evidence of confessions made by the principal offender to a person other than the applicant; evidence which was, on strict principle, inadmissible against the applicant."[629] It was held that the rule that an accused can only be convicted on evidence admissible against him or herself is "fundamental to our system of criminal justice."[630]

Welsh[631] did not overrule the decision in *Dawson,* but did hold that the principle enunciated there:

> should not be extended beyond its present limits by holding that, as against the accessory, prima facie evidence of the principal's guilt is afforded not only by a judgment against him but also an impending verdict of the jury against him.[632]

In the final analysis, then, the current position in Victoria seems to be thus: proof of an actual judgment against the principal offender will constitute prima facie evidence at the trial of the accessory that the principal offence has been committed. However the rule does not make admissible evidence against the accessory which is otherwise not admissible against the accessory such as admissions made by the principal offender. [633] So, where admissions made by the principal amount to only hearsay evidence at the accessory's trial, the admissions cannot be used in evidence against the accessory to prove the commission of the principal offence.

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[627] Ibid, p. 56. However, in that decision the majority followed *Dawson* by holding that proof of the conviction of the principal offender was prima facie evidence of the commission of the offence (see *Welsh* at first instance – (1998) 100 Crim R 484).
[628] *Welsh* (1998) 105 A Crim R 448.
[629] Ibid, p. 449.
[630] Ibid.
[631] Ibid.
[632] Brooking JA goes on to say: "Having regard to modern conceptions, such a course could really only be justified by the adoption of the view —at odds with those conceptions—that literally any evidence admissible against the principal is also admissible against the accessory:" p. 472.
[633] Heydon, *Cross on Evidence,* Above note 616, para 5210.

However, the legal position is still not entirely clear in other jurisdictions[634] and in the dissenting judgment in *R v Carter and Savage*[635] and in the Victorian case of *Welsh*[636] the Courts suggested that consideration be given to clarifying the law in this area so that proof of the conviction of one person can, where relevant, be led in the trial of another, as is the case pursuant to the *Police and Criminal Evidence Act 1984* (UK).[637] In the words of Brooking JA:

> In *Carter and Savage, ex parte A-G* the dissentient, Derrington J […] suggested that Queensland might benefit from legislation along the lines of the English Police and Criminal Evidence Act, s. 74(1). It seems to be that consideration could usefully be given in Victoria as to whether similar legislation is desirable.[638]

The Committee called for submissions on this suggestion, namely whether Victorian law should be amended to clarify that proof of the conviction of one person can, where relevant, be led at the trial of another person.

Witnesses' submissions on the issue of evidence of conviction of the principal offender

The Criminal Bar Association expressed support for clarifying the law in this area. The common law on establishing the conviction of the principal offender is one of the few areas of law which the Criminal Bar Association viewed as being sufficiently unclear to warrant reform. After quoting at length from the relevant authorities, the Criminal Bar Association made the following submission to the Inquiry:

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[634] For example, Ross cites *R v Welsh* as authority for the proposition that a certificate of conviction of the principal offender is not sufficient and nor is a confession or admission by the principal: Ross, above note 105, para 1.060. See also *R v Triffett* (1992) 1 Tas SR 293. For the position in the United Kingdom following the enactment of the *Police and Criminal Evidence Act 1984* see the recent case of *R v Hayter* [2003] EWCA Crim 1048 where the Court of Appeal concluded that in the circumstances of that case the conviction of the co-accused (which rested on his out of court admissions) would be admissible in any retrial of the accessory and that it would not be sensible to hold that a jury could not have regard to "a conclusion which it had reached on evidence presented in a joint trial in order to prove the existence of a fact that was a pre-condition in law to establishing the guilt of the accessory".

[635] *R v Carter and Savage; ex parte Attorney-General* (1990) 47 A Crim R 55.

[636] *Welsh* (1998) 105 A Crim R 448.

[637] Ibid, per Winneke P, p. 450, who noted that he agreed with Brooking JA on this point. Section 74(1) of the *Police and Criminal Evidence Act* (UK) 1984 provides that:- "In any proceedings the fact that a person other than the accused has been convicted of an offence by or before any court in the United Kingdom or by a service court outside the United Kingdom shall be admissible in evidence for the purpose of proving, where to do so is relevant to any issue in those proceedings, that that person committed that offence, whether or not any other evidence of his having committed that offence is given."

[638] Ibid, per Brooking JA, p. 472.

> It is our view that there is a lack of common law clarity here. We think a reform such as that in the UK *Police and Criminal Evidence Act 1984* is desirable. Such a reform establishes an exception to the usual evidentiary rules.
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> Inelegant as it may seem, this is preferable to the current uncertainty, which has the capacity to cast doubt on those very evidentiary rules.[639]

The Director of Public Prosecutions also outlined its preferred option for reform although it prefaced its submission with the rider "if reform is thought necessary," implying that the DPP does not necessarily think that it is.

On this issue the Director of Public Prosecutions submitted that:

> [A] declaratory provision could be enacted to the effect that formal proof of the conviction of one person, for example, by the tendering of the relevant court extract, may be led in evidence at the trial of another person and that it will constitute prima facie proof of the conviction of the first person.[640]

Victoria Legal Aid in its witness submission on this issue argued that "accepted rules of evidence in criminal proceedings and criminal investigations should stay as firmly in place as they can". [641]

Committee's conclusions on the rules relating to evidence for the offence of accessory after the fact

The Committee considers that the lack of clarity in the common law in relation to the evidentiary rules on this issue justifies the creation of a statutory provision which clearly states the current law in Victoria. In arriving at this conclusion the Committee has been influenced by the fact that the three Victorian stakeholders who addressed this question and a Judge in a fairly recent Victorian case[642] all recommended reform or that consideration be given to reform.

The Committee recommends that legislation should be enacted which enables proof of the conviction of the principal offender to be led in the trial of the alleged accessory after the fact and that such conviction will constitute prima facie proof of the commission of the principal offence.

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[639] Criminal Bar Association, submission no. 6, p. 11.
[640] Director of Public Prosecutions, submission no. 9, p. 11.
[641] Victor Stojcevski, *Minutes of Evidence*, 24 November 2003, p. 6.
[642] Brooking JA in *Welsh* (1998) 105 A Crim R 448.

On the related issue of the use of a principal's out of court admission at the trial of an accessory, as discussed earlier in the chapter the current position in Victoria is that such admissions cannot be used in evidence against the accessory to prove the commission of the principal offence because it is covered by the rule against hearsay evidence. The Committee takes note of the Victoria Legal Aid submission (the only witness submission directly addressing this point) that:

> The legislature needs to firmly establish in statute for this class of case that an accused can only be convicted on evidence admissible against him or herself and the applicable admissibility rules for such evidence.[643]

On this issue the Committee agrees with this submission and recommends that for the avoidance of doubt, legislation should be enacted which provides that at the trial of an accessory after the fact, evidence of out of court admissions made by a principal offender cannot be used in evidence at the trial of the accessory to prove the commission of the principal offence, where such admissions would be contrary to the rule against hearsay evidence.

Recommendation 13

(a) That a provision be created in the Evidence Act 1958 (Vic) which provides that formal proof of the conviction of a principal offender may be led in evidence at the trial of an accessory after the fact and that the conviction of the principal offender will constitute prima facie proof of the commission of the principal offence.

(b) That the provision also state that, for the avoidance of doubt, at the trial of an accessory after the fact, evidence of out of court admissions made by a principal offender cannot be used in evidence to prove the commission of the principal offence where such admissions are contrary to the rule against hearsay evidence.

[643] Victor Stojcevski, *Minutes of Evidence*, 24 November 2003, p. 6.

Is it necessary to show that another has been convicted of the principal offence?

Section 325(3) of the *Crimes Act 1958 (Vic)* makes it clear that it is not necessary that another person has actually been convicted of the principal offence:

> A person charged with an offence against subsection (1) may be indicted or presented and convicted together with or before or after the principal offender and *whether or not the principal offender is amenable to justice* (emphasis added).

The other Australian jurisdictions have provisions which are of the same general effect.[644]

What is the position when the principal has been acquitted?

The acquittal of the principal will only lead to the acquittal of the accessory after the fact if the verdicts are inconsistent.[645] The case of *R v Breen*[646] is an example of a decision where it was held that the acquittal of the principal did not necessarily mean that the alleged accessory after the fact had to be acquitted too.

R v Breen

Ferguson was charged with manslaughter and the accused, Martin Breen, was charged with being an accessory after the fact. Upon application, separate trials were granted. After Ferguson was acquitted of manslaughter, Breen argued at his own trial that this acquittal "rendered the accused's acquittal on the accessory after the fact charge inevitable and incontestable."[647]

[644] *Crimes Act 1900 (ACT),* s. 371; *Criminal Code Act (NT),* s. 308(1); *Crimes Act 1900 (NSW),* ss 347, 371; *Criminal Code Act 1899 (Qld),* s. 568(9) and 569; *Criminal Code Act 1924 (Tas*), s. 331; *Criminal Code 1913 (WA),* ss. 586(5), 587; *Criminal Law Consolidation Act 1935 (SA),* s. 279.
[645] Ross, above note 105, para 1.1080. *R v Darby* [1981-82] 148 CLR 668, per Gibbs CJ, Aickin, Wilson and Brennan JJ with Murphy J dissenting. This High Court decision concerned conspiracy but its reasoning has also been held to be applicable to the offence of accessory after the fact.
[646] *R v Breen* (1990) 99 FLR 474. This case applied *R v Darby* [1981-82] 148 CLR 668.
[647] Ibid, p. 477.

It was held that, while it was true that as a matter of law that one ingredient in the offence of accessory after the fact was proof of the principal offence against Ferguson, the jury's verdict of not guilty in respect of Ferguson did not mean that the acquittal on the accessory after the fact charge was "inevitable."[648]

Citing (inter alia) *R v Darby*, his Honour held that the applicable test in such cases was whether the accused's conviction would be inconsistent with the acquittal of the other person. In the present case it could not be said that Ferguson's acquittal was inconsistent with either Breen being convicted of being an accessory after the fact or with perverting the course of justice (the alternative charge). As his Honour put it:

"It is true the Crown shall have to prove Ferguson committed an offence, but the acquittal, on different evidence in a different trial in respect of a different lis[649] between different parties, does not prevent this, and there is nothing in the nature of an estoppel."[650]

In fact, there is authority to suggest that conviction as an accessory after the fact is possible even if the principal offender is not charged.[651] The fate of the principal offender is not relevant. As one judge has put it: "he may even be pardoned, but that does not mitigate the accessory's sentence."[652]

The benefits of proceeding with the offence of perverting the course of justice rather than accessory

As the above discussion indicates, there are difficulties and uncertainties involved in establishing the requisite commission of the principal offence. In *Welsh,*[653] the Court

[648] Ibid, p. 478.
[649] "Lis" is a Roman law term meaning "a proceeding or an issue the subject of a proceeding:" *Butterworths Concise Australian Legal Dictionary*, above note 11, p. 273.
[650] "Estoppel" is "the doctrine designed to protect a party from the detriment which would flow from that party's change of position if the assumption or expectation that led to it were to be rendered groundless by another:" ibid, p. 157.
[651] *R v White* 16 SASR 1977 571, per Bray CJ, p. 574 and see Ross, above note 105, para 1.1070. Bray CJ noted that "it is quite true that the accessory after the fact can now be tried, convicted and sentenced even if the principal offender is never tried at all […]."
[652] Ibid, per Jacobs J, p. 579.
[653] *Welsh* (1998) 105 A Crim R 448, p. 449.

quoted from English commentator Archbold who indicated that some persons tried under the accessory after the fact provisions should instead be charged with the offence of attempting to pervert the course of justice. As Archbold put it:

> What is frequently overlooked in the s.4(1) cases [the equivalent of section 325 in Victoria] is that, in order to establish guilt, the prosecution must prove against the alleged assister that the person he is alleged to have assisted had committed an arrestable offence and this must be proved by evidence which is admissible against the alleged assister whether or not the two are jointly tried.[654]

After making some comments about the rule against using admissions of the principal offender, Archbold continued:

> The difficulties arising from proceeding under s. 4(1) are avoided altogether if the alleged assister is charged with attempting to pervert the course of justice.[655]

The physical element of the offence

As with the other administration of justice offences we have examined the prosecution must establish that the physical or conduct element of the offence is fulfilled. Specifically, the prosecution must prove that the act or acts of the accessory after the fact assisted, or at least had the "potential to assist the principal offender to escape the administration of justice."[656]

It used to be the case that the accessory after the fact had to have provided some sort of personal assistance to the principal (such as concealing him or her or giving him or her a disguise).[657] However, it is now clear that the assistance need not have been

[654] Ibid.
[655] Ibid.
[656] Freckelton, *Criminal Law Investigations and Procedure*, above note 28, para 1.1.3410. Freckelton cited *R v Tevendale* [1955] VLR 95, as authority for this proposition. In terms of potential assistance, Gillies notes: "the cases usually refer to the actus reus as consisting of those acts which assist the felon […] but there is little doubt that an act which has the potential to assist the felon to evade justice suffices even as, in the particular case, it does not have this effect:" Gillies, above note 9, p. 820. Gillies notes that the actus reus (physical element) is very broad in section 325 of the *Crimes Act 1958 (Vic)* because it indicates that "any act" will suffice. In theory, then, the act need not be one which assists or has the potential of assisting the person who has committed the offence to evade justice. However, according to Gillies in practice only acts with this tendency would be prosecuted: p. 828.
[657] Some English cases are to this effect. See Gillies, above note 9, p. 822.

personal. Rather, it is "sufficient to prove that something was done for the purpose of assisting the principal felon to escape apprehension or punishment."[658]

To satisfy the physical element of the offence, the alleged accessory after the fact must have performed a positive act; a mere failure to act is not sufficient.[659]

Other acts which have been held not to be sufficient to satisfy the conduct element of the offence of accessory after the fact are:

- merely enjoying the proceeds of a crime;[660] and
- visiting a place to inspect stolen property with a view to possible purchase.[661]

Examples of acts which have been held to constitute the necessary physical element of the crime include:[662]

- impersonal (or indirect) assistance—for example, altering an engine number and repainting a stolen car so that it is not readily recognisable,[663] or moving from a workshop certain articles used in making counterfeit coins after the principal's arrest for counterfeiting,[664] or employing another to aid the principal offender;[665]

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[658] *R v Tevendale* [1955] VLR 95, p. 97 per Martin J. Gillies takes the view that there is little justification for restricting the offence by imposing an "arbitrary requirement" that the assistance be of a personal nature: "Even the use of "personal" is ambiguous – on one view every act, no matter how indirect, which helps the felon evade justice assists the latter personally. That the act need not be personal is reflected sub silentio in numerous reported case, where liability was imposed notwithstanding that the assistance was indirect and not personal:" ibid, p. 822.

[659] Freckelton, *Criminal Law Investigations and Procedure*, above note 28, para 1.1.3430 and Butterworths Online, para 130-7290. Gillies notes that it has been expressly held that an omission to act does not make the defendant an accessory after the fact (even if it assists the felon to evade justice) – *Sykes v DPP* [1962] AC 528.

[660] *R v Barlow* (1962) 79 WN (NSW) and see Freckelton, *Criminal Law Investigations and Procedure,* above note 28, para 1.1.3410 and Gillies, above note 9, p. 822. Gillies points out it will not be enough that the act merely assists the principal to "realise the fruits of his or her crime after its commission, if this act does not in itself help the principal to evade justice:' p. 821. He notes that helping a thief to dispose of stolen property (e.g. buying it or finding a buyer) will not necessarily make it less likely that the thief will be brought to justice – on the other hand, in general, the quick disposal of stolen goods will make it less likely that a thief will be brought to justice."

[661] *R v Rose* [1961] 3 All ER 298. Freckelton, *Criminal Law Investigations and Procedure*, above note 28, para 1.1.3410.

[662] Gillies also cites a number of examples, including assisting a convicted felon to escape custody before he or she is punished, passing information to another so that he or she can conceal the crime and some of the same ones Freckelton cites. Gillies notes that even advice such as advising the principal to flee the jurisdiction has been held to constitute the actus reus of the offence: Lee (1934) 6 Car & P 536: Gillies, above note 9, p. 820.

[663] *R v Tevendale* [1955] VLR 95; Freckelton, *Criminal Law Investigations and Procedure*, above note 28, para 1.1.3410.

[664] *R v Levy* [1912] 1 KB 158—this case is referred to as authority for the proposition that impersonal assistance can suffice. Freckelton uses the more generic term "the removal of incriminating evidence

- driving the principal away from the scene of the crime;[666]
- helping to dispose of stolen property;[667]
- buying clothes and a car for the principal offender;[668] and
- concealing a homicide by burying the body.[669]

The mental element

In order to satisfy the mental element of the offence of accessory, the prosecution must prove two elements: first, that the accessory after the fact knew or believed the principal offender was guilty of the principal offence and secondly, that he or she intended to assist the principal offender to escape the administration of justice.[670] We discuss each of these elements below.

Intention to assist the principal offender

As well as the requisite knowledge or belief that an offence has been committed (see discussion below), the prosecution must prove that the accessory after the fact intended "to assist the principal offender escape apprehension, prosecution, conviction or punishment."[671] It follows that where an alleged accessory after the fact acts solely

after the principal offender has been arrested." Freckelton, *Criminal Law Investigations and Procedure*, above note 28, para. 1.1.3410. Ross, above note 105, para 1.030.

[665] *R v McKenna* [1960] 1 QB 411 and *R v Jarvis* (1837) 2 Mood and R 40. Freckelton cites these cases as authority for the proposition that indirect assistance may also be sufficient to found liability: Freckelton, above note 28, para 1.1.3410.

[666] *R v Holey* [1963] 1 All ER 106; Freckelton, above note 28, para 1.1.3410.

[667] *R v Williams* (1932) SR (NSW) 504; Freckelton, above note 28, para 1.1.3410; Ross, above note 105, para 1.1030.

[668] *R v Hurley* [1967] VR 526; Freckelton, above note 28, para 1.1.3410.

[669] *R v Williamson* [1972] 2 NSWLR 281 (CCA); Ross, above note 105, para 1.1030.

[670] *Crimes Act 1958 (Vic), s*. 325(1). Freckelton, *Criminal Law Investigations and Procedure*, above note 28, para 1.1.3420.

[671] Ibid. Gillies notes the divergence in authorities (and the scarcity of Australian authority) as to whether knowledge of a result is to be equated with intention (p. 823). However, he concludes that, in principle, knowledge of a result is to be equated with intention "so that if D acts in such a way as to assist a felon, or to perform an act of potential assistance, knowing that the felon is being assisted, or that this act is one of this tendency, D may be viewed as acting with any such element of intent as may be spelt out from the authorities:" Gillies, above note 9, p. 824.

for his or her own benefit or purposes, he or she cannot be guilty of the offence.[672] This element of the offence was considered in the Victorian Court of Criminal Appeal in *R v Middap.*[673] In its examination of the history and meaning of section 325 the Court noted:

> It should first be observed that the impugned act must be performed for the purpose of impeding the apprehension (etc) of another person. If the purpose of the act was merely to protect the actor, then this element has not been proved.[674]

On the other hand, the Court held that "the fact that the actor might also be a beneficiary of the act, is not fatal to that proof"[675] and referred to Sholl J's judgment in *R v Tevendale*[676] where he said:

> […] in my opinion it is not necessary that the Crown should prove in the accused an *intent* to assist the principal felon quite independently of any *desire* to make or acquire some personal gain for the accessory after the fact himself […]. So long as there is present a *desire* to assist the principal felon, it is in my opinion quite immaterial that there is also present some desire to make personal gain for the accessory. [emphasis added].[677]

In conclusion, the Court held that it is sufficient to instruct the jury that they must be satisfied that the accused had at least as one of his or her purposes that the apprehension of the principal offender would be impeded.[678]

Knowledge or belief of the offence

Does the accessory after the fact have to have knowledge or belief of the actual offence or will any offence suffice?

The common law required the accessory after the fact to have knowledge of the precise principal offence which had been committed in order to satisfy this element of the crime.[679]

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[672] Butterworths Online, 130-7295.
[673] *R v Middap* (1992) 63 A Crim R 434.
[674] Ibid, p. 443.
[675] Ibid.
[676] *R v Tevendale* [1955] VLR 95.
[677] Ibid, p. 97.
[678] *R v Middap* (1992) 63 A Crim R 434.
[679] *R v Tevendale* [1955] VLR 95; *R v Stone* [1981] VR 737 per Crocket J at 740: "What must be proved by way of knowledge on the part of the accessory after the fact is knowledge of all the relevant facts, or acts, that establish the precise felony with respect to which the Crown alleges the accused was

However, in Victoria the principal offence that has been committed must be a serious indictable offence (i.e. an offence punishable by 5 or more years' imprisonment) and the accessory after the fact must have the knowledge or belief that the principal offender is "guilty of the principal offence or some other serious indictable offence."[680] This means that it is sufficient that the alleged accessory after the fact knows about the commission of any indictable offence punishable by 5 or more years' imprisonment.[681] This does not mean that the accessory after the fact must know that the law has been breached or what the exact penalty structure of the offence is, as ignorance of the law affords no excuse.[682] Rather, what is required is that the alleged accessory after the fact knows or believes that the principal has committed or been responsible "for a set of facts which discloses to the legally informed person that a serious indictable offence has been committed."[683]

MCCOC

In the Discussion Paper and Final Report on Administration of Justice Offences, MCCOC posed the question as to whether the accessory after the fact should have knowledge that the principal offender has committed the offence in question or merely knowledge or belief that the principal offender has committed that offence or some other offence.[684]

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an accessory." In *Weatherall v The Queen* (1987) 28 A Crim R Forster J put the common law position as follows: "At common law a person can be convicted of being an accessory after the fact only if he assists the perpetrator of a crime having knowledge of all the relevant facts, or acts, with respect to which it may be said by someone with the requisite legal knowledge that they constitute the precise felony with respect to which the Crown alleges that the accused was an accessory:" p. 77. See also Ross, above note 105, para 1.1040.

[680] *Crimes Act 1958 (Vic),* s. 325(1).

[681] Gillies, above note 9, p. 828.

[682] Ibid.

[683] Ibid.

[684] MCCOC Discussion Paper, above note 5, p. 125.

After considering comments by the Gibbs Committee,[685] MCCOC concluded that it should be sufficient that the accessory after the fact had a belief that another offence had been committed but that "where there is only belief as to commission of an offence other than the offence actually committed, the believed offence must be related to the offence actually committed."[686] In other words, conviction as an accessory after the fact should not be possible if the accessory after the fact believed that the principal offender had committed an offence of a completely different nature than the one actually committed.

The Model Code contains the following definition of "related:"

> For the purposes of this section, an offence that was not committed but which the accessory after the fact believes to have been committed by the principal offender is related to an offence committed by the principal offender if the circumstances in which the accessory after the fact believes the offence to have been committed are the same, or partly the same, as those in which the actual offence was committed.[687]

MCCOC also recommended that in cases where the accessory after the fact believes another offence has been committed, and the offence actually committed and the one believed to have been committed carry different penalties, "the penalty for the offence as accessory after the fact should be related to whichever of the two offences first mentioned carried the lower penalty."[688] The reason for this proviso is that many jurisdictions base the penalty for accessory after the fact on the penalty for the principal offence. We will discuss penalties in a later section of this Chapter.

In the draft Model Code this is provided for as follows:

> In a case where the offence that the accessory after the fact believes the principal offender to have committed is not the offence that the principal offender committed, the penalty for an offence against the section is the lesser of
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> (a) the penalty applicable under subsection (1), or

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[685] The Gibbs Committee alluded to the difficulty in logic in Acts such as the UK Act in so far as they applied when there was belief that some offence had been committed (but not the one actually committed) but then related the penalty to the one actually committed. According to the Gibbs Committee this difficulty could be removed by "providing that the offence could arise when there was only belief as to the commission of the offence (provided some other related offence had been committed) but where the offence believed to have been committed is different from that actually committed, the penalty would relate to whatever offence carried the lower penalty:" MCCOC Discussion Paper, above note 5, p. 125, paraphrasing Review of Commonwealth Criminal Law, Interim Report – Principles of Criminal Responsibility, July 1990, para 17.19.
[686] MCCOC Discussion Paper, above note 5, p. 125.
[687] Ibid, p. 129, s. 74.5 (3).
[688] Ibid.

(b) the penalty that would be calculated under that subsection if the principal offender had committed the offence that the accessory after the fact believed him or her to have committed.[689]

Other jurisdictions

In Queensland, Western Australia, the Northern Territory, the ACT and the Commonwealth the accessory after the fact must know that the principal offender is "guilty of an offence"[690] or has "committed an offence."[691] MCCOC took the view that this means that knowledge of the actual offence is required in these jurisdictions.[692]

The South Australian Act provides that an accessory after the fact will not be guilty unless it is established that the principal offender committed:

(i) the offence that the accessory after the fact knew or believed the principal offender to have committed; or

(ii) some other offence committed in the same, or partly in the same circumstances.[693]

In New South Wales, no definition of the offence is provided.[694] On this basis it has been argued that the common law applies—in other words, knowledge of the precise offence committed is required.[695]

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[689] Ibid, p. 120. (This is section 74.5 (2)).
[690] This is the wording of the Queensland Criminal Code: *Criminal Code Act 1899 (Qld),* s. 10; *Crimes Act 1900 (ACT),* s. 181*; Crimes Act 1914 (Cth),* s. 6.
[691] *Criminal Code 1913 (WA),* s. 10; *Criminal Code Act (NT),* s. 13.
[692] MCCOC Discussion Paper, above note 5, p. 125 where MCCOC states, "the next issue is whether knowledge that the principal offender has committed the offence in question should be required, as under existing Australian laws (apart from Victoria) […]."
[693] *Criminal Law Consolidation Act 1935 (SA),* s. 241(2)(a).
[694] s. 347 of the *Crimes Act 1900 (NSW)* simply provides for how accessories after the fact are to be tried and punished. Butterworths Online states that in New South Wales "knowledge of the precise offence committed is required" and cites various cases such as *Tevendale* v R [1955] VLR 95 and *R v Weatherall* (1987) 75 ALR 635, but notes "whether the accessory after the fact believes that the principal offender has committed murder he or she may still be convicted if the principal offence was actually manslaughter:" para 130-7295.
[695] Ibid.

Discussion Paper questions

In the Discussion Paper the Committee called for submissions on the three main options for reform outlined below.

(a) Which of the following options should apply in Victoria?

(i) Should it continue to be the law in Victoria that the accessory after the fact know or believe that the principal offender has committed the actual offence (which must be a serious indictable offence) or *any* serious indictable offence?

or

(ii) Should knowledge or belief of any "related" offence suffice? (The MCCOC recommendation)

or

(iii) Should Victorian law make the mental element dependent on belief or knowledge of the actual offence, as is the case in the Queensland Criminal Code and other Australian jurisdictions?

(b) If the first or second options are adopted, in cases where there are different penalties for the offence actually committed and the offence the accessory after the fact believed was committed, should the penalty for the accessory after the fact be related to whichever offence carries the lower penalty?

Witnesses' submissions on knowledge or belief requirement

The Director of Public Prosecutions and the Criminal Bar Association both submitted that the current Victorian position with respect to knowledge and belief should continue to apply. The CBA argues that the mental element of the offence of accessory after the fact needs no amendment because it is coherent and comprehensible, adding that a qualifier such as "related offence" would create

difficulties of categorisation.[696] On the other hand, the CBA finds that there is merit in MCCOC's proposed provision relating to the penalty for this offence.[697]

The DPP also submitted that the law should continue to require that an accessory after the fact know or believe that the principal offender has committed the actual offence or any indictable offence with a maximum term of imprisonment of 5 years or more. The DPP also referred to the following difficulty which sometimes arises in pleading this offence:

> We make the observation that a difficulty sometimes arises in the pleading of this offence in circumstances where, at the time of the relevant assisting, the offence committed by the principal offender is still uncertain and could not, at that time, be known to the assister. For example, the principal offender may shoot and seriously injure the victim. Immediately thereafter, the assister may dispose of the weapon, believing that only an injury-type offence has occurred. Subsequently, the victim dies and the relevant principal offence is then Murder. On one view, it is appropriate to allege that the offence known or believed by the assister to have been committed, is Murder.[698]

In contrast Victoria Legal Aid submitted that the law should be changed to option (iii) on the grounds that a change requiring knowledge or belief of the "actual offence" would make the law more consistent with the common law. VLA opposed extending the law to "related offences" as recommended by MCCOC. At the public hearing VLA representative Victor Stojcevski elaborated on VLA's support for altering the law. He pointed out that many people keep their behaviour private and that allowing belief or knowledge of any indictable offence to constitute the mental element of accessory after the fact is too broad and may catch situations where the alleged accessory after the fact had no real knowledge of the offence committed. As Mr Stojcevski told the Committee:

> Unless a person is aware of the specific nature of the criminal activity that was engaged in, then that person ought not to be held legally culpable for being aware of such behaviour.[699]

Queensland witnesses who commented on this issue pointed out that the legal position in Queensland is in practice not as different from the Victorian position as the legislation appears to indicate. Director of Public Prosecutions, Leanne Clare,

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[696] Criminal Bar Association, submission no. 6, p. 12.
[697] Ibid.
[698] Director of Public Prosecutions, submission no. 9, p. 12.
[699] Victor Stojcevski, *Minutes of Evidence,* 24 November 2004, p. 9.

referred to a case where it was suggested that an accessory after the fact may not have to know exactly whether the alleged offence was murder or manslaughter:

> [T]here is a case called *R v Carter and Savage* where the distinction in homicide between murder and manslaughter was made. I think where the court, or at least one of the judges, in obiter accepted that an accessory after the fact could be an accessory after the fact to manslaughter notwithstanding that someone had committed murder, because the accessory after the fact may not have know that it was a deliberate killing, for example, but knew that he had in fact killed somebody, and that would be enough.[700]

The Bar Association of Queensland also pointed out there had been no difficulty in applying the law in that jurisdiction. As Ralph Devlin observed:

> The test would be whether someone who has really helped out after an offence has escaped in Queensland – in the case of a serious offence – and I cannot think of any situation where that has occurred. It seems to me the other way around would potentially open the floodgates.[701]

Committee's conclusions on knowledge or belief requirement

The Committee notes the divergence between the views of the Criminal Bar Association and the Director of Public Prosecutions on the one hand and Victoria Legal Aid on the other as well as the alternative middle ground approach suggested by MCCOC. However on this occasion the Committee is of the view that there are no strong policy reasons to warrant reform.

The Committee agrees with the DPP and the CBA that the current provision which makes it an offence to assist a principal offender to evade justice where the principal has committed *any* serious indictable offence should continue to apply. The statutory offence as it stands, is aimed at making it an offence to assist a principal in evading justice *per se*. In the Committee's view therefore, it follows that the requirement that the accessory need only be aware that a serious offence has been committed (but not necessarily the precise offence) is a sound one that does not require change.

On this issue the Committee notes the concerns raised by VLA that the present provision is too broad and that it therefore may catch situations where the accessory after the fact has no real knowledge of the principal offence. However, the Committee

[700] Leanne Clare, *Minutes of Evidence,* 13 November 2003, p. 65
[701] Ralph Devlin, *Minutes of Evidence,* 13 November 2003, p. 96.

is of the view that the accessory's knowledge of the nature of the principal offence is a factor that is taken into consideration by the sentencing judge under the *Sentencing Act* 1991 (Vic) when determining the appropriate penalty for this offence against the administration of justice. In sentencing an offender the Court must have regard to the offender's "culpability and degree of responsibility for the offence".[702] This sentencing principle is clearly illustrated in a recent Victorian case involving two accessories after the fact to the offence of manslaughter. [703] The Committee also notes the CBA's submission that the mental element of this offence is "coherent and comprehensible" and agrees that reform is unwarranted. The Committee therefore in this instance does not adopt the recommendations of MCCOC.

The Committee comments on the issue of the maximum sentence for this offence later in this Chapter.

Recommendation 14

That the existing provisions contained in s 325(1) of the Crimes Act 1958 (Vic) relating to the knowledge or belief requirement for the offence of accessory after the fact be retained in Victoria.

The defence of lawful authority or reasonable excuse

In Victoria, only acts done "without lawful authority or reasonable excuse" can constitute the offence of accessory. The UK Act contains a similar defence. The UK Criminal Law Revision Committee (upon which the UK legislation was based) made the following comments about the meaning of lawful authority and reasonable excuse:

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[702] *Sentencing Act* 1991 (Vic), s. 5(2)(d).

[703] *DPP v McLeod, Bumpstead & Bumpstead* [1999] VSC 298. In this case one of the accessories after the fact assisted the principal by hiding the body of the deceased while the other accessory assisted by making a misleading statement to police to the effect that the deceased had moved to New South Wales. This accessory however was unaware that the deceased was in fact dead at the time the body was concealed. The sentencing judge recognised that she was "an accessory after the fact, but in a minor way" and this was reflected in her sentence. She was placed on a 2 year good behaviour bond while the other accessory who had hidden the body was given a 6 month prison sentence.

> The exception for 'lawful authority' will cover an executive decision against a prosecution, and that for 'reasonable excuse' will avoid extending the offence to acts such as destroying the evidence of an offence (for example a worthless cheque) in pursuance of a legitimate agreement to refrain from prosecuting in consideration of the making good of loss caused by that offence.[704]

At least one legal commentator has expressed the view that the defence of lawful authority does not need to be in the statute as an act done under lawful authority cannot be illegal.[705] MCCOC argued that reliance should be placed on the general defence of lawful authority recommended in an earlier Discussion Paper rather than a specific provision and this recommendation did not change in the Final Report.[706]

Should the exception for acts done with lawful authority or reasonable excuse be retained in Victoria? The Committee sought responses to this question in its Discussion Paper.

Witnesses' submissions on the defence of lawful authority or reasonable excuse

This question attracted relatively little attention from witnesses to the Inquiry. Both the Criminal Bar Association and Victoria Legal Aid submitted that the defence should be retained but did not elaborate on their reasoning.[707] The Director of Public Prosecutions pointed out that the defence may be redundant:

> Whether this expression should be removed depends upon when related amendments, as proposed by MCCOC, are enacted. If they are, then the expression in issue would certainly be redundant. There is merit in the view that the expression is redundant anyway, simply because acts done with lawful authority axiomatically lack criminal intent.[708]

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[704] UK Criminal Law Revision Committee, Law *Cmnd* 2659, para 28, quoted in MCCOC Discussion Paper, above note 5, p. 129. Also paraphrased in Freckelton, above note 28, para 1.1.3430.
[705] Freckelton, *Criminal Law Investigations and Procedure*, above note 28, para 1.1.1430. *Crafter v Kelly* [1941] SASR 237 at 243 per Napier J is cited in support of this.
[706] MCCOC Discussion Paper, above note 5, p. 129. In the Final Report it was noted that this recommendation was supported by several submissions and none of the submissions received did not support it: MCCOC Report, above note 6, p. 163. The Gibbs Committee recommended acts done with lawful excuse should be excluded noting: "this would, for instance, exclude acts done in pursuance of a legitimate agreement to refrain from prosecuting in consideration of making good a loss:" Review of Commonwealth Criminal Law, *Principles of Criminal Responsibility,* above note 457, para 17.22.
[707] Criminal Bar Association, submission no. 6, p. 12; Victoria Legal Aid, submission no. 7, p. 7.
[708] Director of Public Prosecutions, submission no. 9, p. 12.

Dr David Neal took a similar position, stating that he struggled with the notion that an offence can be committed if there was a lawful entitlement to do so. However he did not see it as a central issue, noting that:

> It should be dealt with, whether you deal with it through lawful authority or if because the MCCOC proposal is relying on a provision which is not yet enacted in Victoria then it is a simple matter of drafting to put in the equivalent.[709]

Benjamin Lindner agreed that "reasonable excuse or reasonable cause or lawful authority" are general principles which always apply to all offences." On the other hand, he does not object to its retention:

> Defences are not incorporated, the reasonable excuses or the lawful excuses are not necessarily incorporated. It is a general defence that will continue to be. I do not know that it is necessary but if for the avoidance of ambiguity this Committee decided that it was best to have without lawful excuse in the offence, I do not think that anyone would have a problem with that, from the defence or the prosecution point of view.[710]

Finally, Howard Posner, commenting on behalf of Queensland Legal Aid, also opposed the creation of separate statutory offences, preferring instead a general defence of the kind which appears in the Queensland Criminal Code or recommended by MCCOC.[711] Posner pointed out that placing the defence in some offences but not in others could create problems of statutory interpretation:

> We felt that you would be creating possibly a statutory interpretation mountain for yourself if you started putting that lawful authority is an excuse for particular offences – in other words, it is not an offence if done with lawful authority. That applies to all offences. If you start putting it into one or two offences some bright lawyer may stand up and say, "Look, lawful authority is an excuse in this offence because it says it is. You are silent about it on that one. Therefore there is impliedly a lesser excuse. Otherwise you would put it in – because you put it into this bit.[712]

Committee's conclusion on the defence of lawful authority or reasonable excuse

Noting that this was not an issue which attracted much attention in this Inquiry, the Committee considers that the defence of reasonable authority or reasonable excuse

[709] Dr David Neal, *Minutes of Evidence,* 24 November 2003, p. 20.
[710] Benjamin Lindner, *Minutes of Evidence,* 24 November 2003, p. 61.
[711] Howard Posner, *Minutes of Evidence,* 13 November 2003, p. 105.
[712] Ibid.

should be retained. While there is merit in the argument put by a number of witnesses that the expression may be redundant, for the avoidance of doubt the Committee believes it should be retained so that it is clear that persons acting with lawful authority or reasonable excuse will have a valid defence to the offence of accessory.

Recommendation 15

That the defences of "lawful authority" and "reasonable excuse" to the offence of accessory after the fact in s 325(1) of the Crimes Act 1958 (Vic) be retained.

Other issues

Application of the offence of accessory after the fact to the disposal of the proceeds of an offence

In Victoria, the statutory offence does not specifically apply to the disposal of the proceeds of an offence. However a person can also be charged with the offence of handling stolen goods if he or she dishonestly assists in the disposal of the stolen goods.[713]

MCCOC examined the issue of whether the offence of accessory after the fact should specifically apply to the disposal of the proceeds of the offence.[714] MCCOC noted that the Commonwealth and ACT Acts specifically extend to the disposal of the proceeds of an offence.[715] The South Australian Act also extends to disposing of the proceeds of an offence.[716] In addition receiving stolen goods is an offence in other jurisdictions.[717]

Despite this MCCOC recommended that the accessory after the fact offence "should extend expressly to where the defendant's intention in receiving or assisting the principal offender is to enable him or her to obtain, keep or dispose of the proceeds of

[713] *Crimes Act 1958 (Vic),* s. 88
[714] Ibid, p. 127.
[715] *Crimes Act 1900 (ACT),* s. 181; *Crimes Act 1914 (Cth),* s. 6.
[716] *Criminal Law Consolidation Act 1935 (SA),* s. 241(1)(b).
[717] Known as handling stolen goods in Victoria. *Crimes Act 1958 (Vic),* s. 88.

the offence."[718] MCCOC suggested that the express provision would be of benefit in circumstances where the defendant's actions did not amount to receiving (known as handling stolen goods in Victoria) and where, despite substantial assistance in disposing of the goods, it cannot be proven that the assistance was directed at helping the principal offender to elude punishment.[719]

The Committee asked in the Discussion Paper whether the offence of accessory after the fact should expressly extend to cases where the alleged accessory's intention in receiving or assisting the principal offender is to help him or her to obtain, keep or dispose of the proceeds of the offence.

Witnesses' submissions on extending accessory after the fact to the disposal of the proceeds of an offence

In Queensland Howard Posner of Legal Aid expressed the need for caution on this issue:

> It is a legitimate aim, and it may be that we are running against the wind with this one, but we felt if you both extend accessory after the fact to obtaining, keeping or disposing of proceeds and extend your definition of 'accessory' to knowledge of not only the actual offence but of related offence or any offence, then you create two separate widenings. […]
>
> The aim is laudable, but we felt that was almost a perfect example of where you build a new law—when you apply it—it could have the most unexpected consequences because if you both extend knowledge of any offence and of attempting to dispose of or keep the proceeds, you could then legitimately charge any lawyer who charged a fee to a criminal client who, for example, said 'Look, I'm guilty of this part, but not guilty of that part.' […]
>
> We felt very strongly that our position would be that if you extend it to obtaining, keeping or disposing of proceeds then make sure your accessory after the fact definition is nice and tight. Or if you are going to extend your accessory after the fact definition—to basically anyone who knows anything that is close to being the offence or any offence—then do not widen the net, because if it is having anything to do with the money of anybody who you know has ever done anything wrong, that is a pretty wide net.[720]

[718] MCCOC Discussion Paper, above note 5, p. 127. This recommendation did not change in the Final Report: MCCOC Report, above note 6, p. 161.
[719] MCCOC Discussion Paper, above note 5, p. 127.
[720] Howard Posner, *Minutes of Evidence,* 13 November 2003, p. 104.

This cautionary view about the dangers of simultaneously extending the offence of accessory after the fact to the disposal of the proceeds of an offence and widening the mental element of the offence, was not shared by Victorian witnesses, although, for different reasons. Two of the three Victorian stakeholders who addressed this issue agreed that the offence should not be extended in this way and the third was neutral on this point.

Victoria Legal Aid took the view that the "current provisions around handling stolen goods is sufficient for dealing with the disposal of the proceeds of an offence and that no new offence is needed."[721] If it were thought necessary to introduce a new offence, this should in any event be distinct from section 325.[722] The Director of Public Prosecutions agreed that "there is no need to expressly extend the offence as proposed, because other offences would be more appropriate in such fact situations."[723]

The Criminal Bar Association is expressly "neutral as to the desirability of criminalising disposal of proceeds of crime beyond the current array of offences."[724] However, like Victoria Legal Aid the CBA submits that, if this conduct is to be criminalised, it ought to be done by a new and distinct offence. As the submission points out:

> Section 325 is focused upon assisting the principal offender, whereas the proposal is aimed at the disposer of the proceeds of crime.[725]

Committee's conclusions on extending accessory after the fact to the disposal of the proceeds of an offence

The Committee accepts the evidence of witnesses that there is no pressing need to extend the offence of accessory after the fact to the disposal of the proceeds of an offence because this conduct is adequately covered by other offences. For this reason and because the recommendation to extend the scope of the offence does not appear to be central to MCCOC's proposed reforms in this area, the Committee has decided not to recommend an extension to the existing law.

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[721] Victoria Legal Aid, submission no. 7, p. 6.
[722] Ibid.
[723] Director of Public Prosecutions, submission no. 9, p. 12.
[724] Criminal Bar Association, submission no. 6, p. 12.
[725] Ibid.

Recommendation 16

That no change be made to the current Victorian law relating to the offence of accessory after the fact in relation to the disposal of the proceeds of an offence.

Scope of the purpose of the accessory's act—reference to escaping punishment

Currently, as we have seen, the accessory after the fact provision in the Victorian *Crimes Act 1958* applies to any act done with the purpose of impeding the "apprehension, prosecution, conviction or punishment of the principal offender."[726] Is this formula appropriate?

MCCOC reached the conclusion that any conduct which occurs after the arrest of the accused and the commencement of the prosecution (such as conviction and punishment) would be more appropriately dealt with by other offences, such as perverting the course of justice.[727] For instance, an act such as destroying evidence may be done with the intent of impeding the conviction of the accused but this conduct is more appropriately covered by the offence of perverting the course of justice or, depending on whether separate offences are created in Victoria, a separate offence of destroying evidence. On this basis, MCCOC favoured the UK formulation that the accessory after the fact must "do any act with intent to impede his apprehension or prosecution."[728] This formulation omits the words conviction and punishment which are currently in the Victorian Act.

The Gibbs Committee formula was "to escape apprehension, trial or punishment"[729] and in the UK it is doing "any act with intent to impede his apprehension or prosecution."[730]

The phrase in the Queensland Code is "in order to enable the person to escape punishment."[731] This wording is also used in Western Australia[732] and the

[726] Section 325(1).
[727] MCCOC Discussion Paper, above note 5, p. 131.
[728] Ibid.
[729] Review of Commonwealth Criminal Law, *Principles of Criminal Responsibility,* above note 457, s. 7A Draft Bill, para 17.8 – cited in MCCOC Discussion Paper, above note 5, p. 131.
[730] See MCCOC Discussion Paper, above note 5, p. 131.
[731] *Criminal Code Act 1899 (Qld),* s. 10.

Commonwealth.[733] The ACT legislation also uses these words and applies to assistance in order to enable the principal to "dispose of the proceeds of an offence."[734] The Northern Territory Code uses the words "in order to escape prosecution."[735] The South Australian Act refers to impeding the investigation of an offence or assisting the principal offender to escape apprehension or prosecution or to dispose of the proceeds of an offence.[736] The legislation in New South Wales and Tasmania is silent on this issue.

The Discussion Paper requested stakeholders' views as to whether the current formulation in section 325 of the *Crimes Act 1958 (Vic)* is appropriate or whether it should be replaced with the UK formula or, alternatively, some other form of words.

Witnesses' submissions on the formulation of the reference to escaping punishment

Victorian witnesses split between advocating that no reform is desirable (Criminal Bar Association and the Director of Public Prosecutions) and agreeing with MCCOC that reform is desirable (Victoria Legal Aid).

The Criminal Bar Association opposes reform but at the same time advocates that if the offence of attempting to pervert the course of justice remains the same "some rationalisation of section 325 is meaningful."[737] The CBA takes this position because, as its written submission points out, "if the common law offence of Attempt to Pervert is retained or preserved in statutory form, then acts done to impede the "prosecution, conviction or punishment" and in many cases, to impede the "apprehension" of the principal offender would be chargeable as Attempts to Pervert."[738] Presumably the CBA advocates "rationalisation" in order to avoid overlap of this kind.

The Director of Public Prosecutions' submission on this point is succinct, stating that:

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[732] *Criminal Code 1913 (WA),* s. 10(1).
[733] *Crimes Act 1914 (Cth),* s. 6 although as we have seen s. 6 also extends to disposing of the proceeds of an offence.
[734] *Crimes Act 1900 (ACT),* s. 181.
[735] *Criminal Code Act (NT),* s. 13.
[736] *Criminal Law Consolidation Act 1935 (SA),* s. 241(1).
[737] Criminal Bar Association, submission no, 6, p. 12.
[738] Ibid.

> Although on one view reference to "conviction or punishment" in this provision may be superfluous, we see no compelling reason to remove that phrase.[739]

In contrast Victoria Legal Aid agrees with the MCCOC recommendation on this point, stating that:

> VLA is of the view that the current formulation in section 325 ought to be replaced by the UK formulation or similar for the reasons laid out in the Discussion Paper and this formulation is consistent with our view to place in statute the general offence of attempting to pervert.[740]

Committee's conclusion on the formulation of the reference to escaping punishment

The Committee takes a similar approach to the formulation of the reference to escaping punishment as it did to the defence of lawful authority or reasonable excuse—namely that, while the reference to "conviction or punishment" may on one view be superfluous, there is, to use the words of the Director of Public Prosecutions, "no compelling reason to remove that phrase." Accordingly, the Committee makes no recommendation for reform in relation to this issue.

Recommendation 17

That the reference to "conviction or punishment of the principal offender" in relation to the accessory after the fact provision in s. 325(1) of the* Crimes Act 1958 (Vic) *be retained.

Sentencing

Victoria

In Victoria the penalties are covered by section 325(4) of the *Crimes Act* which provides:

[739] Director of Public Prosecutions, submission no. 9, p. 13.
[740] Victoria Legal Aid, submission no. 7, p. 7.

A person convicted of an offence against subsection (1) shall be liable –

(a) If the principal offence is one for which the penalty is level 1 imprisonment (life) to level 3 imprisonment (20 years maximum); or

(b) In any other case, to imprisonment for a term which is neither –

(i) More than 5 years in length; nor

(ii) More than one-half the length of the longest term which may be imposed on first conviction for the principal offence.

This means that the maximum penalty for accessory after the fact to most serious indictable offences including manslaughter is 5 years, while for the offence of accessory after the fact to murder, the maximum sentence is 20 years imprisonment.[741]

MCCOC

MCCOC considered whether provision should be made for a range of penalties according to the seriousness of the offence (as is the case in most jurisdictions) and concluded that it should.[742] Further, MCCOC agreed with the Gibbs Committee that where the offence actually committed is different from the offence that the person believes was committed, the penalty should relate to whichever offence carried the lower maximum penalty.[743]

The MCCOC section provides as follows:

(1) Maximum penalty (subject to subsection (2))

(a) Where the maximum penalty for the offence committed by the principal offender is imprisonment for life – imprisonment for a period not exceeding 10 years; or

(b) Where the maximum penalty for that offence is imprisonment for 14 years or a greater period (not being imprisonment for life) – imprisonment for a period not exceeding 3 years or the maximum penalty for that offence, whichever is the lesser.

[741] See *Crimes Act* 1958 (Vic), ss. 3, 3A and 5.
[742] MCCOC Discussion Paper, above note 5, p. 131.
[743] Ibid.

(c) In any other case – imprisonment for a period not exceeding 3 years or the maximum penalty for that offence, whichever is the lesser.

(2) In a case where the offence that the accessory after the fact believes the principal offender to have committed is not the offence that the principal offender committed, the penalty for an offence against the section is the lesser of:

(a) The penalty applicable under subsection (1); or

(b) The penalty that would be calculated under that subsection if the principal offender had committed the offence that the accessory after the fact believed him or her to have committed.

In the Discussion Paper the Committee asked whether the current penalties provision in section 325(4) of the *Crimes Act 1958 (Vic)* is appropriate and, if not, how it should be amended.

Other jurisdictions

In the Commonwealth, accessories after the fact can be imprisoned for up to two years.[744] In the other jurisdictions the maximum penalty varies according to the nature of the principal offence.[745] For instance in Queensland the maximum penalty is 2 years for most indictable offences including manslaughter[746] and life imprisonment for the offence of accessory after the fact to murder. [747] In New South Wales there is a 5 year maximum penalty for being an accessory after the fact to a serious indictable offence,[748] to 14 years for the crimes of robbery with arms in company and kidnapping[749] to 25 years for accessory after the fact to murder. [750] The Western Australian Code however provides that accessories after the fact to indictable offences are liable as a maximum penalty of half the maximum penalty prescribed for the principal offence[751] but for offences where the principal offender may be sentenced to

[744] *Crimes Act 1914* (Cth), s. 6.
[745] *Crimes Act 1900* (NSW), ss. 348-350; *Criminal Code 1913 (WA*), s. 562(2), 563; *Criminal Code Act (NT),* s. 294; *Criminal Code Act 1924 (Tas),* s. 300, 389; *Criminal Law Consolidation Act 1935 (SA*), ss. 241(3) and (4).
[746] *Criminal Code Act 1899(Qld)* s. 544
[747] *Criminal Code Act 1899(Qld)* s. 307
[748] *Crimes Act* 1900 (NSW) s. 350.
[749] *Crimes Act* 1900 (NSW) s. 349(2).
[750] *Crimes Act* 1900 (NSW), s. 349(1).
[751] *Criminal Code* 1913 (WA), s. 562(2)(b).

life imprisonment, the accessory after the fact can be sentenced for up to 14 years imprisonment. [752]

On the other hand South Australia prescribes a slightly different penalty regime. Where the maximum penalty for the principal offence is life imprisonment, accessories after the fact may be sentenced for up to 10 years imprisonment [753] while where the principal offence attracts up to 10 years imprisonment, the accessory can be sentenced for up to 7 years imprisonment.[754] For principal offences where the maximum sentence is between 7 to 10 years, the accessory may receive up to 4 years imprisonment [755] and for other offences—up to 2 years in prison or the same penalty as the principal offender (whichever is less). [756]

Sentencing principles

As we discussed earlier in the chapter, sentencing judges must have regard to sentencing principles when they sentence offenders. [757] In particular the Court must have regard to factors including the maximum penalty for the offence as well as the offender's culpability and degree of responsibility for the offence. [758]

While the Victorian Higher Court Sentencing Statistics do not record detailed sentencing statistics for the offence of accessory after the fact,[759] a cursory examination of recent cases before the Supreme Court involving the offence of accessory after the fact to murder indicate sentences varying from a 3 year good behaviour bond with no conviction recorded [760] to 7 years imprisonment, with an eligibility for parole after 5 years. [761] Although this small sample of cases is not

[752] *Criminal Code* 1913 (WA), s. 562(2)(a).
[753] *Criminal Law Consolidation Act* 1935 (SA), s. 241(3)(a).
[754] Criminal Law Consolidation Act 1935 (SA), s. 241(3)(b).
[755] Criminal Law Consolidation Act 1935 (SA), s. 241(3)(c).
[756] Criminal Law Consolidation Act 1935 (SA), s. 241(3d).
[757] *Sentencing Act* 1991 (Vic), s. 5.
[758] *Sentencing Act* 1991 (Vic), ss. 5(2)(a) and (e).
[759] Victorian Higher Court Sentencing Statistics, above note 102. The statistics on the whole focus only on the type of offences that occur frequently enough in the Higher Courts. The statistics for this offence record that there has been only one principal proven offence for "accessory after the fact to [a] serious indictable crime. The offence was in 1998/99. See p. 160.
[760] *R v Miller* [2002] VSC 456.
[761] *DPP v Scott & Kitchin* [2000] VSC 247. See also *R v Culleton* [1999] VSC 478 and *R v Kyu Hyuk Kim* [1999] VSCA 65.

indicative of a sentencing range or tariff for this offence, it does however illustrate the type of sentencing options open to the court in the circumstances of each case.

Witnesses' submissions in relation to penalties for accessory

As with the submissions in relation to the reference to escaping punishment, the Criminal Bar Association and the Director of Public Prosecutions opposed reform whereas Victoria Legal Aid agreed with MCCOC that reform is desirable along the lines of the UK formula noted above.

The Criminal Bar Association submitted to the Inquiry that it sees no need to alter the current penalty scales. This is subject to its comments in relation to its view that there should be a lower penalty where the accessory after the fact believed that a less serious principal offence had in fact taken place. [762]

The Director of Public Prosecutions submitted that the current provision is appropriate. However it recommends that "the exception of spousal liability for this offence, as in s. 338, be reviewed."[763]

In contrast, Victoria Legal Aid believes that "the maximum penalty ought to be set at a definitive maximum (as set out in the Commonwealth legislation) and vary according to the nature of the principal offence."[764] Such a change, continues the VLA submission, "would simplify the current law."[765]

Committee's conclusion in relation to maximum penalties for accessory after the fact

The Committee has decided not to alter the current penalty provision in relation to accessory after the fact. Unlike the 25 year maximum penalty for attempting to pervert the course of justice, the Committee received no submissions that the current maximum sentence of 20 years for the offence of accessory after the fact to murder is excessive. Also when compared to other jurisdictions this maximum sentence does

[762] Ibid.
[763] Director of Public Prosecutions, submission no. 9, p. 13.
[764] Victoria Legal Aid, submission no, 7, p. 7.
[765] Ibid.

not represent the high-water mark in sentencing for this offence. For instance in Queensland the maximum sentence is life imprisonment[766] while in New South Wales the maximum is 25 years imprisonment. [767]

The Committee notes that MCCOC's sliding scale of penalties is somewhat different and that, in particular, the maximum possible penalty is only 10 years. However, given that sentencing judges do in fact already take into account the offender's level of responsibility in the sentencing process, as well as the lack of controversy surrounding the provision and the fact that Victorian witnesses appear to be generally supportive of the penalties, the Committee has opted to recommend the retention of the status quo in relation to this issue.

Recommendation 18

That the current penalties in section 325(4) of the Crimes Act 1958 (Vic) for the offence of accessory after the fact be retained.

Related offence: Concealing offences for benefit

Section 326(1) of the *Crimes Act 1958 (Vic)* criminalises accepting a benefit for not disclosing information of a serious indictable offence where a person knows or believes that that offence or some other serious indictable offence has been committed.[768] The section provides as follows:

> Where a person has committed a serious indictable offence, any other person who, knowing or believing that the offence, or some other serious indictable offence, has been committed and that he has information which might be of material assistance in securing the prosecution or conviction of an offender for it, accepts any benefit for not disclosing that information shall be guilty of a summary offence and liable to level 8 imprisonment (1 year maximum).

The Committee sought submissions as to the ongoing utility of this provision.

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[766] *Criminal Code Act* 1899 (QLD), s. 307.
[767] *Crimes Act* 1900 (NSW), s. 349(1)
[768] Butterworths Online lists this as one of the offences in various jurisdictions which also deals with assistance provided after the commission of an offence including compounding an offence, concealing an offence, concealing treason, hindering the investigation of an offence, harbouring an escapee, receiving stolen goods and handling stolen property: para 130-7315.

Witnesses' submissions on concealing offences for benefit

Victoria Legal Aid and the Criminal Bar Association both advocate that this offence should be retained. CBA takes this view on the grounds that the section appears to be coherent and clear (although it acknowledges that "it is used seldom if at all") and that the conduct covered "may fall short of blackmail or of attempting to Pervert."[769] Victoria Legal Aid's support for retention is based on the fact that this conduct is "likely to be outside the ambit of the general offence."[770] The Director of Public Prosecutions gives no direct answer to this question, merely noting that, as a summary offence, this provision rarely arises for consideration by the DPP and there are "no recent examples of its use."[771]

Committee's conclusion on concealing offences for benefit

Again, given that the Committee received no calls for its removal from the *Crimes Act 1958 (Vic)* the Committee has opted to retain the offence of concealing offences for benefit. Aside from the general support for this offence amongst stakeholders, the Committee is persuaded by the argument advanced by the Criminal Bar Association and Victoria Legal Aid that this conduct many not necessarily be covered by other offences such as attempting to pervert the course of justice.

[769] Criminal Bar Association, submission no. 6, p. 12.
[770] Victoria Legal Aid, submission no. 7, p. 7.
[771] Director of Public Prosecutions, submission no. 9, p. 13.

CHAPTER FIVE – PERJURY

Introduction

The classic common law definition of perjury is derived from the following passage in King CJ's judgement in *R v Traino*:[772]

> The crime of perjury consists in giving upon oath, in a judicial proceeding, before a competent tribunal, evidence which was material to some question in the proceeding and was false to the knowledge of the deponent, or was not believed by him to be true: WO Russell, Crime: a Treatise (12th ed, 1964), Vol 1, p. 291. The crime consists in the making of a deliberately false statement in the postulated circumstances.[773]

Victorian statutory law has extended the application of common law perjury but has not replaced it. In contrast to the legislation in some other jurisdictions, which we will discuss below, the *Crimes Act 1958 (Vic)* does not define perjury, leaving this to be ascertained from the common law.

Section 314 of the *Crimes Act 1958 (Vic)* and section 141 of the *Evidence Act 1958 (Vic)* extend the common law of perjury in two important ways. First, pursuant to section 315 of the *Crimes Act 1958* all evidence is deemed to be "material" which is not the case at common law.[774] We will discuss the issue of materiality later in this Chapter. Secondly, the same section extends the application of perjury, which at common law applies to statements made in judicial proceedings,[775] to oaths, affirmations, declarations or affidavits required or authorised by any Act and section 141 of the *Evidence Act 1958 (Vic)* is of similar effect.[776]

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[772] *R v Traino* (1987) 45 SASR 473.
[773] Ibid, p. 475. This definition is cited in Butterworths Concise Australian Legal Dictionary, above note 11, p. 333.
[774] Ibid.
[775] See definition in *R v Traino* (1987) 45 SASR 473.
[776] Freckelton, Criminal Law Investigations and Procedure, above note 28, para 1.9.30. Section 141 of the *Evidence Act 1958 (Vic)* provides: "any person who upon or in any oath examination affidavit

In the course of this Inquiry Victorian witnesses highlighted the confusing "hybrid" state of the law in Victoria and the convoluted drafting of the current statutory provisions. Benjamin Lindner was particularly scathing of the current state of the law of perjury, submitting that:

> The law as stated in s. 314(3) is in tortuous, inelegant and unnecessarily complicated language. It calls out for a draftsman to recast it in terms of simple English. That section operates by deeming certain conduct as wilful and corrupt perjury. The adjectival description adds nothing to the crime of 'perjury.' Which like all crimes, consists of a criminal intent (i.e. knowledge of the falsity of a statement) and some associated conduct (i.e. a falsely sworn/affirmed statement), whether in court or out of court.
>
> As the statute in Victoria adds to the common law, the offence has a hybrid quality which is unsatisfactory. The codification of the offence (both curial and non-curial) might be simply stated thus:
>
> 314(1) A person who intentionally commits perjury shall be guilty of an indictable offence.
>
> Penalty: Level 4 imprisonment (15 years maximum).
>
> For the avoidance of doubt, s. 315 of the Crimes Act may be added as sub-section (2) of the offence stating that:
>
> 314(2) All evidence and proof, whether oral or in writing, shall be deemed to be material with respect to any person who is proceeded against for perjury.[777]

At the public hearings, Lindner read out section 314(3) in full, which provides that:

> Where by or under any Act it is required or authorized that facts matters or things be verified or otherwise assured or ascertained by or upon the oath affirmation declaration or affidavit of some or any person, any person who in any such case takes or makes any oath affirmation or declaration so required or authorized and who knowingly wilfully and corruptly upon such oath affirmation or declaration deposes swears to or makes any false statement as to any such fact matter or thing, and any person who knowingly wilfully and corruptly upon oath deposes to the truth of any statement for so verifying assuring or ascertaining any such fact matter or thing or purporting so to do, or who knowingly wilfully and corruptly takes makes signs or subscribes any such affirmation declaration or affidavit as to any such fact matter or thing, such statement affirmation declaration or affidavit being untrue wholly or in part, or who knowingly wilfully and corruptly omits from any such affirmation declaration or affidavit made or sworn under the provisions of any law any matter

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affirmation or declaration whatsoever which is required authorized or permitted in or by or under any provision of this Act wilfully and corruptly makes any false statement whether oral or in writing shall be deemed to be guilty of wilful and corrupt perjury. This section shall apply notwithstanding that such oath examination affidavit affirmation or declaration may be required authorized or permitted by or under any other Act whether passed before or after the commencement of this Act."

[777] Benjamin Lindner, submission no. 8, p. 7.

> which by the provisions of such law is required to be stated in such affirmation declaration or affidavit, shall be deemed guilty of wilful and corrupt perjury. Nothing herein contained shall affect any case amounting to perjury at the common law or the case of any offence in respect of which other provision is made by any Act.

He then commented critically on the drafting of this provision:

> But that is ancient drafting. It is confusing. Tortuous I think was an understatement. I could not think of another word for it, and it is incredibly difficult to understand for lawyers. I have just notched up 20 years at the Bar this year and I have to read that ten times to make any sense of it and I get out my yellow highlighter and sort of try to work out what the heck it means and it is just impossible. I think it means that you are not allowed to sign an untrue affirmation. That is what it means.[778]

The Director of Public Prosecutions, Paul Coghlan QC agreed that, in relation to the law of perjury:

> […] [T]he combination of s. 107, s. 141 and s. 314 is not a very happy one.[779]

Mr Coghlan also referred to Schedule 5 to the *Magistrates' Court Act* 1989 (Vic) which sets out all the rules of procedure for committal proceedings which, he complained, "gets more complicated […] every time you look at it."[780]

The first recommendation of this Report, which supports the codification of administration of justice offences, applies also to our consideration of perjury. From the starting point of this basic proposition the Committee has considered the elements of the offence of perjury in more detail.

Elements of the offence

As we have seen in our discussion of other offences, in order to convict a person of a criminal offence, the prosecution needs to prove the required elements of the crime. In this Chapter, we discuss the elements of the crime of perjury as it applies in Victoria. At the end of the discussion of each element of the crime we refer to the relevant MCCOC recommendation and then examine the law in other jurisdictions before presenting options for reform and questions for consideration by stakeholders.

[778] Benjamin Lindner, *Minutes of Evidence*, 24 November 2003, p. 60.
[779] Paul Coghlan QC, *Minutes of Evidence*, 24 November 2003, p. 34.
[780] Ibid.

A summary of the principal elements of the crime of perjury in Victoria is outlined below. We note that some of these are more accurately described as rules of evidence rather than as substantive elements of the crime.[781]

- **requirement of a lawful oath** - the statement must have been given under a lawfully administered oath or affirmation and, as a corollary of this, the witness must be "competent" to testify;
- **proceedings to which perjury applies -** the statement must have been made in a judicial proceeding before a competent tribunal or in an oath, affirmation, declaration or affidavit required by any Act;
- **fault element** - the statement made must be false to the knowledge of the deponent or not believed by him or her to be true;
- **rule against duplicitous counts –** there can be only one count of perjury for each false statement; and
- **corroboration requirement -** there must be independent evidence proving perjury or the falsity of the statement must be proved by at least two witnesses;

Other issues relevant to the law in Victoria which we will consider are:

- **the rule against double jeopardy** - the rule that the accused cannot be convicted of the same crime in respect of the same conduct;[782] and
- **sentencing –** including maximum sentences, principles and statistics

Other issues which are part of the law in other jurisdictions which we will consider for adoption in Victoria are:

- **materiality** – whether the evidence should be material to the proceedings;
- **constitution and jurisdiction of court -** whether there should be a specific requirement that the court must have been properly constituted and had

[781] Substantive law refers to "the law which creates, defines and regulates people's rights, duties, powers and liabilities; the actual rules and principles administered by the courts, including legislative and common law principles. Substantive law is to be contrasted with adjective or 'procedural' law, concerned with the method of enforcing rights and duties, in particular the rules of procedure and evidence:" *Butterworths Concise Australian Legal Dictionary*, above note 11, p. 416.

[782] This is rule is not unique to the law of perjury but rather is a general principle of criminal law. However, the issue of double jeopardy in relation to perjury proceedings was recently considered in the High Court case of *R v Carroll* (2002) 194 ALR 1 HCA 55 and we have included a short section on this rule.

jurisdiction or alternatively a specific provision that these factors are immaterial; and

- **interpreters -** whether perjury should specifically apply to persons lawfully sworn as interpreters.

Requirement of a lawful oath

What is an oath or affirmation?

The first element of the crime of perjury is that the accused person must have given the false evidence while under a lawfully administered oath or affirmation.[783]

Witnesses and others involved in court proceedings must usually make an oath or an affirmation before giving evidence[784] and in order to be charged with perjury, they must be competent to make an oath or affirmation. We will address the question of competence in the next section.

An oath is essentially a solemn promise to tell the truth which invokes the name of a deity. In Victoria the *Evidence Act 1958* states that the primary or standard way of making an oath is by taking the Bible in an uplifted hand while repeating the words of the oath, starting with "I swear by Almighty God."[785] In practice, it seems Courts have settled on the following as the standard form of oath (with minor variations) for witnesses in court cases:

[783] The common law applies to statements made in judicial proceedings (see Freckelton, Indictable Offences in Victoria, above note 103, para 93.170). Section 314 of the Crimes Act 1958, which extends the application of perjury to oaths, affirmations, declarations or affidavits required or authorised under any Act arguably does not displace the requirement of a lawful oath. This is because, pursuant to section 102 of the *Evidence Act 1958 (Vic)*, affirmations are of the same force and effect as oaths, affidavits must be sworn on oath or affirmation and statutory declarations are deemed to have the same effect as oaths: Freckelton, *Criminal Law Investigations and Procedure*, above note 28, para 1.9.60 and *Evidence Act 1958 (Vic*), ss. 105, 107.

[784] JD Heydon, *Cross on Evidence*, 6th Australian edition, 2000 cites various cases in support of the proposition that "testimony not given on a validly administered oath or affirmation or other sanction recognised by law is inadmissible unless it falls within a specific exception permitting unsworn evidence:" para 13275.

[785] *Evidence Act 1958 (Vic)* section 100(1).

> I swear by Almighty God that the evidence I shall give to the Court in this case shall be the truth, the whole truth and nothing but the truth.[786]

Other forms of oath can be accommodated if the witness objects to making an oath in that form.[787] For example, Victorian Courts have allowed Muslim witnesses to take oaths on the holy book, the Qu'ran.[788]

An affirmation is also a solemn promise to tell the truth but does not have any religious component. Instead of invoking the name of God, witnesses must "solemnly, sincerely and truly declare and affirm" that the evidence they shall give shall be the truth.[789]

What is the importance of the form of the oath?

There are two main questions here. First, does the oath have to be administered strictly in accordance with the relevant legislation? Secondly, even if the form of oath administered is in accordance with the statutory requirements, is it rendered invalid if the witness took a form of oath which was not strictly in accordance with his or her religion?

In Victoria, it would seem that the form of the oath is immaterial if it is binding on the witness's conscience. Also, the validity of an oath is not affected by the absence of religious belief. We will now discuss these issues in more detail.

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[786] For example, this form of oath appears in the Manuals of the Magistrates' Courts of Victoria. See further Victorian Parliament Law Reform Committee (VPLRC), *Inquiry into Oaths and Affirmations with Reference to the Multicultural Community*, October 2002.

[787] See ibid, p. 37 and Chapter 7 – Range of Texts and Forms of Oath. The source of law for allowing other forms of the oath is section 100(5) of the Evidence Act 1958 which provides: "Any oath may now be administered in any manner which is now lawful."

[788] The oath on the Qur'an is by far the most common "alternative" form of oath accommodated. However, there are historical examples of different oaths administered – see VPLRC, *Oaths and Affirmations*, above note 499, pp. 112-118. Unusual oaths are still sometimes administered today; Supreme Court witnesses gave evidence to the Inquiry that a wicca witch had been allowed to swear an oath on his sacred borstal and another witness was administered an oath on an ankh (a religious cross with two loops above the crossbeam): pp. 119-120.

[789] Section 103. Section 102 sets out where an affirmation may be made instead of an oath – namely, where a person objects to being sworn or "it is not in the circumstances reasonably practicable without inconvenience or delay to administer an oath to a person in a manner appropriate to the religious belief of the person." In its *Inquiry into Oaths and Affirmations with Reference to the Multicultural Community*, above note 499, the Committee concluded that a legislative regime which treats the oath (whether on the Bible or in any other form appropriate to the range of religious practices) and the affirmations as equal options would be more appropriate than the current legislation which accords priority to the oath on the Bible.

On the issue of whether the oath has to be administered correctly, there appears to be some divergence in the case law. The leading case of *R v Sossi*[790] is authority for the proposition that the form of oath is immaterial providing it is binding on the witness's conscience. Thus it was held that, although the usual form of words was not used in the oath, they still amounted to an oath because "the party to whom those words were addressed should have appreciated that he was being asked to make an oath that the contents of the affidavit were true to the best of his knowledge and belief."[791] On the other hand in *Damon v R,*[792] a decision relating to the Tasmanian Criminal Code, it was held that the failure to say all the words of the affirmation meant that the defendant was not lawfully sworn for the purposes of the perjury provisions of the Code.[793] On balance, and in light of the cases discussed below, it is submitted that the position in *R v Sossi* applies in Victoria.[794]

The second question has occasionally arisen in the context of members from religious minorities making an oath which was alleged to be otherwise than in accordance with their religion. The case of *R v Kemble*[795] provides a good example.

R v Kemble

A Muslim witness took an oath on the Holy Bible. The question was later raised as to whether he had been lawfully sworn, the submission being that he should have been sworn in accordance with his own religion.[796]

The Court in that case held that the question as to whether the administration of an

[790] *R v Sossi* 17 A Crim R 405.
[791] Ibid, pp. 408-409.
[792] *Damon v R* [1985] Tas.R. 25.
[793] In that case the relevant Act provided that the form of affirmation should be "I, A.B. do solemnly, sincerely, and truly declare and affirm." However, the clerk of the court had posed it as a question instead and left out the words "and truly declare." It was held that the Act required the person to actually say the whole affirmation including the words, "and truly declare." See Freckelton, *Criminal Law Investigations and Procedure*, above note 28, para 1.9.70.
[794] In addition, other cases have indicated that "formal errors in a declaration do not prevent the commission of perjury:" see for instance *R v Shing Duck* (1902) 7 ALR (CN) 96 (Vic Sup Ct FC), cited in Freckelton, *Criminal Law Investigations and Procedure*, above note 28, para 1.9.70.
[795] *R v Kemble* [C.A] [1990] 1 W.L.R 1111.
[796] This case involved an application for leave to appeal against conviction rather than perjury proceedings but the point of law is still relevant to the law of perjury.

oath is lawful "does not depend upon what may be the considerable intricacies of the particular religion which is adhered to by the witness."[797] Rather, the relevant matters to be considered are: does the oath appear to be binding on the conscience of the witness and if so, is it an oath which the witness himself or herself considers to be binding on his conscience.[798]

The Court accepted the evidence of the witness who said (this time having taken the oath on an Arabic copy of the Qu'ran): "Whether I had taken the oath upon the Qu'ran or upon the Bible or upon the Torah, I would have considered that to be binding on my conscience."[799]

This case illustrates the general common law rule that the form of oath is immaterial provided it is binding on the witness's conscience.[800]

A South Australian decision suggests that the Court should assume that if an oath is tendered without objection then the witness has the necessary religious belief or is bound in conscience by the oath. As the Court put it:

> The Court is obliged to enquire into the matter only if the witness raises a question or objection, or if a doubt about the propriety of administering the oath is raised by counsel at the time. It would be highly inconvenient if the court had to enquire into the beliefs of every witness. And these days, it would be inappropriate to submit witnesses routinely to an enquiry about their religious beliefs before permitting them to give evidence on oath.[801]

Validity of the oath is not affected by absence of religious belief or a form not binding on conscience

Related to the case law discussed above is the statutory provision that the validity of the oath is not affected by the absence of religious belief.

[797] Ibid, p. 1114.
[798] Ibid.
[799] Ibid.
[800] Freckelton, *Criminal Law Investigations and Procedure*, above note 28, para 1.9.70.
[801] *R v T (1998)* 71 SASR 265.

Section 104 of the *Evidence Act 1958 (Vic)* provides:

> When an oath has been duly administered and taken, the fact that the person to whom the same was administered had at the time of taking such oath no religious belief shall not for any purpose affect the validity of such oath.

A case on a similar section in the South Australian legislation has held that the effect of this provision is that "a witness who has given evidence on oath is liable to prosecution for perjury or any other relevant offence, notwithstanding that it later emerges that the witness had no religious belief, or took the oath in a form not binding on his conscience."[802] This means that witnesses who have given false evidence after taking an oath on the Bible cannot escape liability for perjury by later claiming that they had no religious belief or that it was not in fact binding on their conscience.

Administration of the oath is an act of the court

The administration of the oath is considered to be an act of the court.[803] It has been held that a broad interpretation should be given to the authority of courts to administer oaths, meaning that the oath can be administered by a judge or clerk or "any other suitable person directed to do so by the court."[804] Section 100(6) of the *Evidence Act 1958* (Vic) supports this. That section provides that an officer "includes any and every person duly authorised to administer oaths and any and every person administering oaths under the direction of any court or person acting judicially."

Persons authorised to witness affidavits and statutory declarations

Persons who administer an oath for the purposes of an affidavit or a statutory declaration must be competent to do so.[805] The classes of persons authorised to witness affidavits and statutory declarations are set out in the *Evidence Act 1958* (Vic).

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[802] Ibid, relating to section s. 6(2) of the Evidence Act 1929 (SA).
[803] Freckelton, *Criminal Law Investigations and Procedure*, above note 28, para 1.9.70 and *R v Shuttleworth* [1909] VLR 431, p. 434; MCCOC Report, above note 6, p. 21.
[804] *R v Shuttleworth* [1909] VLR 431, p. 435.
[805] Freckelton, *Criminal Law Investigations and Procedure*, above note 28, para 1.9.70. *Evidence Act 1958 (Vic),* s. 107A and s. 123C. For further information on this issue see VPLRC*, Oaths and Affirmations*, above note 499.

MCCOC recommendation

The main question posed in the MCCOC Discussion Paper in relation to this element of perjury is whether there should be a requirement that evidence be given under a lawfully administered oath. MCCOC recommended that, for the purposes of perjury, the requirement that evidence be given on oath or affirmation should be retained. It noted that the problem with the provisions in Queensland, Western Australia and the Northern Territory was that "they do not on their face require the person giving the false testimony to have received any form of warning that the giving of false evidence would have serious consequences."[806] In this conclusion MCCOC appears to agree with the UK Law Commission that the oath functions as a solemn warning to witnesses and other participants in court proceedings.[807] The Gibbs Committee went even further, recommending that the person should be "distinctly warned that he or she would be liable to criminal penalties for giving false evidence."[808]

Legislation in other jurisdictions

The Codes in Queensland, Western Australia and the Northern Territory all provide in relation to perjury charges that it is "immaterial whether the testimony is given on oath or under other sanction authorised by law"[809] and the Commonwealth legislation is of similar effect.[810] In contrast, Tasmania, South Australia and New South Wales all require (with certain limited exceptions)[811] that evidence be given on oath, as does the ACT by operation of the common law.[812]

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[806] Ibid, p. 21.
[807] UK Law Commission, above note 38, para 2.26.
[808] Gibbs Committee Report, above note 85, para 6.11.
[809] *Criminal Code Act* 1899 (Qld), s.123(2); *Criminal Code Act* (NT), s. 96(2) and *Criminal Code* 1913 (WA), s. 124; MCCOC Report, above note 6, p. 21.
[810] *Crimes Act* 1914 (Cth), s. 35(2).
[811] The MCCOC Report, above note 6, notes some of these – for instance, in all jurisdictions, children can give unsworn evidence: pp. 21-23. While MCCOC notes that interstate tribunals "vary considerably" in the statutory requirements as to how evidence can be received, in Victoria the Victorian Civil and Administrative Tribunal (VCAT) requires evidence to be given on oath or affirmation: see VPLRC, *Oaths and Affirmations*, above note 499, pp. 98-99, summarising the evidence of VCAT President, Justice Kellam and VCAT member Margaret Lothian.
[812] *Criminal Code Act* 1924 (Tas), s. 94; *Criminal Law Consolidation Act* 1935 (SA), s. 242(1) and *Crimes Act* 1914 (NSW), s. 327. For example, section 94(1) of the Tasmanian Code provides that "any person lawfully sworn as a witness, or as an interpreter, in a judicial proceeding, who wilfully makes a statement which he knows to be false or does not believe to be true, is guilty of a crime. Charge: Perjury." This is supported by subsection (2) of section 94 which deems statements made in judicial proceedings to be those "made on oath for the purposes of any such proceeding."

The UK *Perjury Act 1911* also retains the requirement that a person charged with perjury must have made a lawful oath.[813] The following passage from the UK Law Commission Report sums up the argument commonly advanced in favour of retaining the oath:

> In the circumstances of today the practical importance of both the affirmation and the oath derives principally from the fact that they serve as a means of warning a witness that his undertaking to tell the truth carries with it a liability to criminal penalties if he does not. In our view, a warning to this effect is indeed an essential precondition for criminal liability for giving false evidence […][814]

The New Zealand *Crimes Act 1961* also preserves the requirement of a lawful oath as does the *Criminal Code Canada*.[815]

In the Discussion Paper the Committee invited submissions on this issue and on any other issue related to the requirement that evidence must be given on a lawful oath or affirmation. In particular, the Committee asked whether, for the purposes of perjury, the common law requirement that the evidence must be given on a lawfully administered oath or affirmation should be retained and whether there should be an additional requirement of an express warning that the giving of false testimony could lead to a criminal penalty.

Witnesses' submissions in relation to the oath or affirmation requirement

Victorian witnesses were unanimous in their support for the requirement that evidence must be given on oath or affirmation and most stakeholders also supported the introduction of an additional requirement that witnesses be given an express warning. Victoria Legal Aid supported the sworn evidence requirement on the basis that "the oath serves as a warning to persons giving evidence of their legal obligation to give a truthful testimony"[816] and submitted that:

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[813] MCCOC Report, above note 6, p. 21; *Perjury Act* 1911 (UK), s. 1(1).
[814] UK Law Commission, above note 38, para 2.26.
[815] The MCOCC Discussion Paper, above note 5, at p. 19 also contains comments on the Draft Canadian Code, which would relate perjury to false solemn statements made in public proceedings and the Draft NZ Crimes Bill, which it describes as very broad and would "depart from existing New Zealand law:" "Perjury is an assertion as to a matter of fact, opinion, belief, or knowledge made by a witness in a judicial proceeding as part of the witness's evidence, whether the evidence is given in open Court or by affidavit or otherwise, and whether on oath or not, that assertion being known to the witness to be false and being intended by the witness to mislead the tribunal holding the proceeding."
[816] Victoria Legal Aid, submission no. 7, p. 7.

> The express warning will enable those witnesses who don't fully appreciate the extent of their legal obligation to tell the truth to be cautioned about the legal ramifications of giving a false testimony.[817]

The Criminal Bar Association submitted that the common law requirement that evidence needed to be given on an oath or affirmation for the purposes of perjury, should be retained because it serves as a warning. They also supported the option of requiring an express warning about perjury to be given, referring to the significant number of non-believers for whom an oath in itself may not be sufficient:

> The warning of a potential criminal sanction in this jurisdiction is now crucial, given the current absence of unanimous recognition of inevitable justice in the next.[818]

Other submissions to this Inquiry also expressly supported the retention of the oath and the introduction of an express warning requirement. For instance, the submission of a group of constituents from the East Yarra Province electorate made a number of submissions in relation to oaths and firmly supported the retention of the oath and the introduction of a warning of the consequences which would follow any false statement.[819] The submission also advocated that:

> The scope of the offence of perjury ought to depend on whether a warning is to be given to all deponents who swear or affirm an oath. [The constituents] are inclined to think that the justification for limiting perjury to sworn statements given in the course of legal proceedings carries less force if a clear and effective warning of the serious consequences of a false statement is to be issued in all cases.[820]

In contrast to most other witnesses, the Director of Public Prosecutions submitted that:

> With respect to verbal evidence given in Court, the administration of the oath should suffice to warn the witness of the potential of criminal penalty.[821]

Some interstate witnesses also expressed misgivings about the introduction of an "express warning" requirement. For instance, Brian Sandland representing Legal Aid New South Wales was uneasy about an express warning, arguing that it could serve to further destabilise already nervous witnesses:

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[817] Ibid.
[818] Criminal Bar Association, submission no. 6, p. 13.
[819] East Yarra Province Electorate, submission no. 5, p. 4. Another respondent to this Inquiry who specifically supported retaining the oath and giving a warning was Brendon Falzon, submission no. 4, p. 2.
[820] Ibid.
[821] Director of Public Prosecutions, submission no. 9, p. 13. The submission continued: "We note that in relation to perjury which may arise out of written witness statements, the required form of jurat includes an express warning as to liability for the penalties of perjury."

> There are people who are very anxious to get across their version of what they believe to be the truth […] and who would be absolutely terrified by the thought that "Not only am I in trouble for getting up here and telling my story, but if I am not believed I might be charged yet again.[822]

Barristers representing the Criminal Bar Association of Queensland also highlighted potential problems with the introduction of express warnings, including:

- the fact that a warning from the judge might have some adverse effect on the jury's perception of the person's evidence;[823] and
- that it would slow down trials.[824]

Committee's conclusions in relation to the oath or affirmation requirement

Given the overwhelming support expressed for the requirement that evidence be given on oath or affirmation and in line with the MCCOC recommendation the Committee considers that this requirement should be retained in Victoria.

In relation to the question of whether the need to give truthful evidence should be reinforced by the introduction of an express warning to witnesses as to the legal ramifications of giving false testimony, the Committee is not convinced by the arguments presented in favour of the introduction of such a warning. No such recommendation was made by MCCOC, and although the majority of witnesses supported the introduction of such a measure, on balance the Committee feels that there was insufficient evidence presented to suggest that a change to the current situation is necessary. The Committee notes that a judge currently has the power to warn a witness of the consequences of giving false evidence should the judge consider it necessary to do so.

[822] Brian Sandland, *Minutes of Evidence*, 11 November 2003, p. 19.
[823] Tony Glynn SC, *Minutes of Evidence*, 13 November 2003, p. 91.
[824] Tony Glynn SC and Ralph Devlin, *Minutes of Evidence*, 13 November 2003, p. 91.

Should all incompetent witnesses be liable to perjury?

In Victoria and at common law, incompetent witnesses are not liable to perjury[825] whereas in the Commonwealth and the Code jurisdictions, legislation has been enacted which changes the common law position. These jurisdictions specifically make the competence of a witness immaterial to perjury. [826]

MCCOC reviewed the effect of this kind of legislation and recommended that certain incompetent witnesses—young children and persons with intellectual disabilities should not be liable to perjury.[827]

Who is an incompetent witness?

There are several kinds of incompetent witnesses. In general, a witness is considered incompetent by the court if he or she is incapable of understanding the obligation to give truthful evidence (the essence of the oath or affirmation). Also, previously a person was generally considered incompetent to give evidence for or against his or her spouse. However in all Australian jurisdictions such persons are now considered to be competent.

In its Discussion Paper, MCCOC examined whether these two groups of incompetent witnesses should be liable for perjury. We will now look at these two groups separately.

Should young child witnesses and witnesses with intellectual disabilities be liable for perjury?

In Victoria, the *Evidence Act* 1958 permits these witnesses to give unsworn evidence in certain circumstances. [828] The Act provides that where the court believes that the proposed witness (either a child under the age of 14 or a person with impaired mental

[825] MCCOC Discussion Paper, above note 5, p. 41, citing *R v Clegg* (1868) 19 LT 47; *R v Kilpenny* (1890) 16 VLR 139. In these cases the witnesses were not competent but had been sworn by mistake. It was held that they were not liable for perjury.
[826] Ibid.
[827] Ibid.
[828] *Evidence Act 1958 (Vic),* s. 23(1).

functioning) understands the duty of speaking the truth and is capable of responding rationally to questions about the facts in issue, he or she may give unsworn evidence.[829] In Victoria, therefore these witnesses can never be charged with perjury because in Victoria, the offence of perjury only applies to sworn evidence.

The MCOCC view mirrors the Victorian position in relation to incompetence due to age or mental impairment. MCCOC considered that incompetence because of lack of capacity to give sworn evidence by reason of age or mental impairment should debar prosecution for perjury.[830]

In contrast, the Code jurisdictions and the Commonwealth have enacted legislation which provides that the competence of the witness is immaterial to perjury.[831] This means that it is technically possible for an incompetent witness such as a young child or a person with an intellectual disability to be charged with perjury.

Witnesses' submissions

Victoria Legal Aid, Benjamin Lindner and the Director of Public Prosecutions supported the MCCOC recommendation.[832] Victoria Legal Aid made the following observations in support of its position:

> Incompetence due to age or mental impairment should exclude prosecution for perjury. It is desirable that these classes of witnesses are excluded from prosecution due to their lack of understanding and appreciation of the legal obligation to give a truthful testimony.

[829] Ibid.
[830] MCCOC Discussion Paper, above note 5, p. 41.
[831] For example, section 123(6) of the *Criminal Code Act* 1899 (Qld) provides: "it is immaterial whether the person who gives the testimony is a competent witness or not […]." The identical phrase is used in the *Criminal Code* 1913 (WA), s. 124; *Criminal Code Act* (NT), s. 96(6) and a largely identical phrase is used in the *Criminal Code Act* 1924 (Tas), s. 94(6) and the *Crimes Act* 1914 (Cth), s. 35(2). The common law rule applies in the remaining jurisdictions: MCCOC Discussion Paper, above note 5, p. 41. The Gibbs Committee recommended that the proposed consolidating law "continue to provide that it is immaterial whether the person who gave the testimony was a competent witness or not:" Gibbs Committee Report, above note 85, para 6.19.
[832] Director of Public Prosecutions, submission no. 9, p. 14; Victoria Legal Aid, submission no. 7, p. 8; Benjamin Lindner, submission no. 8, p 8.

Committee's conclusions

The Committee agrees with the reasoning behind the MCCOC recommendation that incompetent witnesses, namely children and persons with intellectual disabilities, who give unsworn evidence, should not be liable for prosecution for perjury, and supports the recommendation. The Committee notes that the MCCOC recommendation already reflects the current law in Victoria and is supported by the majority of stakeholders who addressed this issue.

Recommendation 19

That the current law in Victoria which provides that witnesses who give unsworn evidence due to impaired mental functioning or youth are not liable to perjury, be retained.

Should persons giving evidence for or against his or her spouse be liable for prosecution?

MCCOC recommended that "incompetence of a witness on grounds other than age or mental impairment should not be material on a charge of perjury" so that persons such as the spouse of a defendant would be able to be charged with perjury.[833]

However since it is the case that in all Australian jurisdictions including Victoria that spouses of parties to litigation are competent witnesses [834] (and therefore liable to prosecution for perjury), the Committee did not need to consider this issue.

[833] MCCOC Discussion Paper, above note 5, p. 43.

[834] J D Heydon et al, Evidence in Halsbury's Laws of Australia, [195-7155]: Citing the following legislation: VIC: *Evidence Act* 1958 s 24 and *Crimes Act* 1958 s 400; CTH: *Evidence Act* 1995 s 12(a); NSW: *Evidence Act* 1995 s 12(a); QLD: *Evidence Act* 1977 s 8(2); SA: *Evidence Act* 1929 s 21 (a close relative is defined as a spouse, parent or child: ibid s 21(7)); TAS: *Evidence Act* 2001 s 12(a); WA: *Evidence Act* 1906 s 9; NT: *Evidence Act* 1939 s 7(6).

Proceedings to which perjury applies

Under the common law the false statement must be given in judicial proceedings in the ordinary sense of the term before a competent tribunal.[835] However, in Victoria perjury has a wider application. The common law position has been extended so that perjury applies to the making of a false oath, affirmation, declaration or affidavit required or authorised under any statute.[836]

MCCOC recommended that proceedings in which perjury may be committed should be limited to judicial proceedings, but defined judicial proceedings to mean 'proceedings in which evidence may be taken on oath'.[837]

In New South Wales perjury is limited to proceedings before a judicial tribunal. Judicial proceeding means a proceeding in or before a judicial tribunal in which evidence may be taken on oath. Judicial tribunal means:

> a person (including a coroner and an arbitrator), court or body authorised by law, or by consent of parties, to conduct a hearing for the purpose of the determination of any matter or thing and includes a person, court or body authorised to conduct a committal proceeding.[838]

Other Australian jurisdictions vary in their definitions of "judicial proceedings" or similar term. The Queensland Code defines "judicial proceeding" as including "any proceeding had or taken in or before any court, tribunal or person, in which evidence may be taken on oath."[839] The other Codes contain identical or similar definitions.[840]

Similar to the Code States the UK *Perjury Act 1911* provides that the expression judicial proceeding "includes a proceeding before any court, tribunal, or person having by law power to hear, receive, and examine evidence on oath."[841]

In contrast, the definition in the Commonwealth Act is more extensive.[842] In that jurisdiction "judicial proceeding" is defined as:

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[835] *R v Aylett* [1785] 1 D & E 63 per Lord Mansfield. MCCOC Discussion Paper, above note 5, p. 15; *R v Traino* (1987) 45 SASR, 473, p. 475.
[836] *Crimes Act* 1958, section 314(3).
[837] MCCOC Discussion Paper, above note 5, p. 17.
[838] *Crimes Act* 1900 (NSW), s. 311(1).
[839] *Criminal Code Act* 1899 (Qld), s. 119.
[840] *Criminal Code Act* 1924 (Tas), s. 89; *Criminal Code* 1913 (WA), s. 120: *Criminal Code Act* (NT), s. 1.
[841] *Perjury Act* 1911 (UK), s. 1(2). The UK Law Commission did not recommend any change to this definition: above note 38. See also MCCOC Discussion Paper, above note 5, p. 13.

> A proceeding in or before a federal court exercising federal jurisdiction or court of a Territory and includes a proceeding before a body or person acting under a law of the Commonwealth or a Territory in which evidence may be taken on oath.[843]

In New Zealand the definition is similarly expansive.[844]

The South Australian legislation defines judicial proceedings as "proceedings of any judicial body"[845] which is in turn defined as "a court or any tribunal, body or person invested by law with judicial or quasi-judicial powers, or with authority to make any inquiry or to receive evidence.[846]

MCCOC Conclusion

MCCOC weighed up the arguments for and against the more limited New South Wales definition on the one hand and the wider Code and Commonwealth definitions on the other. In favour of the New South Wales position it could be argued that, by limiting perjury to proceedings before a judicial tribunal ("a body authorised to conduct a hearing for the purpose of the determination of any matter or thing"), the definition is closer to the common law concept of perjury.[847] The Codes and the Commonwealth jurisdictions could be said to "unduly extend the application of perjury."[848]

On the other hand, by omitting the requirement that the evidence be taken before a judicial tribunal, the Australian Codes and the Commonwealth have, according to MCCOC, "the merit of simplicity:"[849] "It can be argued that the requirement that the evidence [is] to be taken on oath or affirmation is sufficient."[850] MCCOC ultimately favoured this approach and recommended that "legal proceedings" for the purposes of perjury should be defined to mean "proceedings in which evidence may be taken on

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[842] Ibid, p. 13.
[843] *Crimes Act* 1914 (Cth), s. 31.
[844] Section 108(4) of the *Crimes Act* 1961 (NZ) provides for a lengthy list of judicial proceedings including courts, the House of Representatives or Committees, "any arbitrator or umpire or any person or body of persons authorised by law to make an inquiry and take evidence therein upon oath," legal tribunals "by which any legal right or liability can be established," etc.
[845] *Criminal Law Consolidation Act* 1935 (SA), s. 237.
[846] Ibid.
[847] MCCOC Discussion Paper, above note 5, p. 15.
[848] Ibid.
[849] Ibid.
[850] Ibid.

oath."[851] In the Final Report, following discussion of the use of the term "legal proceedings" (which is a term used throughout the Model Criminal Code) MCCOC recommended that an alternative term "proceedings in which judicial powers are exercised" be inserted into the definition.[852]

Witnesses' submissions in relation to the proceedings to which perjury should apply

In Victoria the first question is whether the proceedings to which perjury applies need to be defined in the *Crimes Act 1958* (Vic) or whether the current position (common law as extended by section 314) should be retained. If a definition is desirable, what form should it take? Is it desirable that perjury apply to any proceedings in which evidence may be taken on oath? Specifically the Discussion Paper asked:

(a) Should the proceedings to which perjury applies be defined in the *Crimes Act 1958 (Vic)*? If a definition of proceedings is desirable what form should it take? Should perjury apply to any proceedings in which evidence may be taken on oath?

or

(b) Should the current position (the common law as extended to apply to the making of a false oath, affirmation, declaration or affidavit under any statute) be retained?

Submissions on this issue did not necessarily directly address the Discussion Paper questions or reach a concluded view. In particular, some of the comments made by witnesses in relation to this issue are arguably more relevant to the next issue in this Report, namely the application of perjury to documents. For instance, the Criminal Bar Association submitted that the answer to the question as to whether perjury should apply in non-curial contexts "depends upon the view one takes of the appropriate ambit of the offence:"

[851] Ibid.
[852] MCCOC Report, above note 6, pp 19 and 61.

> Parliament created a new offence in section 314(3), albeit that the new offence is deemed to be perjury. There is no objection to criminalising such behaviour.[853]

The CBA noted its concern that the problem with perjury extending to documents as well as court proceedings is that "accused persons are frequently surprised to find that conduct forbidden by section 314(3) is perjury. Subsection (3) has no profile in the community."[854] However, it concludes that this is "not of itself a basis for reform."[855]

Without revealing its own views on the matter, the CBA submitted to the Inquiry:

> If there were to be reform to section 314, one option is to create a separate offence of non-curial perjury, with a lighter maximum penalty.[856]

Benjamin Lindner implicitly supports the extension of perjury to non-curial contexts, noting that his proposed provision for perjury may need to be accompanied by an explanatory note in the definitions section that " 'perjury' may be committed in both curial and non-curial contexts."[857]

The Director of Public Prosecutions is more forthright in its support for option (a) noted above and for the continued application of perjury to non-curial contexts:

> With respect to perjury which may occur during the giving of oral evidence, it is our view that the offence should apply to any legal proceedings in which evidence is given on oath. With respect to perjury which may occur by false swearing other than during oral evidence (which in some jurisdictions in regarded as a separate offence from perjury), we support the continued application of the offence to knowingly false evidence in a statutory declaration or affidavit.[858]

Victoria Legal Aid also expressly supports option (a), stating that a definition of proceedings is desirable:

> Legal proceedings for the purposes of perjury should be defined to mean proceedings in which evidence may be taken on oath or affirmation.[859]

The issue of which proceedings perjury applies to is closely related to the issue of the application of perjury to documents, and witnesses' responses tended to conflate the

[853] Criminal Bar Association, submission no. 6, p. 13.
[854] Ibid.
[855] Ibid.
[856] Ibid.
[857] Benjamin Lindner, submission no. 8, p. 8.
[858] Director of Public Prosecutions, submission no. 9, p. 14.
[859] Victoria Legal Aid, submission no. 7, p. 8.

two issues. Consequently we will consider the second issue of the application of perjury to documents before reaching our conclusions on both issues.

Application to false statements made in documents

Victoria

As already stated, in Victoria the *Crimes Act 1958* extends the application of perjury to oaths, affirmations, declarations or affidavits required or authorised by any Act.[860] There is no specific statutory requirement that the false statement in such cases must have been made in documents *in or for the purpose of legal proceedings*. This means that a person who knowingly makes a false statement in, for instance, a statutory declaration, can be charged with perjury, even though the statutory declaration was not made for the purpose of legal proceedings and was never actually used (became evidence) in legal proceedings. The maximum penalty of 15 years for perjury applies to all offences ranging from making a false statutory declaration which is not made for court proceedings, to making a false statement for the purposes of legal proceedings.[861]

MCCOC recommendation

MCCOC took the view that perjury should apply to statements made on oath or affirmation in (or for the purposes of) legal proceedings (including proceedings which may be instituted) but that there should be no requirement that the statement should actually have become evidence. [862] The relevant section of the Model Code provides that perjury applies to "a person who makes a sworn statement in or for the purposes of a legal proceeding."[863] The corollary of this is that perjury should not apply to statements made on oath or affirmation in other circumstances. In such other circumstances, "it may well be appropriate for a penalty less than that for perjury to apply to the making of such false statements […]."[864] MCCOC's recommendation

[860] *Crimes Act* 1958 (Vic), s. 314(3). Section 141 of the *Evidence Act 1958 (Vic)* is of the same effect.
[861] *Crimes Act* 1958 (Vic), s.314.
[862] MCCOC Discussion Paper, above note 5, p. 25.
[863] Model Criminal Code, section 71.1.
[864] MCCOC Discussion Paper, above note 5, p. 25.

appears to be more limited than the current law in Victoria. Section 314(3) of the *Crimes Act 1958 (Vic)* does not specify that the statement must have been made in or for the purposes of legal proceedings.[865]

Other jurisdictions

Unlike Victoria, perjury does not apply in relation to every oath, affirmation, declaration or affidavit in Queensland, Western Australia, the Northern Territory and the Commonwealth. In these jurisdictions the false statement must have been made in the form of *testimony (or evidence) given in, or for the purposes of, judicial proceedings*.[866] This means that perjury does not apply to affidavits or statutory declarations not made for the purpose of legal proceedings or made for the purpose of legal proceedings but which were not actually tendered as evidence in those proceedings.[867]

In New South Wales, South Australia and Tasmania, on the other hand, statements must be made in connection with or in judicial proceedings but there is no requirement that they have actually been admitted into evidence.[868]

Other Law Reform Agencies

The UK Law Commission recommended that perjury should apply to false statements given in affidavits or statutory declarations made for the purposes of judicial proceedings and made admissible in those proceedings.[869] The Gibbs Committee also recommended that perjury apply to affidavits, statutory declarations and certificates in the same circumstances as the UK Law Commission but clarified that the statement

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[865] Rather, section 314(3) applies "where by or under any Act it is required or authorized that facts matters or things be verified […] by or upon the oath affirmation declaration or affidavit of some or any person […]."

[866] *Criminal Code Act* 1899 (Qld), s. 123(1) "any person who in any judicial proceeding, or for the purpose of instituting any judicial proceeding;" *Criminal Code* 1913 (WA), s. 124 (same wording); *Criminal Code Act* (NT), s. 96(1) (same wording); *Crimes Act* 1914 (Cth), s. 35 (same wording).

[867] MCCOC Discussion Paper, above note 5, p. 23.

[868] Ibid. *Crimes Act* 1900 (NSW), s. 327; *Criminal Law Consolidation Act* 1935 (SA), s. 242; *Criminal Code Act* 1924 (Tas), s. 94; MCCOC Discussion Paper, above note 38, p. 23.

[869] UK Law Commission, above note 38, para 2.47 and see MCCOC Discussion Paper, above note 5, p. 23.

need not actually have been admitted into evidence and that the statements must have been made on oath, affirmation or declaration or "after the person making or giving it had been distinctly warned that the making of a false statement would render him or her liable to criminal proceedings […]."[870]

In the Discussion Paper the Committee called for submissions as to which of the following approaches to documents is preferable:

(a) the wide application of perjury to documents made on oath, affirmation, declaration or affidavit even where these documents may not have been made in or for the purpose of legal proceedings (current Victorian situation);

or

(b) perjury limited to statements made on oath or affirmation in or for the purposes of legal proceedings (including proceedings that may have been instituted) (as recommended by MCCOC).

Witnesses' submissions on the application of perjury to documents

The Director of Public Prosecutions and Benjamin Lindner express support for option (b), namely that perjury should be limited to statements made on oath or affirmation in or for the purposes of legal proceedings (including proceedings that may have been instituted), as recommended by MCCOC.[871] The DPP started on the basis that, as a matter of general principle, "it is arguable that any statement made upon oath, affirmation or declaration, and which is knowingly false, should attract criminal liability whether it is for perjury or for some lesser offence expressed as the making of a false statement."[872] Equally, however, the DPP stated that:

> As a matter of policy, it might be thought inappropriate that false material in a sworn or affirmed document, not intended to be used in any form of legal proceedings, should automatically give rise to the need for an indictable-only prosecution.[873]

[870] Gibbs Committee Report, above note 85, para 6.30. Further "any such warning should have been given in writing, or the affidavit, declaration or certificate should contain an acknowledgement that the warning was given."
[871] Director of Public Prosecutions, submission no. 9, p. 15; Benjamin Lindner, submission no. 9, p. 8.
[872] Director of Public Prosecutions, submission no. 9, p. 15.
[873] Ibid.

Victoria Legal Aid submitted that the current Victorian law is too wide and that Victoria should consider the MCCOC recommendation (option (b)) with the clarification suggested by the Gibbs Committee, namely that "the statements must have been made on oath, affirmation or declaration or after the person making or giving it had been distinctly warned that the making of a false statement would render him or her liable to criminal proceedings."[874]

The Criminal Bar Association's views in relation to this question were reviewed in the section in relation to proceedings to which perjury applies. The CBA did not reach a concluded view on this point, noting that the answer to this question depends on the view taken of the appropriate ambit of the offence.[875] In its written submission the Victorian Bar noted that the current Victorian position seems right in principle.[876] At the public hearings Dr David Neal elaborated on this observation, commenting that this position is based on first principles that "if you swear on oath that something is true and you know it is not, there seems to me to be a problem about doing that and that this is enough to warrant a criminal offence."[877]

Committee's conclusion on proceedings to which perjury applies and the application of perjury to documents

The Committee's conclusion on this issue is that the MCCOC recommendation should be adopted, i.e. perjury should be limited to statements (both oral and written) made on oath or affirmation in or for the purpose of legal proceedings. Also, the Committee believes that a definition of legal proceedings is desirable and that the term should be defined to mean proceedings in which judicial powers are exercised and includes proceedings in which evidence may be taken on oath or affirmation.

The Committee has reached this conclusion on the basis that the current Victorian law seems too wide and out of step with both the MCCOC recommendations and with the law in other Australian jurisdictions.

[874] Victoria Legal Aid, submission no. 7, p. 8.
[875] Criminal Bar Association, submission no. 6, p. 13.
[876] The Victorian Bar, submission no. 10, p. 7.
[877] Dr David Neal, *Minutes of Evidence*, 24 November 2003, p. 21.

Recommendation 20

That section 314(3) of the Crimes Act 1958 (Vic) be amended so that:

(a) the offence of perjury is restricted to statements (both written and oral) made on oath or affirmation in or for the purpose of "legal proceedings"; and

(b) "legal proceedings" be defined as meaning "proceedings in which judicial powers are exercised, and includes proceedings in which evidence may be taken on oath"; and

(c) a reference to "legal proceedings" includes a reference to any such proceedings that have been or may be instituted.

Separate lesser offences in other jurisdictions

In Victoria the maximum penalty of 15 years imprisonment for perjury applies to all offences ranging from making a false statutory declaration (which is not made for court proceedings), to making a false statement for the purposes of legal proceedings.[878] Unlike Victoria most other jurisdictions have separate offence provisions with considerably lower penalties for false statements made outside the context of legal proceedings.

MCCOC was of the opinion that it may be appropriate for a penalty less than that for perjury in these situations but recommended that this should be dealt with outside the Model Code by separate legislation because the conduct does not amount to an attempt to pervert the course of justice. [879]

Jurisdictions such as New South Wales have lesser offences such as making a false statement which carries a maximum penalty of 5 years imprisonment as opposed to the more serious offence of perjury which carries a maximum sentence of 10 years imprisonment [880] In Queensland the offence of making a false declaration imposes a maximum penalty of 3 years imprisonment compared with the maximum sentence of 14 years imprisonment for the offence of perjury. [881] Similar offence provisions

[878] *Crimes Act* 1958 (Vic), s.314.
[879] MCCOC Discussion Paper, above note 5, p. 25.
[880] *Crimes Act* 1900 NSW; s. 330.
[881] *Criminal Code* 1899 (QLD). S. 193-4 and s. 124(1).

operate in the Northern Territory [882] while in the Commonwealth it is an offence to give a false certificate, punishable by up to 2 years imprisonment. [883]

Witnesses' Submissions

VLA believes that the creation of a lesser offence will allow for a suitable differentiation between the more serious cases of perjury and those that are considered less serious.[884]

The CBA also noted that "one option is to create a separate offence of non-curial perjury, with a lighter maximum penalty."[885] Like the CBA, Dr Neal noted that it may be appropriate that false swearing in documents such as statutory declarations could be the subject of a lesser offence than false swearing in judicial proceedings.[886]

Committee's conclusion

The Committee considers that a separate lesser offence should be enacted for false statements made outside the context of legal proceedings (for instance, most statutory declarations). The Committee has reached this conclusion on the basis that the current maximum penalty for less serious offences is at odds with the law in other Australian jurisdictions which recognises that lesser offences should carry a lower maximum penalty. The Committee agrees with Victoria Legal Aid that creating a separate, lesser offence for false statements made in documents such as statutory declarations would take account of the differentiation between the serious cases of perjury and cases which are not considered as serious.

The Committee takes the view that the maximum penalty for the lesser offence should be 5 years imprisonment (as opposed to 15 years which is the current maximum penalty for perjury in Victoria) in recognition of the fact that it is a less serious offence. This maximum penalty would also be comparable to the maximum penalties in the other jurisdiction which range from 2 to 5 years imprisonment.

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[882] *Criminal Code Act* (NT), s. 118-119.
[883] *Crimes Act* 1914 (Cth); s. 87.
[884] Ibid.
[885] Ibid.
[886] Ibid.

Recommendation 21

That the Crimes Act 1958 (Vic) be amended, making it a separate offence to deliberately make a false statement on oath or affirmation, where the statement is not made for, or in the course of "legal proceedings" (as defined in Recommendation 20 above).

That the maximum penalty for this offence be 5 years imprisonment.

Fault element

As with other serious crimes, in order to commit the offence of perjury, it is necessary to show that the accused person had the necessary state of mind, often referred to as the mental or fault element or mens rea ("a guilty mind"[887]). In relation to the fault element of the crime the classic definition of perjury given by King CJ in his judgment in *R v Traino*[888] states that the statement must have been "false to the knowledge of the deponent, or was not believed by him to be true.[889] The crime consists in the making of a deliberately false statement in the postulated circumstances."

In Victoria and at common law the fault element is established where the defendant had a *lack of belief in the truth* of the statement whereas other jurisdictions require a higher standard—that the defendant actually knew that the statement was false. We will look at this issue later in the chapter.

The *Crimes Act 1958 (Vic)* refers to "wilful and corrupt perjury"[890] but sheds no further light on the meaning of the mental element of the offence. Therefore, the law in Victoria is once again mainly governed by the common law. In this part of the Chapter we will focus on case law concerning a key question in this area: the distinction between mistaken certitude (or certainty) and wilful perjury.

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[887] Butterworths Concise Australian Legal Dictionary, above note 11, p. 288.
[888] *R v Traino* (1987) 45 SASR 473.
[889] Ibid, p. 475. This formulation has been adopted in other cases – notably in the High Court judgment of *MacKenzie v R* (1996) 71 ALJR 91, where it was held that the jury should have been told that "the prosecution had to establish that the statements made were false and that, when made, the accused knew that they were false or at least did not believe them to be true […]:" p. 106.
[890] This term is used in sections 314 and 315 of the Victorian *Crimes Act* 1958.

Distinction between mistaken certitude and wilful perjury

The case of *R v Lowe*[891] sets out the correct direction to the jury on the fault element of perjury in Victoria:

> In order that you should convict the defendant on this indictment you ought to be satisfied beyond reasonable doubt that the statement was not only untrue, but was wilfully false; for if you should think he made it mistakenly, it would not be within the statute.[892]

This direction was cited with approval in the High Court decision of *MacKenzie v R*.[893] In that decision the issue was whether the trial judge's directions on the mental element had been so inadequate or confusing that the appellant had lost any chance of acquittal.[894] The High Court held that the direction had been inadequate "because of a failure to remind the jury of the need to take into account the possibility of honest mistake."[895]

The High Court pointed out that factors such as repetition by witnesses of their certainty as to their evidence could be equally consistent with the giving of false evidence innocently and mistakenly rather than dishonestly and with criminal intent.[896] As the High Court put it:

> Sometimes repeated assertion of the false evidence can tend to establish the criminal intention of the witness, especially where the falsity is "inescapable and self-evident" or where it leaves no reasonable cause for a belief that it is true. But honest mistake, inadvertence, carelessness or misunderstanding leading to evidence shown to be false will not constitute perjury for which a criminal intention must always be proved.[897]

After repeating the principle that the prosecution must establish that the accused knew the statements were false or at least believed them not to be true, the High Court held that:

> The jury should then have been told that, if they concluded that the statements had been made mistakenly, but genuinely believing them to be true, the prosecution would not have established an essential ingredient of the offences charged.[898]

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[891] *R v Lowe* [1917] VLR 155.
[892] Ibid, p.162. The direction was per the dissenting judgment of Cussen J.
[893] *MacKenzie v R* (1996) 71 ALJR 91.
[894] Ibid, p. 94.
[895] Ibid, p. 104.
[896] Ibid.
[897] Ibid. The last part of this passage was cited with approval in *Menner v R* BC9707 201- WACCA – 15/12/1997.
[898] Ibid, p. 106.

A similar comment on direction of the jury was made in the case of *Menner v R*[899] which also cited parts of the above passages in *MacKenzie v R.*[900]

R v Lowe

Dr Lowe was charged in Victoria under the *Registration of Births, Deaths and Marriages Act* 1915 (Vic) with having wilfully made false statements concerning particulars to be registered. The false statement related to a death certificate on which he stated that he had last seen the deceased on a particular date and on which Dr Lowe certified the causes of death. In point of fact, he had never seen the patient who had been attended by a fifth-year medical student who had provided Lowe with the relevant details. Dr Lowe's defence was that he had honestly believed he was entitled to sign the certificate because the medical student was acting as his agent and had attended the patient on his behalf.

In *R v Lowe*[901] it was held that the requisite mental element had been satisfied. The majority in that case held that, because the statements were false, which Lowe knew, and he made them intentionally, he was guilty of the offence. It was no defence that he honestly believed he was entitled to give the certificate.[902]

[899] *Menner v R* BC9707 201 – WACCA – 15/12/1997, p. 39.
[900] *MacKenzie v R* (1996) 71 ALJR 91. The relevant passage from *Menner v R* is as follows: "It was essential, in my opinion, that in redirecting the jury, His Honour instruct them that it was for the prosecution to establish beyond reasonable doubt that the statements of the subject of the respective charges were false and that, when made, the accused knew they were false, or did not believe them to be true. And further, that if they concluded the statements to have been made mistakenly but in the genuine belief they were true, then the prosecution would not have made out the offences charged:" Ibid, p. 40.
[901] *R v Lowe* [1917] VLR 155.
[902] Ibid, per A'Beckett and Hodges JJ.

A note on the interpretation of "wilfully" (Victorian Crimes Act)

It will be recalled that the Victorian *Crimes Act 1958* uses the term "wilfully" in sections 314 and 315 on perjury. It has been held that wilfully means intentionally.[903] In *R v Millward*[904] the court, commenting on the same term as used in the UK *Perjury Act 1911,* found that it meant that the prosecution had to prove that the statement was made deliberately and not inadvertently or by mistake.[905]

MCCOC recommendation on the fault element

In Victoria, where the common law applies, the fault element is that the defendant had a *lack of belief in the truth* of the statement whereas in other jurisdictions the prosecution must establish that the defendant *actually knew* that the statement was false.

In its Discussion Paper MCCOC notes the division in Australian jurisdictions on this point:

> […] Australian jurisdictions are divided between those that require for perjury that the defendant knew that the statement was false and those that accept, as an alternative to knowledge of falsity, lack of belief on the part of the defendant that the statement was true.[906]

MCCOC on this issue concluded that the fault element for perjury should be "recklessness as to the falsity of the statement" in line with its general recommendation that recklessness should be the basic fault element of the draft Code.[907]

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[903] *R v Ryan* (1914) 10 Cr App R 4, p. 7 and see Freckelton, *Criminal Law Investigations and Procedure*, above note 28, para 1.9.80.
[904] *R v Millward* [1985] 2 WLR 532.
[905] Ibid, p. 536.
[906] MCCOC Discussion Paper, above note 5, p. 9.
[907] MCCOC Final Report, above note 6, p. 17. and MCCOC Discussion Paper, above note 5, p. 11. MCCOC also recommended (as the second part of the fault element) that the statement itself must be false. We discuss this in the next part of this Chapter.

Fault element in other jurisdictions

The Queensland, Western Australian and Northern Territory Codes and the Commonwealth *Crimes Act* require that the defendant knowingly or intentionally gave false testimony.[908] In other words, they require that the defendant knew that the statement was false.

In contrast, in Tasmania it is enough that a person "wilfully makes a statement which he knows to be false or does not believe to be true."[909] Similarly the New South Wales Act refers to "any person […] who makes a false statement on oath […] knowing the statement to be false or not believing it to be true."[910] The South Australian Act is of similar effect.[911] In the UK the defendant must know that his or her statement was false in a material particular or at least did not believe it to be true.[912]

The ACT legislation does not give a definition of perjury (apart from the reference to "wilful and corrupt" perjury) and hence, like Victoria, the common law rule applies—that is, it is enough that the defendant did not believe the statement to be true.[913]

In the Discussion Paper the Committee called for stakeholder's views as to whether it should be a requirement of the fault element of perjury that the defendant know that the statement was false or whether a lack of belief that the statement was true would be sufficient (the current position in Victoria).

Witnesses' submissions on the fault element

Submissions to this Inquiry were split between those who advocated that the defendant must know that the statement was false (Victoria Legal Aid and Benjamin

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[908] *Criminal Code Act* 1899 (Qld), s. 123; *Criminal Code* 1913 (WA), s. 124; *Criminal Code Act* (NT), s. 96; *Crimes Act* 1914 (Cth), s. 35.
[909] *Criminal Code Act* 1924 (Tas), s. 94.
[910] *Crimes Act* 1900 (NSW), s. 327.
[911] *Criminal Law Consolidation Act* 1935 (SA), s. 242(5)(b)(i), MCCOC Discussion Paper, above note 5, p. 9.
[912] The UK Law Commission recommended that it should be sufficient to support a charge of perjury "if in certain circumstances he makes a false statement (i) intending it to be taken as true and (ii) knowing that it is false or reckless as to whether it is false:" UK Law Commission, above note 38, para 2.67, as cited in MCCOC Report, above note 6, p. 13.
[913] *R v Traino* (1987) 45 SASR 473. In other words, the statement was false to the knowledge of the defendant or was not believed by him to be true.

Lindner) and those who, like MCCOC, took the view that a lack of belief that the statement was true is sufficient (Criminal Bar Association and the Director of Public Prosecutions).

Benjamin Lindner expressed his support for requiring that only actual knowledge of the falsity of the statement satisfy the mental element of the offence in the following terms:

> The mental (rather than 'fault') element of perjury should be confined to knowledge that the statement is false. Neither recklessness (nor, for that matter, negligence) should be sufficient to constitute the mens rea of this offence. In that sense, the same rationale applies as in determining the appropriate mental element for perverting the course of justice. It should be noted that perjury is also a crime against the administration of justice. It exists to punish false statements made under oath in an adversary system of litigation that depends on litigants giving truthful accounts.[914]

Victoria Legal Aid justified its view that it should be a requirement of the fault element of perjury that the defendant knew the statement was false thus:

> It is not desirable in the public interest for a person to be prosecuted for perjury unless the person had actual knowledge of the falsity of the statement made.[915]

Two interstate witnesses who commented on this issue agreed that knowledge of the falsity of the statement should be required. Julie Shouldice, who appeared before the Committee on behalf of the New South Wales Law Society, pointed out that it would be difficult to prove what the person believed if the statement was true:

> I think trying to prove what somebody believed if they believed it to be false is too difficult. You have to really look at the objective facts and what you can objectively prove from other evidence.[916]

Representatives of the Queensland Bar Association agreed that many cases in Queensland turn on the requirement of knowledge.[917] Tony Glynn SC specifically opposed the notion that the mental element in perjury should be based on a mere belief that the statement was false (rather than actual knowledge that it is false), arguing before the Committee that:

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[914] Benjamin Lindner, submission no. 8, p. 8.
[915] Victoria Legal Aid, submission no. 7, p. 9.
[916] Julie Shouldice, *Minutes of Evidence*, 11 November 2003, p. 4.
[917] Ralph Devlin and Michael Byrne QC, *Minutes of Evidence*, 11 November 2003, p. 99,

> While I think perjury is underprosecuted that does not mean we should cut loose on a wider range, I just think we should use the provisions we have.[918]

The Director of Public Prosecutions submits that a lack of belief in the truth of a statement is consistent with the purpose of the evidence being received on oath which acquires a particular status which is of fundamental importance to the administration of justice.[919] It is also "consistent with the actual form of oath normally administered, which indicates a positive belief in the truth of the material in question."[920]

The Criminal Bar Association agrees that a lack of belief in the truth of the statement should suffice for the purposes of perjury. The CBA points out that the common law extends this far and that the terms of the oath administered in Victoria require it.[921] The submission concludes that "to do away with [the requirement that a lack of belief suffices] would be to exempt a range of potential liars from perjury."[922]

Committee's conclusion in relation to whether knowledge of falsity or alternatively a lack of belief of truth is required

The Committee concludes that a lack of belief in the truth of a statement should be sufficient to bring a charge of perjury. The Committee believes that our justice system relies on witnesses giving evidence which they positively believe to be true. The Committee agrees with the submission of the Director of Public Prosecutions that a lack of belief in the truth of a statement is inconsistent with the purpose of the evidence being received on oath. Such evidence acquires a particular status which is of fundamental importance to the administration of justice. Witnesses who take an oath "that the evidence that they will give will be the truth the whole truth and nothing but the truth" should be expected to not merely refrain from giving evidence which they know to be false, but rather to tell the truth. This means that witnesses who do not believe in the truth of the evidence they give should be exposed to the laws of perjury.

In line with our views on codification outlined in the earlier Chapters of this Report, the Committee believes that the common law rule which currently applies in Victoria

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[918] Tony Glynn SC, *Minutes of Evidence*, 13 November 2003, p. 99.
[919] Director of Public Prosecutions, submission no. 9, p. 16
[920] Ibid.
[921] Criminal Bar Association, submission no. 6, p. 13.
[922] Ibid.

should be put into statutory form. The Committee prefers the drafting in the Tasmanian Code which provides that perjury applies to a person who wilfully "makes a statement which he knows to be false or does not believe to be true" rather than MCCOC's use of the term "reckless." However, the exact wording of the new provision depends to some extent on what other Model Criminal Code provisions have been enacted (for example whether a statutory definition of reckless is enacted) — a subject which is beyond the scope of the current Inquiry.

Recommendation 22

That s 314 of the Crimes Act 1958 (Vic) be amended to clarify that the mental element for the offence of perjury is the lack of belief that the statement was true.

Objective falsity element

We now consider another element (in some jurisdictions) for the offence of perjury: the so-called "objective falsity" element. What this means is that in some jurisdictions the prosecution also has to establish that the defendant's statement actually *was* a false statement. This is not an element of the offence at common law—a defendant can be prosecuted even if it turns out that the statement was true, as the truth of the statement is no defence to a charge of perjury if the defendant believed it to be false or was reckless as to whether it was true or false.[923]

The law in Victoria appears to require the objective falsity of the statement, however as we will see, this is open to debate.

MCCOC considered the question as to whether the prosecution should also have to prove that the statement was *objectively false* (that is, whether it was actually false) or whether it is enough that the defendant merely believed it to be false or was reckless[924] as to whether it was true or false.

[923] MCCOC Report, above note 6, p. 15. MCCOC refers to Smith & Hogan 6 Ed p. 746 which cites various ancient authorities in support of this proposition.

[924] Recklessness as a legal term has been defined as "heedless or careless conduct where the person can foresee some probable or possible harmful consequence but nevertheless decides to continue with those actions with an indifference to, or disregard of the consequences […] Recklessness implies something

MCCOC states that "in Victoria and the ACT the common law rule applies."[925] However, the Director of Public Prosecutions took issue with this view arguing that they "are not sure whether you can be convicted of something that was actually true,"[926] adding that:

> I do not know that we have prosecuted anyone in those circumstances and that derived largely from a reference to Smith & Hogan, the English criminal law text which says at common law that is the position and apparently cites a number of ancient authorities for it. But I do not know that we have ever proceeded on that basis in Victoria.[927]

The Director of Public Prosecutions written submission states that a reading of sections 107 and 141 of the *Evidence Act* and 314(3) of the *Crimes Act* suggests that each provision assumes the objective falsity of the material to be elemental.[928] Paul Coghlan QC elaborated on the DPP's position at the public hearings:

> […] Generally dealing with [statutory declarations] in [section] 107(2) of the *Evidence Act* a person who makes a declaration which the person knows to be false is liable to penalties for perjury. I do not think that you could know something to be false if it was objectively true. […] In section 141, the other provision in the *Evidence Act*, any person who upon or on any oath, examination, affidavit, affirmation or declaration whatsoever which is mentioned or referred to or which is required, authorised or permitted by or under any provision of this Act wilfully and corruptly makes any false statement, how that could mean only subjectively false and not actually false we are not sure.
>
> So we are not completely sure that whatever view was taken in England and by the Model [Criminal] Code Committee, we are not convinced that there is enough left of the common law in Victoria in this area to—I mean we do not have much of the common law of perjury left anyway by the time we look at the statutory provisions.[929]

The Queensland, Western Australian and Northern Territory Codes require the testimony to be false (the person must "knowingly give false testimony").[930] Objective falsity of testimony is also required in the Commonwealth, New South

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less than intent but more than mere negligence:" *Butterworths Concise Australian Legal Dictionary*, above note 11, p. 370.

[925] Ibid.

[926] Paul Coghlan QC, *Minutes of Evidence*, 24 November 2003, p. 33. Mr Coghlan finishes this statement thus: "When you look at s. 314 of the *Crimes Act*, false statement is the expression that is used there as well. It does not seem to us that it is capable of being subjectively false in the ordinary meaning of the word."

[927] Ibid.

[928] Director of Public Prosecutions, submission no. 9, p. 16.

[929] Paul Coghlan QC, *Minutes of Evidence*, 24 November 2003, p. 33.

[930] *Criminal Code Act* 1899 (Qld), s. 123; *Criminal Code* 1913 (WA), s. 124; *Criminal Code Act* (NT), s. 96.

Wales and South Australia.[931] The position in Tasmania is somewhat unclear but it appears not to require objective falsity.[932] There the reference is to a person who "wilfully makes a statement which he knows to be false or does not believe to be true."[933] Several international jurisdictions also require objective falsity of the statement.[934]

MCCOC conclusion on fault and objective falsity

In its Final Report MCCOC concluded that "the fault element for perjury should be recklessness as to the falsity of a statement *that is false*"[935] (emphasis added). In other words, objective falsity should be required. This recommendation differed somewhat from the Discussion Paper which had recommended that there be two alternative fault elements for perjury, namely:

(a) belief that the statement is false (whether or not the statement is false); or

(b) recklessness as to the falsity of a statement that is false.[936]

In other words, in the Discussion Paper MCCOC distinguished between belief that a statement is false and recklessness as to falsity, requiring objective falsity only for the latter state of mind. In the Final Report, MCCOC noted that submissions on this proposal were mixed, and amended its recommendation as described above.[937]

Should it be a requirement of the fault element of perjury that the defendant know that the statement was false or should lack of belief that the statement was true be

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[931] *Crimes Act* 1914 (Cth), s. 35; *Crimes Act* 1900 (NSW), s. 327; *Criminal Law Consolidation Act* 1935 (SA), s. 242.

[932] See also reference in MCOCC Report, above note 6, p. 17 that six of the nine Australian jurisdictions require objective falsity. Clearly Victoria and ACT are two of the ones which do not—and presumably Tasmania is the other, although this is not made clear in the Report.

[933] *Criminal Code Act* 1924 (Tas), s. 94.

[934] Section 1 of the *Perjury Act* 1911 UK refers to a person who wilfully makes a statement etc "which he knows to be false or does not believe to be true." *The Crimes Act* 1961 (NZ) section 108(1) relevantly provides, "that assertion being known to the witness to be false and being intended by him to mislead the tribunal holding the proceeding." In the *Criminal Code* of Canada, section 131(1), the relevant words are "knowing that the statement is false." MCCOC reports that the relevant section of the US Model Code "requires for perjury the making of a false statement on oath or the swearing or affirming the truth of a statement previously made when the statement is material and the defendant does not believe it to be true:" MCCOC Report, above note 6, p. 15.

[935] MCCOC Report, above note 6, p. 17.

[936] MCCOC Discussion Paper, above note 5, p. 13.

[937] MCCOC Report, above note 6, p. 17.

sufficient? Should the fact that the statement is true, even though the person believed it to be false, be a defence to perjury? These are the questions posed in the Discussion Paper and which generated considerable interest among witnesses to the Inquiry.

Witnesses' submissions in relation to objective falsity

Again the views of witnesses were split on this question. The Criminal Bar Association and the Director of Public Prosecutions submitted that objective falsity should not be required and Victoria Legal Aid, the Victorian Bar and Benjamin Lindner advocated for the position that the fact that the statement was true, even though the person believed it to be false, should operate as a defence to perjury.

The Director of Public Prosecutions approached this question from the same policy perspective that informed his response to question 34 in the Discussion Paper (regarding whether knowledge or belief of the falsity of the statement should constitute the mental element of perjury).[938] The DPP's submission to the Inquiry states:

> […] It is our view that, in theory, liability for perjury should arise where a person swears to the truth of certain material despite believing it to be false and that in such circumstances, the objective truthfulness of the material (such truthfulness being unknown to the deponent) cannot logically affect such liability.[939]

The Criminal Bar Association agrees that the objective falsity of the statement should not operate as a defence to perjury but its submission does not give reasons for this position.[940]

In contrast, Dr David Neal, who represented the Victorian Bar at the public hearings for this Inquiry, believed that the statement at the heart of a perjury charge should be objectively false. Dr Neal based his support for objective falsity on general criminal law principles that if someone does something wrong believing it to be criminal but it is not in fact a criminal offence (for example because the conduct element is not

[938] Director of Public Prosecutions, submission no. 9. p. 16.
[939] Ibid. However, note that the DPP disagrees with MCCOC that law in Victoria does not require the objective truth of the statement—see comments in the discussion of the law and MCCOC's views on this question.
[940] Criminal Bar Association, submission no. 6, p. 14.

fulfilled) that person is not generally considered to be guilty of a crime.[941] He explained his position to the Committee as follows:

> I am troubled because the parallel – if I do something believing it to be wrong when it is not in fact wrong, that is exactly, in a sense, what you are saying. Traditionally the criminal law has not punished that, there has been a big debate in the law of attempts. I shoot at a tree believing it is a human being, am I guilty of a criminal offence because it actually turns out to be a tree? That is the issue. Currently under the law of attempt in Victoria it would be an illegal attempt, but do you see we are now at the point where there is a danger of lapsing into Humpty Dumpty type prohibitions and that is the problem that I am trying to highlight in that area. Mere belief that you are doing the wrong thing is never enough. It may be, as you say, Mr Chairman in reply, that if you do not believe it but actually give some evidence that that is enough. I do have a reservation about it for the reasons that I have just outlined.[942]

Greg Smith, the Deputy Director of Public Prosecutions with the New South Wales Office of the Director of Public Prosecutions, expressed similar reservations about allowing convictions for perjury for defendants who believed an objectively true statement to be false, observing that:

> If the purpose of the law is to seek the truth, which I think it is, then [this approach] seems to be dragging that out beyond the realms in which it should be. I am just trying to think of other examples where you might have thought you killed someone. Say you thought you hit someone on the road and it was actually a dog, and you drove off. Have you got to go and put yourself in to the police for killing a person because you believed it was a person, rather than a dog?[943]

Mr Smith noted further that, while allowing prosecutions of people who believed a statement to be false even though it was true "is encouraging people to tell what they believe is the truth […] I think it is getting a bit tough to be up for an indictable offence and a jail sentence if what you said was true anyhow."[944]

Benjamin Lindner takes a slightly different view on this question, arguing that the fact that a statement is true, even though the person believed it to be false, is already a defence of perjury because it would constitute "mistaken falsity and that is clearly a defence."[945]

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[941] Dr David Neal, *Minutes of Evidence*, 24 November 2003, p. 21.
[942] Ibid.
[943] Greg Smith, *Minutes of Evidence*, 12 November 2003, p. 48.
[944] Ibid.
[945] Benjamin Lindner, submission no. 8, p. 8. The defence being referred to is probably mistaken certitude for which *MacKenzie v R* (1996) 71 ALJR 91 cited by Lindner is a relevant authority.

Committee's conclusions in relation to objective falsity

The Committee prefers the view that the objective falsity of the statement should be a requirement of the offence of perjury. The Committee has reached this conclusion for the reasons outlined below:

- If the purpose of the justice system is to discover the truth of a matter, then arguably a statement which is objectively true (even if believed to be false) does not compromise the justice system in the same way that a false statement does;

- The Committee agrees with the reservations expressed by the Victorian Bar and the New South Wales Office of the Director of Public Prosecutions that allowing objectively true statements to form the basis of perjury charges is at odds with general criminal law principles;

- The MCCOC provision requires the statement to be objectively false. Again, where possible, the Committee is keen to promote the harmonisation of laws throughout Australia and adopting the principles of MCCOC is a small step towards this goal;

- The Committee agrees with the submission of the Director of Public Prosecutions that the law in Victoria already appears to require the objective falsity of the statement.

Given the different views on this matter, for the avoidance of doubt, the Committee considers that the objective falsity of the statement should be a specific requirement of perjury in Victoria.

Recommendation 23

That the offence of perjury in s. 314 of the Crimes Act 1958 (Vic) specify that the offence of perjury only applies to statements that are objectively false.

Should perjury extend to expressions of opinion?

At common law expressions of opinion not genuinely held can amount to perjury.[946] Arguably, this is also the position in Victoria as the legislation makes no reference to the issue. The Codes and statutes of other Australian jurisdictions also do not address the issue.[947]

MCCOC reached the conclusion that perjury should extend to false statements of opinion on the basis that an opinion not genuinely held "can impair the administration of justice."[948]

The Gibbs Committee concluded that, "although it may be difficult to prove that a statement of opinion was false, there seems no reason why such a statement when proved to have been false should not amount to perjury."[949] On that basis the Gibbs Committee determined that the section should be redrafted to make it clear that a false statement whether of fact or opinion may amount to perjury.[950]

In the Discussion Paper the Committee asked interested parties for their views as to whether the law of perjury in Victoria should apply to expressions of opinion where the opinion is not genuinely held.

Witnesses' submissions in relation to expressions of opinion not genuinely held

All submissions to this Inquiry which commented on this issue supported the application of perjury to opinions which are not genuinely held.[951] Benjamin Lindner and Victoria Legal Aid expressly agreed with MCCOC that such statements can impair the administration of justice.[952] The Criminal Bar Association argued that

[946] MCCOC Discussion Paper, above note 5, p. 47 and Gibbs Committee Report, above note 85, para 6.21.
[947] However, the Gibbs Committee noted that "if the testimony is false it does not seem material that the witness's statement in evidence was the statement of opinion:" Gibbs Committee Report, above note 85, para 6.21.
[948] MCCOC Discussion Paper, above note 5, p. 47.
[949] Ibid.
[950] Ibid.
[951] These were the Criminal Bar Association, Benjamin Lindner, Victoria Legal Aid, the Director of Public Prosecutions and Mr John Pesutto (on behalf of the constituents from the East Yarra Province electorate).
[952] Benjamin Lindner, submission no. 8, p. 8; Victoria Legal Aid, submission no. 7, p. 9.

"there is no basis for exempting from perjury expressions of opinion not genuinely held," citing experts and others permitted to give evidence in court as an example of those who would be exempt from prosecution if expressions of opinion not genuinely held could not constitute perjury:[953]

> There are many situations where a witness may be tempted to advance what she does not believe. This may be less morally heinous than deliberately advancing a positive falsehood. But to falsely testify to what one does not believe imperils justice in the same way as falsely testifying to what one knows to be false.[954]

The submission of John Pesutto on behalf of constituents from the electorate of East Yarra Province, stated that:

> Members can see no reason for excluding from the scope of perjury opinions given under oath that are untrue, however formidable the matter of proof might be.[955]

The Director of Public Prosecutions takes issue with the term 'expression of opinion not genuinely held.' However, he agreed with other witnesses that those who express "opinions" which they do not genuinely hold, should be liable for perjury. The submission highlights the conceptual difficulty with this phrase on the basis that "an opinion is either held or it is not:"[956]

> One may pretend to have an opinion when in fact one does not have such an opinion. That circumstance is not "an opinion which is not genuinely held;" it is not an opinion in the first place.
>
> If an expert or other witness is asked whether he or she holds a particular opinion and they state that they do and describe the terms of that "opinion, whilst in fact they do not have any such opinion, then such evidence is plainly perjurious, not because of the subjective untruthfulness of the "opinion," but because no such opinion was in fact held.[957]

Committee's conclusion in relation to expressions of opinion not genuinely held

The Committee supports the application of perjury to opinions which are not genuinely held, in line with the unanimous stakeholder support for this view. The

[953] Criminal Bar Association, submission no. 6, p. 13.
[954] Ibid, p. 14.
[955] John Pesutto, (on behalf of constituents from the electorate of East Yarra Province), p. 4.
[956] Director of Public Prosecutions, submission no. 9, p. 16.
[957] Ibid.

Committee believes that expressions of opinions which the deponent does not genuinely hold, particularly where the deponent is an expert witness upon whom Courts rely heavily in many cases, can have an equally detrimental effect on the administration of justice as knowingly untrue statements of "fact." It may be true that opinions not genuinely held are already caught by the law of perjury, as suggested by the submission of the Director of Public Prosecution. However, MCCOC clearly took the view that this was a matter worth including in the Model Criminal Code and, for the avoidance of doubt, the Committee supports the inclusion of a provision along the lines of clause 7.2.2(4) in the Model Criminal Code, which provides:

> If a sworn statement concerns an opinion of the person making the statement, the statement is false for the purpose of the offence of perjury if the opinion is not genuinely held by the person.

Recommendation 24

That the offence of perjury in s. 314 of the Crimes Act 1958 (Vic) be amended to provide that if a sworn statement includes an opinion of the person making the statement, the statement is false if the opinion is not genuinely held by the person.

The rule against duplicitous counts

In the criminal law there is a rule against "duplicitous counts" which has been described as follows:

> […] A prosecutor may not ordinarily charge in one count of an indictment, information or complaint two or more separate offences provided by law.[958]

In the perjury context this rule means that each false statement must be the subject of a separate charge. The rationale behind the rule has been described as "the necessity, in the interests of fairness, of identifying with clarity and particularity the allegedly false statements made by the appellant."[959]

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[958] *Walsh v Tattersall* (1996) 188 CLR 77. See Freckelton, Indictable Offences, above note 103, p. 387.

[959] *Stanton v Abernathy* (1990) 19 NSWLR 656, p. 662. In this way, the rule is related to the rule that particulars are to be provided which appears as a separate element of the rule against duplicitous counts in Ross, above note 105, para 16.450, but which cites cases such as *R v Traino* (1987) 45 SASR 473

In many cases of perjury a defendant may have made more than one false statement. Sometimes it is difficult to determine whether a series of statements properly amounts to a single count of perjury or several.[960]

King CJ, whose definition of perjury in the case of *R v Traino*[961] we have already examined, also emphasised the need to treat each false statement as a separate crime of perjury.[962] However, he acknowledged that it is not always easy to know "when a number of answers in evidence amount to a single false statement or when they constitute false statements"[963] and concluded:

> As with charges in relation to other areas of criminal activity, it is a question which must be answered "by applying common sense and by deciding what is fair in the circumstances […].[964]

As an example of a situation in which the cumulative effect of a number of statements may amount to a "single compendious lie"[965] he cites the following:

> Thus, for example, a number of false statements as to […] various disabilities may amount to a compendious statement that the witness is incapable of performing heavy work or is incapable of performing remunerative work or is incapable of undertaking physical exercise or is incapable of engaging in active sporting activities.[966]

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and *R v Haslett* 50 NTR 17 which are more commonly cited as authority for the rule against duplicitous counts (in the perjury context). Freckelton cites *Stanton v Abernathy* as authority for the proposition that "an accused is entitled to adequate particulars of the alleged false evidence:" Freckelton, *Criminal Law Investigations and Procedure*, above note 28, 1.9.100. As Gleeson CJ in that case noted: "There is a high risk that, unless proper attention is given to the matter of particulars, the case against the appellant may be put and dealt with in a manner which fails to face up to the detail of the charges against him and which, from his point of view, makes those charges extremely difficult to defend:" pp. 671-2.

[960] Freckelton, *Indictable Offences*, above note 28, puts it thus: "There is some uncertainty as to how to charge perjury where the accused has told a number of lies on oath. The question is whether each lie should be the subject of a separate count or whether they should all be contained in only one count:" p. 387.

[961] *R v Traino* (1987) 45 SASR 473.

[962] Ibid, p. 475: "The crime consists in the making of a deliberately false statement in the postulated circumstances. It follows that if more than one false statement is made in the course of the evidence of the witness in a particular case, each such false statement is a separate crime of perjury […] Each statement to which perjury is assigned is a separate crime and must therefore be made the subject of a separate count […]."

[963] Ibid.

[964] Ibid.

[965] Ibid, p. 476.

[966] Ibid.

However, in the circumstances of that case, the Judge found that the language of the particulars described more than one statement about the appellant's physical capacity.[967]

R v Traino[968] has been cited with approval in subsequent case law.[969] However, a more recent Victorian case has questioned the interpretation in that case. In *R v Hoser,*[970] Brooking JA noted that King CJ adopted his conclusion (that each deliberately false statement was a separate crime) from the definition given in 'Russell on Crime' but a passage later in the same work indicates that a less strict interpretation of the rule against duplicitous counts should be taken.[971]

His Honour went on to note similar views expressed by other commentators and commented that "examples of reliance on numerous falsehoods in support of a single charge of perjury are easily found."[972]

Brooking JA's comments were strictly "obiter dicta" which means a "remark in passing" and refers to judicial observations that do not form part of the reasons for the decision in the case and which are therefore not binding on lower courts or on the same court.[973] However, another judge in that case, Callaway JA, made it clear that the important question of duplicity in perjury proceedings was one which should be debated in a future case.[974]

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[967] Ibid.
[968] Ibid.
[969] E.g. *Stanton v Abernathy* (1990) 19 NSWLR 656, p. 662 and *R v Haslett and Another* 50 NTR 17 where the relevant passages from *Traino* were cited with approval and where it was held that "one can only conclude from the presentation of the transcript and the marking of various passages in the transcript that the Crown really does propose to present to the jury a series of allegedly false statements made by the accused and invite the jury to come to one verdict on all of them:" p. 31. Hence the general count against each accused was held to be bad for duplicity.
[970] *R v Hoser* [1998] 2 VR 535.
[971] That passage reads as follows:
"It should be noted that the essence of perjury is that the offender has proved false to the oath which he has sworn rather than that he has made one or more false statements. Any false statement which he has made constitutes the evidence upon which the charge that he has betrayed his oath is based (or "assigned") and it is termed an assignment of perjury; however many assignments there may be on one oath which has been sworn there is only one perjury:" ibid, p. 544.
[972] Ibid. After looking at case law in other jurisdictions, his Honour noted that in Victoria a presentment which alleged two lies in support of a single charge of perjury was allowed to pass without comment in the case of *R v Sumner* [1935] VLR 197.
[973] *Butterworths Concise Australian Legal Dictionary*, above note 11, p. 312.
[974] *R v Hoser* [1998] 2 VR 535, p. 545. Callaway J. A. observed: "Like Brooking J.A., I would reserve for decision in a future case, where the matter arises and we have the benefit of full argument, the question of duplicity in the context of perjury. When that case arises, his Honour's observations this morning should be the starting point for any analysis in this court."

The question of duplicity in the context of perjury does not seem to have been canvassed by MCCOC, perhaps on the basis that duplicity is a general rule of criminal law and is therefore not limited to perjury or administration of justice offences.

Witnesses' submissions in relation to the rule against duplicitous counts

Should the rule against duplicitous counts apply strictly to the law of perjury? The Criminal Bar Association and Benjamin Lindner took the view that it should whereas Victoria Legal Aid and the Director of Public Prosecutions supported a less strict application of this rule. Benjamin Lindner supports the continued application of the rule to perjury on the grounds that it is a fundamental and universal principle of fairness which should not be abrogated under any circumstances:

> […] The law of duplicity is a fundamental principle of fairness and should apply universally to criminal offences, notwithstanding the difficulties encountered by having to particularise verbal utterances or written statements made under oath/affirmation.[975]

The Criminal Bar Association agrees that the law lacks clarity but submits that the problem with not applying the rule against duplicitous counts is one of certainty. In its written submission the CBA states:

> Where lies on discrete topics or on separate occasions are alleged in a single count, the danger is that a jury might convict upon one lie only, producing potential uncertainty. Further, if the lies are of different levels of seriousness, an insolvable sentencing dilemma arises. […][976]

The CBA believes that prosecutorial discretion is the best guard to ensure that a coherent charge is laid, pointing out that:

> Although clarity in the abstract is desirable, the multiplicity of potential fact situations makes a discretionary approach attractive. There is no evidence that prosecutors are charging inappropriately at this time.[977]

Victoria Legal Aid, on the other hand, advocates that the approach expressed by Brooking JA in *R v Hoser*[978] be adopted in Victoria. Readers will recall that the passage referred to was as follows:

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[975] Benjamin Lindner, submission no. 8, p. 8.
[976] Criminal Bar Association, submission no. 6, p. 14.
[977] Ibid.

> It should be noted that the essence of perjury is that the offender has proved false to the oath which he has sworn rather than that he has made one or more false statements. Any false statement which he has made constitutes the evidence upon which the charge that he has betrayed his oath is based (or "assigned") and it is termed an assignment of perjury; however many assignments there may be on one oath which has been sworn there is only one perjury.[979]

The Director of Public Prosecutions informed the Inquiry that the approach suggested by Brooking JA in *R v Hoser* was already being implemented in practice:

> Despite technically being obiter dicta, the relevant observations by Brooking JA in *Hoser* have been applied in practice by the Crown when pleading perjury counts on presentments. The general experience has been that a series of individual falsehoods, if given together in the same proceeding and relating to the same general issue may be pleaded within the one count, and that the necessity to plead individual falsehoods separately arises only if there is some particular difficulty of proof or other issue affecting that falsehood, as distinct from the others given at the same time and in the same proceeding.
>
> The impracticality of the strict application of *Traino* may be demonstrated by the fact that in a lengthy proceeding, a witness might attest to dozens or even hundreds of individual alleged facts, whilst not believing those individual assertions to be true. However, any subsequent indictment averring dozens or hundreds of individual counts would be found to be oppressive.
>
> Accordingly it is our view that to the extent that any clarification is required, it should be clarified that one count of perjury may properly encompass a series of individual sworn falsehoods, given together in the same proceeding and relating to the same general issue.[980]

Committee's conclusion in relation to the rule against duplicitous counts

The Committee has decided not to recommend any amendment to the law in relation to duplicitous counts. The Committee agrees with Benjamin Lindner that the legislature should not abrogate or interfere with this long-standing common law principle of fairness which applies universally to all criminal offences, including perjury. In addition, the evidence the Committee received suggests that the rule against duplicitous counts is not resulting in incoherent charges being laid for perjury in practice. In particular, the Committee refers to the evidence of the Director of Public Prosecutions that the approach outlined by Brooking JA in *R v Hoser* is already

[978] *R v Hoser* [1998] 2 VR 535.
[979] Ibid. p. 544.
[980] Director of Public Prosecutions, submission no. 9, p. 17.

being implemented in Victoria due to the impracticality of a strict interpretation of the *Traino* decision.

Corroboration requirement

In Victoria and at common law a special rule of evidence applies in relation to the offence of perjury—the prosecution must lead independent evidence to support the charge:

> There is in relation to perjury an exceptional rule of evidence that where the prosecution is forced to rely on direct oral evidence in contradiction of the accused's statement, there should be an acquittal, unless the falsity of the accused's statement is proved by two witnesses or by one witness with corroboration. This exceptional rule is confined strictly to proof of the falsity of the statement. This rule applies where it may be said to be a case of oath against oath. It may not apply in a case where the prosecution can rely on the production of a record which proves itself shown to have been known to the accused or on documentary evidence springing from [the accused] himself.[981]

As this citation from the case of *R v Linehan*[982] (and quoted in full with approval in a recent Victorian Court of Appeal decision[983]) indicates, to convict a person of perjury there must be corroboration when there is "oath on oath." This means that it is not possible to convict someone of perjury if the only evidence against him or her is the evidence of one other person. Rather, in such cases there must be independent evidence proving perjury or the falsity of the statement must be proved by at least two witnesses. This is referred to as the corroboration requirement. The independent corroborative evidence must be evidence of some fact which implicates the accused and tends to confirm his or her guilt of the offence.[984] The rule of corroboration is perhaps best illustrated by means of a case study.

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[981] *R v Linehan* [1921] VLR 582. Cited in *R v Hoser* [1998] 2 VR 535. In *R v Hoser* it was noted that these principles remain relevant to the common law offence of perjury in Victoria. *R v Townley* (1986) 24 A Crim R 77 is referred to in support of this statement. *Love v R* (1983) 9 A Crim R 1 also cites the statement of Cussen J in Linehan. In Love it was held that the Trial Judge's direction had been adequate even though it was not given in the normal way, especially as greater explanation would not have assisted the appellant's case: p. 19 per Pidgeon J.

[982] *R v Linehan* [1921] VLR 582.

[983] *R v Hoser* [1998] 2 VR 535, p. 541.

[984] Freckelton, *Criminal Law Investigations and Procedure*, above note 28, para 1.9.200. In *Cuttone-Santoro v The Queen* (1982) 5 A Crim R 220 Wallace J found the Trial Judge's direction to be erroneous by departing "from the need to explain to the jury that what is required is independent evidence of some material fact which implicates the accused person and tends to confirm that he is

R v Hoser

The accused, Mr Hoser, was convicted in the Magistrates' Court for failing to comply with a traffic control signal; he drove through a red light. On appeal to the County Court Hoser gave evidence on oath that he had received a fax from Vic Roads which stated that the relevant traffic lights were malfunctioning at the time of the offence.

The prosecution argued that the letter was a doctored version of an earlier letter sent by Vic Roads which related to the malfunctioning of another set of traffic lights at a different location. Mr Hoser was subsequently convicted of perjury. On appeal one of the issues concerned corroborative evidence. The Trial Judge had directed the Jury that the following evidence corroborated the falsity of the Mr Hoser's statement:

- evidence from the Police that the lights were not malfunctioning;

- evidence from the letter itself; it had incorrect reference and telephone numbers.

Held: After citing the passage from *R v Linehan* above, it was held that the classes of evidence identified were capable of fulfilling the corroboration requirement.

Should there be at least two witnesses or documentary evidence to corroborate?

It is clear from the above analysis that the common law, which applies in Victoria and the ACT, requires that on a charge of perjury there are at least two witnesses to disprove a material statement sworn by the accused or independent (documentary) evidence to corroborate the falsity of the statement.

guilty of the offence…", p. 223 (but it was ultimately found that the directions by the Trial Judge were more in favour of the appellants than against their interests).

MCCOC recommendation

MCCOC recommended that "there should be no requirement of law for corroboration of a single witness on a charge of perjury but there should be a requirement for consent of the Director of Public Prosecutions."[985] This conclusion was reached on the basis that there were not sufficient reasons to justify a distinction between perjury and other serious offences. Why should perjury require corroboration where other offences do not? Instead, MCCOC took the view that the "special position of perjury in this regard"[986] would be more appropriately dealt with by requiring the consent of the Director of Public Prosecutions. In the Final Report it was noted that a number of stakeholders supported this view but others expressed reservations as to whether the consent of the DPP was necessary or even really a safeguard.[987]

Other jurisdictions

What is the position in other Australian jurisdictions? Queensland, Tasmania and the Northern Territory all provide that a person cannot be convicted of perjury (or of counselling or procuring the commission of perjury) upon the uncorroborated evidence of one witness.[988] In contrast, the South Australian Act contains a provision which specifically provides:

> It is not necessary for the conviction of a person for perjury or subornation of perjury that evidence of the perjury be corroborated.[989]

Western Australia used to require corroboration but this section was repealed in 1988 on the recommendation of the Murray Report in that State.[990] The reasons behind the repeal are set out in the next section of this Chapter. The Commonwealth and New South Wales Acts are silent on this issue.

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[985] MCCOC Discussion Paper, above note 5, p. 51.
[986] Ibid.
[987] MCCOC Report, above note 6, p. 59.
[988] *Criminal Code Act* 1899 (Qld), s. 125; *Criminal Code Act* 1924 (Tas), s. 96; *Criminal Code Act* (NT), s. 98. The Queensland Code provides: "A person cannot be convicted of committing perjury or of counselling or procuring the commission of perjury upon the uncorroborated testimony of 1 witness." The wording is identical in the Northern Territory Code. The Tasmanian Code provides: "No person shall be convicted of any crime under the provisions of section 94 or section 95 solely upon the evidence of one witness as to the falsity of any statement alleged to be false."
[989] *Criminal Law Consolidation Act* 1935 (SA) section 242(4).
[990] See MCCOC Discussion Paper, above note 5, p. 49.

The New Zealand *Crimes Act 1961,* the UK *Perjury Act 1911* and the *Criminal Code Canada* all specifically require corroboration.[991]

Views of other Law Reform Agencies

The Murray Report pointed out that this provision could operate artificially.[992] It acknowledged that the basis of the rule is to ensure that an accused is not convicted by the evidence of a single witness who may him or herself be lying but expressed the following view:

> However, the requirement for corroboration does not achieve that result. Perjury cases are usually proved either by ample independent evidence demonstrating the falsity of the witness's account on oath, or by evidence of admissions made by the accused out of Court to the effect that his former evidence was indeed a lie. In the latter case the requirement for corroboration is satisfied by the simple expedient of calling two police officers to testify as to those admissions, the one to corroborate the other. That satisfies the requirement of law, but it may leave the Court no nearer to determining where the truth of the matter lies and in no way assisted in that exercise.[993]

The UK Law Commission concluded that the corroboration requirement should be retained but found the traditional "oath against oath" justification to be unconvincing, because the same could be said of similar situations where no corroboration is required.[994] The Law Commission considered that the possibility that witnesses could be reluctant to give evidence if they could be convicted of perjury on the evidence of one other person to be of greater importance.[995] In this way, the requirement of corroboration encourages the giving of evidence. The Law Commission also noted that the corroboration requirement operates as a safeguard in those instances "where a principal witness against the person charged with perjury has a strong interest in

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[991] *Crimes Act* 1961 (NZ), s 112: "No one shall be convicted of perjury, or of any offence against section 110 or section 111 of this Act, or on the evidence of one witness only, unless the evidence of that witness is corroborated in some material particular by evidence implicating the accused." Criminal Code Canada, s. 133: "No person shall be convicted of an offence under section 132 on the evidence of only one witness unless the evidence of that witness is corroborated in a material particular by evidence that implicates the accused." Section 13 of the UK *Perjury Act* 1911 provides: "A person shall not be liable to be convicted of any offence against this Act, or of any offence declared by any other Act to perjury or subornation of perjury, solely upon the evidence of one witness as to the falsity of any statement alleged to be false."

[992] Murray Report, above note 53, p. 59; MCCOC Discussion Paper, above note 5, p. 49.

[993] MCCOC Discussion Paper, above note 5, p. 49 and Murray Report, above note 53, pp. 59-60.

[994] UK Law Commission, above note 38, para 2.62 and MCCOC Discussion Paper, above note 5, pp. 49-50.

[995] Ibid.

securing his conviction."[996] This could arise in cases where the principal witness has been convicted and imprisoned or lost a civil case as a result of the allegedly perjured evidence.[997]

The Gibbs Committee endorsed the comments of the UK Law Commission.[998] It acknowledged that it is anomalous to require corroboration for perjury where other equally serious offences do not require it and agreed that the traditional justification that, without such a requirement, there would be only "oath against oath" was unconvincing.[999] Nevertheless the Gibbs Committee concluded:

> However, the rule does afford a safeguard against an honest witness being exposed to a trial for perjury on the oath of a disgruntled party who, having been convicted or having lost a civil case because the evidence of the witness now accused of perjury has been accepted, has a strong interest to secure a conviction. The possibility of being exposed to prosecution in those circumstances might deter the honest witness from giving evidence.[1000]

The Committee invited submissions on the question of whether the requirement for corroboration of a single witness on a charge of perjury should be retained and, if not, whether an acceptable alternative would be that the consent of the Director of Public Prosecutions is required before a person can be charged with perjury (as recommended by MCCOC).

Witnesses' submissions in relation to the corroboration requirement

Mark Marien SC, Director of the Criminal Law Review Division of the New South Wales Attorney-General's Department expressed support for the common law rule of corroboration:

> The fact that a jury is able to simply believe one person beyond reasonable doubt and accept somebody's evidence over the word of another beyond reasonable doubt may be okay in relation to a particular offence which has nothing to do with perjury, but when we are actually talking about the offence of perjury I think as a safeguard the

[996] Ibid.
[997] Ibid.
[998] Gibbs Committee Report, above note 85, para 6.24. The Committee noted it regarded the reasons given by the Law Commission as convincing. MCCOC Discussion Paper, above note 5, p. 51.
[999] Ibid.
[1000] Gibbs Committee Report, above note 85, paragraph 6.24.

> requirement of corroboration is a sensible one. Sometimes the common law is sensible. It is an age-old principle of the common law.[1001]

This view was shared by Victorian witnesses. In fact, every witness to this Inquiry who commented on the issue of corroboration believed that this long-standing rule should be retained and thereby disagreed with MCCOC's conclusion that there are insufficient reasons to justify a distinction between perjury and other serious offences. Their opposition to any change arose out of the following considerations:

- no basis for altering this long-standing law has been demonstrated;[1002]
- the abolition of the requirement could open the door to many unmeritorious prosecutions and it should therefore be retained to ensure that only "provable" allegations are litigated;[1003]
- witnesses could be reluctant to give evidence if they could be convicted of perjury on the evidence of only one other person. Accordingly, the requirement encourages the giving of evidence and operates as a safeguard in instances where a principal witness against the person charged with perjury has a strong interest in securing his or her conviction[1004]

Victoria Legal Aid and Benjamin Lindner expressed reservations about the alternative recommendation by MCCOC.[1005] Lindner notes that requiring the consent of the DPP would be an unusual requirement:

> It is currently required for the approval of a conspiracy charge, and in other limited circumstances. It is unnecessary to burden the Director with the need to authorise prosecutions for perjury in my view.[1006]

The Director of Public Prosecutions supports the retention of the requirement for corroboration of a single witness in order to prove perjury, noting, however, that:

> If this view […] does not prevail, a requirement that the consent of the DPP be given may ensure that unmeritorious cases are not pursued, however it must be noted that

[1001] Mark Marien SC*, Minutes of Evidence*, 12 November 2003, p. 31.
[1002] Criminal Bar Association, submission no. 6, p. 14.
[1003] Benjamin Lindner, submission no. 8, p. 8. Lindner also notes: "I would be surprised if a charge of perjury would be laid unless there was some corroboration. It is an allegation that is easy to make but difficult to disprove. It is unusual for an offence to require corroboration, as a matter of law."
[1004] Summary of the UK Law Commission position, specifically supported by Victoria Legal Aid, submission no. 7, p. 9.
[1005] Victoria Legal Aid, submission no. 7, p. 9 and Benjamin Lindner, submission no. 8, p. 9.
[1006] Benjamin Lindner, submission no. 8, p. 9.

> the exercise of the Director's discretion to grand consent would be significantly influenced by the availability of credible and reliable evidence as to the knowing falsity of the material in question. Any power conferred on the Director to consent to such prosecutions would be exercised according to the same criteria which already apply to the prosecution of various other offences for which the Director's consent is required, including an assessment of the sufficiency of the available evidence to lead to the view that there is a reasonable prospect of conviction. In the absence of any corroboration of a single witness in a contested perjury matter, the Director may be compelled to the view that the insufficiency of evidence is such that there is no reasonable prospect of a safe conviction being sustained and decline consent on that basis.[1007]

Committee's conclusion in relation to the corroboration requirement

The Committee is persuaded by the unanimous support of Victorian witnesses for the corroboration requirement and therefore recommends the retention of this common law rule. The Committee is particularly concerned that abolition of the corroboration requirement could make witnesses reluctant to give evidence for fear of being charged with perjury based on the evidence of one other person.

Recommendation 25

That the common law rule of evidence requiring that evidence of perjury be corroborated be retained.

Contradictory Statements / admissions

What is the position when an accused contradicts a statement he or she made earlier? Is this sufficient to corroborate the falsity of one of the statements? The common law position as applicable in Victoria seems to be thus: contradictory statements are only evidence that one of the statements is untrue.[1008] They are not sufficient proof of

[1007] Director of Public Prosecutions, submission no. 9, p. 18.

[1008] See following case studies. *R v Willmot*, *ex parte Attorney-General* (Qld) [1987] 1 Qd R 53 held that the position is similar under the Queensland Criminal Code. In that case a question was referred to the Court of Appeal: "Where in a trial the Crown tenders proof that a witness gave evidence on oath admitting he told a lie on a prior occasion when he gave evidence on oath, then can that witness be convicted by proof of the relevant transcript of his evidence without evidence of corroboration?"

perjury. If, however, one of the statements amounts to a formal admission of the falsity of the first statement, then this will be sufficient corroborative evidence to convict.[1009]

R v Townley,[1010] a case of the Victorian Court of Criminal Appeal is an example of a contradictory statement which was held not to amount to corroborative evidence.

R v Townley

The applicant, Ian Townley, had signed a statutory declaration in support of an insurance claim. In a later conversation with police officers he made statements which could be seen as admissions that two of the items in his statutory declaration had not been stolen. The "admission" was reported in evidence. It should be noted that there was no signed statement nor recording or any note taken of the following conversation:

"Q: I have reason to believe that some of the items that you have reported to be as stolen in the burglary were not in fact stolen?

A: Yes, the Greeners [shotgun valued at over $1000].

Q: I have reason to believe that two Greener double barrel shotguns that you reported to me as stolen were not in fact stolen?

A: Right (or words to that effect).

Q: Well, why did you report those shotguns to me as stolen when in fact they weren't stolen?

Connolly J referred to several decisions including *R v Sumner* which it found was fairly close to the facts in this case. All three judges agreed that the answer to the question posed should be in the positive: "It is obvious why a person ought not to be convicted of perjury where it is a question of oath against oath; that is, one person's word against another's. But this is not such a case. Here the accused gave evidence on oath in the one trial on two separate occasions and gave contradictory answers. Then he admitted—and this in my view is the critical part—that on the former occasion he gave false evidence:" p. 57. However, note that, since this case, a new section 123A regarding contradictory statements has been inserted into the Queensland Criminal Code: see discussion below.

[1009] See *R v Sumner* [1935] VLR 197.

[1010] *R v Townley* [1986] 24 A Crim R 77.

A: Well it would seem obvious.

Q: Well did you report them as stolen because you were short of money at the time?

A: Yes, it was stupid (or words to that effect).

Q: Did you actually report it to the insurance company that those Greener shotguns were stolen?

A: Yes."

Held: These comments did not amount to an admission that the original declaration was false. The questions were a mixture between what Townley had said to the police and what he had said to the insurance company. The admission has to be clearly referable to the sworn declaration which is the subject of the perjury charge. Hence, the "statements by the applicant (were) in the category of contradictory statements and [did] not amount to an admission sufficient to dispense with the requirement of corroboration."[1011]

Townley's appeal was allowed and he was acquitted of the offence.

The case of *R v Sumner,*[1012] on the other hand, is a good illustration of where the accused made an admission sufficient to dispense with the requirement of corroboration.

R v Sumner

The accused, Ethel Sumner, who had been a witness in proceedings before a Police Magistrate in Victoria later admitted to a police officer in relation to a statement she had made: "I now realise that I have done wrong by telling a lie to Mr Bond, but at the

[1011] Ibid, p. 79.
[1012] *R v Sumner* (1935) VLR 197.

time I did not realize I was on oath." Mrs Sumner signed a statement to this effect in the presence of the police officer.

Held: The judge referred to the rule that it is not sufficient to establish a charge of perjury to show the accused had, on another occasion, made a statement which is contradictory to the statement in relation to which perjury is alleged.

His Honour acknowledged that these principles "ran close" to these facts but held that the case did not fall within them. He said:

"The distinction is this: in this particular case the accused person not only said, according to the evidence as it stands at present, something contradictory, but in terms admitted that the evidence given in the hearing before the Magistrate was untrue and gave a reason as to why the untrue statement was made. On this evidence there can be no difficulty in the jury's not only deciding, if they so please, that there are contradictory statements in the ordinary sense, but in coming to a conclusion which of the two statements they ought to believe. As I say, the principles to which I have been referred to do not apply to a case of this kind."[1013]

Sumner was found guilty of perjury.

Reform option for two statements irreconcilably in conflict

Should a jury be able to convict someone of perjury if he or she has made two statements which are irreconcilably in conflict so that it is obvious that one of them is false but not clear which one?

MCCOC recommendation

On this issue, MCCOC suggested that the following provision should apply:

> A person may be convicted of perjury if the trier of fact is satisfied beyond reasonable doubt that the person is guilty of perjury in respect of one of two sworn statements

[1013] Ibid, p. 199.

> that are irreconcilably in conflict, but is unable to determine which of those statements constitutes the offence. It is immaterial whether or not the two statements were made in the same proceedings.[1014]

Other jurisdictions

The New South Wales *Crimes Act 1900* specifically allows the jury to find the accused guilty of perjury or wilful swearing in cases where the accused has made two statements on oath and they are irreconcilably in conflict. Section 331 of the *Crimes Act 1900 (NSW)* provides as follows:

> If on the trial of one person for perjury or for an offence under section 330 (False statement on oath not amounting to perjury):
>
> (a) the jury is satisfied that the accused has made 2 statements on oath and one is irreconcilably in conflict with the other; and
>
> (b) the jury is satisfied that one of the statements was made by the accused knowing it was false or not believing it was true but the jury cannot say which statement was so made,
>
> the jury may make a special finding to that effect and find the accused guilty of perjury or of an offence under section 330, as appropriate, and the accused is liable to punishment accordingly.[1015]

The Queensland section 123A regarding contradictory statements was introduced in 1997 as part of a package of legislation to amend the Griffith Code.[1016] The new section was not included in MCCOC's Discussion Paper or Final Report but nor does the MCCOC Discussion Paper appear to have been the impetus for the section. Rather, the amendment seems to have been the result of a recent case which was recounted in the Second Reading Speech:[1017]

> For example, in a recent case of S, his de facto wife, O, was called to give evidence against him in reliance on her written statement given under oath to police and oral evidence given on oath at S's committal before the magistrate. At the trial, O became hostile and said under oath that she had made up allegations that he had sexually abused her children and S was acquitted. O, to whom the taking of an oath obviously

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[1014] s. 71.1(3) of the Draft Model Code.

[1015] MCCOC notes that no other Australian jurisdiction other than New South Wales has such a provision. However, in 1997 the Queensland Parliament introduced various amendments to perjury and like offences including the introduction of a new section 123A regarding contradictory statements.

[1016] *Criminal Law Amendment Act 1997 (Qld).*

[1017] Queensland, Parliamentary Debates, Legislative Assembly, 4 December 1996, p. 4870 (Hon. D.E. Beanland, Attorney-General and Minister for Justice).

> meant nothing, later admitted that she had lied at S's trial and was charged with perjury. These amendments would mean that a jury in a similar case could still convict for perjury if unable to say which of the statements given under oath was the lie when obviously one of them was a lie.[1018]

Other Law Reform Agencies

The UK Law Commission considered whether there should be a separate offence directed at self-contradictory witnesses. However, it ultimately recommended against this course, as did the Gibbs Committee.[1019] The Law Commission considered whether a separate offence (other than perjury) should be directed at the self-contradictory witness.[1020] The Commission rejected this option, relying on statements in an earlier report which had pointed out that if self-contradiction were an offence, witnesses could be deterred from correcting false statements which would "hinder rather than promote the interests of justice."[1021]

The Gibbs Committee reviewed the reasons given by the Law Commission and stated that it found them convincing.[1022] It also referred to an additional reason for not recommending an offence along the lines of section 331 of the *Crimes Act 1900 (NSW):*

> […] False evidence of a witness, which a provision such as section 331 might deter the witness from correcting, may have been given through mistake, misunderstanding, inadvertence or emotional stress.[1023]

Should it be an offence in Victoria to make two statements on oath which are irreconcilably in conflict as allowed by the provisions in the *Crimes Act 1900 (NSW)*

[1018] Ibid, p. 4871.
[1019] UK Law Commission, above note 38, para 2.57; Gibbs Committee Report, above note 85, para 6.24.
[1020] UK Law Commission, above note 38, para 2.59.
[1021] Ibid. The Commission stated: "A special provision dependent on the fact of contradiction would have to apply whether the false statement in question was the earlier or the later, and it may well be the later which is true. If self-contradiction were an offence, a witness who has given false evidence might, in consequence, be deterred from correcting it, which would hinder rather than promote the interests of justice. It could also not be ruled out that an overzealous police officer or prosecution solicitor might warn a prosecution witness who wished to modify his evidence of the risks of doing so; and this might result in injustice to the defence in a criminal trial." Another objection raised was the fact that a frequent cause of witnesses falsely retracting earlier evidence was a fear of retaliation by the associates of the accused. These passages are referred to in MCCOC Discussion Paper, above note 5, pp 43-44.
[1022] Gibbs Committee Report, above note 85, para 6.24.
[1023] Ibid.

or the Queensland Criminal Code? This question was posed in the Discussion Paper and elicited a range of responses.

Witnesses' submissions on a provision for two statements in irreconcilable conflict

This question attracted considerable attention from both Victorian and interstate stakeholders. Most Victorian witnesses opposed the introduction of a provision which allows defendants who have made two statements on oath which are in irreconcilable conflict to be convicted of perjury.

Victorian witnesses

The Criminal Bar Association submission states:

> The existence of irreconcilable statements is a matter capable of founding an inference, and may be powerful evidence of perjury in some cases. There is no demonstrated need for a further offence.[1024]

At the public hearings Peter Morrissey, who appeared on behalf of the CBA, elaborated on the problems with introducing such a provision. He pointed out that the mere fact that contradictory statements are made on oath does not mean one of them is a lie:

> […] It is safe to say that just because there are contradictory statements that does not necessarily mean that one of them was a lie. It may be that one of them was believed at the time but subsequently has been forgotten. It may be that one of them was said in error or in hope or perhaps making a certainty out of something that was not, you can put that into a lie as well. In other words asserting as positively true what you are not quite sure is positively true.[1025]

Benjamin Lindner opposes the introduction of a provision to allow perjury convictions for two statements in irreconcilable conflict on the grounds that two opposing statements do not necessarily evidence criminal intent:

[1024] Criminal Bar Association, submission no. 6, p. 14.

[1025] Peter Morrissey, *Minutes of Evidence*, 24 November 2003, p. 47. On the other hand, Mr Morrissey acknowledged that there may be cases of irreconcilable statements which do indicate that one of them must be a lie, but "in those circumstances our position is to favour the retention of another offence or the use of another offence evidence of which is these irreconcilable statements and the use of detail."

> That intention should not be inferred as a matter of course merely from the fact that two statements have been sworn […] which are irreconcilably in conflict.[1026]

Victoria Legal Aid also opposes such a provision for the reasons outlined by the UK Law Commission and the Gibbs Committee.[1027] Readers will recall that these law reform bodies took the view that if self-contradiction were an offence, witnesses might be deterred from correcting false statements which would "hinder rather than promote the interests of justice.[1028]

The Director of Public Prosecutions critically examined the above rationale of the Gibbs Committee for opposing the creation of an offence similar to that of section 331 in the *Crimes Act 1900 (NSW),* noting that a correct application of the law of perjury combined with appropriate use of prosecutorial discretion "should mean that the correction of genuine misunderstandings or innocent mistakes would not result in prosecution for perjury."[1029]

However, in cases of irreconcilable statements which are clearly not cases of genuine mistake or inadvertence, the DPP is not opposed to the creation of a perjury like offence:

> […] There is no reason in principle why liability for a perjury-like offence should not arise where the only difficulty is that it cannot be demonstrated which of the statements was in fact not believed to be true when deposed to. This issue will only arise where, as a matter of logic, one of the statements must be true; in cases where the statements are logically irreconcilable but it can be demonstrated that the deponent did not believe either or any to be true, then it would be appropriate to avert two or more counts of ordinary perjury.[1030]

After expressing support for the creation of an offence in the form recommended by MCCOC (subject to the discretions noted), the DPP noted the following formulation of a "contradictory statements" offence suggested in 1996 by the Victoria Police Prosecutions Division:

> Where a person makes contradictory statements on oath in such a manner that at least one of the statements must be false, it shall not be necessary for the prosecution to prove which of the statements is false. It shall be sufficient for the charge to

[1026] Benjamin Lindner, submission no. 8, p. 9.
[1027] Victoria Legal Aid, submission no. 7, p. 9.
[1028] UK Law Commission, above note 38, para 2.59.
[1029] Director of Public Prosecutions, submission no. 9, p. 18.
[1030] Ibid.

> nominate that either one or two or more statements made by a person on oath is false.[1031]

Interstate witnesses

Because New South Wales and Queensland both already have provisions of the kind under discussion in this section, witnesses from these States were able to provide the Committee with their views as to how the sections are operating in practice. For instance, the New South Wales Office of the Director of Public Prosecutions commented on the use of prosecutorial discretion to ensure that cases where there may be an innocent explanation for the discrepancy between statements are not prosecuted. Stephen Kavanagh, Acting Deputy Solicitor for Public Prosecutions (Legal), gave an example of a young woman who had been forced into marriage at an early age by an abusive husband. The DPP had deemed it not appropriate to prosecute her for perjury for contradictory statements she made on oath in the following circumstances:

> She gave evidence in some Local Court proceedings in support of an apprehended violence order application, and the proceedings were adjourned. When she came back on the following occasion she told the court that everything she had said previously was a lie; that in fact her husband had never beaten her up; and that she wanted to withdraw the proceedings. The magistrate dismissed the complaint against the husband and the papers were then referred to the office as to whether we should prosecute the woman for perjury.
>
> My recollection is that the police went and interviewed her and she did not wish to be interviewed. She was obviously in a difficult domestic situation. We did not prosecute that. The public interest is not served by prosecuting a person in those circumstances.

When asked about the Queensland provision Tony Glynn SC, who appeared before the Committee on behalf of the Bar Association of Queensland, answered:

> It works very well. It stops the ludicrous situation of a person swearing on one occasion and a different thing on another occasion and in the absence of evidence to show which was the lie it cannot be prosecuted. In my view that should not be an escape hatch. I thought that it was a very sensible and very workable amendment to the law.[1032]

[1031] Director of Public Prosecutions, submission no. 9, p. 18.
[1032] Tony Glynn SC, *Minutes of Evidence*, 13 November 2003, p. 91.

Michael Byrne QC (the former deputy Director of Public Prosecutions in Queensland) added that, in his view the provision did not discourage people from coming forward to correct mistakes due to the appropriate exercise of prosecutorial discretion.[1033]

The Queensland Director of Public Prosecutions, Leanne Clare, also commented on how the Queensland provision was working in practice. In response to the question as to whether a provision of this nature could have the effect of discouraging someone from correcting mistakes or comments she observed:

> That is one way of looking at it. But another way of looking at it is the need to deter people from committing perjury in the very first place. From the angle that you raise —that is allowing people to come back and correct matters themselves—from one perspective that could really be about shutting the gate after the horse has bolted […]. Where somebody lies the first time and comes back at the next proceeding and lies again and is ultimately prosecuted that would be an aggravating feature because they are compounding the perjury. Normally I think people tend to make admissions only after they have been caught out, so only after there is some other evidence.[1034]

Howard Posner, Senior Solicitor Crime with Legal Aid Queensland, was the only interstate witness to criticise this provision. He argued that this was another example of creating a provision to fill a perceived gap in the law in circumstances where it was not necessary:[1035]

> Again it is "right the every wrong" argument. One of the people we discussed it with yesterday is a former senior prosecutor who had actually been involved in one of the cases which led to the provision. In the end they did successfully prosecute because they got the person to finally admit which one was the lie, but they said, 'Isn't it interesting?' What would have happened if they had not admitted it"? Oh, there is a gap. Right, off we go, let's get the bricks and mortar, here is a gap, let's fill it,' so in comes this piece of legislation which to our knowledge have never, ever been used.[1036]

[1033] Michael Byrne QC, *Minutes of Evidence*, 13 November 2003, p. 91. Michael gave an example of this as follows: "We recently had an electoral inquiry [in Queensland] and I know at least one lawyer appeared and gave false evidence on one day and came back and recanted on the second day. No prosecution action was taken against her on the recommendation of the presiding member, but disciplinary action was brought. I think it comes down to how one exercises the discretion."

[1034] Leanne Clare, *Minutes of Evidence*, 13 November 2003, p. 63.

[1035] Howard Posner, *Minutes of Evidence*, 13 November 2003, p. 108. Posner seemed to base this view on the fact that, according to the available statistics, the offence had apparently never been used. However, it is submitted that this is a misunderstanding of the nature of the provision; it does not create a new offence itself, but rather is allows witnesses who have made contradictory statements on oath to be convicted of the offence of perjury.

[1036] Howard Posner, *Minutes of Evidence*, 13 November 2003, p. 108.

Committee's conclusion on a provision for two statements in irreconcilable conflict

The Committee has decided to support MCCOC's recommendation for a provision allowing perjury convictions for two statements which are irreconcilably in conflict. While the Committee acknowledges that this conclusion is not consistent with the views of the majority of Victorian stakeholders, the Committee believes that there are sufficient reasons to introduce such a provision, particularly given the desirability of achieving national consistency and in light of other recommendations which the Committee has made in this Report. The Committee also takes note of the fact that this kind of provision is operating effectively in other jurisdictions.

In relation to the argument that, if self-contradiction were an offence, witnesses might be deterred from correcting false statements, the Committee accepts the evidence of the Director of Public Prosecutions that an appropriate use of prosecutorial discretion would mean that the correction of genuine misunderstandings or innocent mistakes would not result in prosecution for perjury (whether or not a provision allowing perjury convictions for two statements in irreconcilable conflict is enacted). In any event, the Committee notes that the deterrence argument has less cogency when one considers that, under the current law, if a person contradicts (or "corrects") an earlier statement on oath by way of a sworn statement amounting to a formal admission of the falsity of the first statement (as in the case of *R v Sumner* referred to above) that person can be charged and convicted of perjury. In this way it can be seen that the law may already discourage deponents from formally correcting the record.

The Committee's resolve to support the introduction of a provision for contradictory statements is strengthened by the fact that most witnesses from New South Wales and Queensland, where such a provision currently operates, are satisfied with the way it is working in practice and do not believe that it discourages people from coming forward to correct mistakes due to the appropriate exercise of prosecutorial discretion.

Another reason to support the introduction of this provision lies in the Committee's decision to recommend that the statements which are the subject of perjury charges should be objectively false and that the corroboration requirement should be retained. It is conceivable that there may be cases, like the one which precipitated the introduction of section 123A in Queensland, where there is no corroborating evidence to show which statement is objectively false and yet it is clear that, on one of the occasions, the deponent must have, to use the vernacular for a moment, "blatantly

lied." Should such deponents be able to escape conviction for perjury? We think not. Accordingly, the Committee recommends the introduction of an appropriate provision along the lines of section 7.2.2(3) of the Model Criminal Code.

Recommendation 26

That a new provision be inserted in the Crimes Act 1958 (Vic) which provides that a jury may convict a person for the offence of perjury where they are satisfied beyond reasonable doubt that:

(a) the person made two sworn statements, one of which is irreconcilably in conflict with the other; and

(b) the person is guilty of perjury in respect of one of the sworn statements; but

(c) the jury is unable to determine which of those statements constitutes the offence.

That the provision specify that it is immaterial whether or not the two statements were made in the same proceedings.

Double jeopardy

Double jeopardy has been defined as:

> Placing an accused person in peril of being convicted of the same crime in respect of the same conduct on more than one occasion.[1037]

At common law there is a long standing rule against a person being placed in a position of double jeopardy.[1038]

The recent High Court case of *R v Carroll*[1039] examined the "particular issues which arise where double jeopardy is said to lie in a subsequent prosecution for perjury in

[1037] *Butterworths Concise Australian Legal Dictionary*, above note 11, p. 137.
[1038] Ibid.
[1039] *R v Carroll* (2002) 194 ALR 1.

respect of statements made by the accused in evidence in earlier criminal proceedings."[1040]

R v Carroll

In 1973 a baby was taken from her cot during the night and later found strangled to death in a near-by park. In 1985 a jury found Carroll guilty of the baby's murder. At his trial Carroll gave evidence on oath that he had not killed the baby. The Court of Criminal Appeal of Queensland later quashed the conviction and directed that he be acquitted on the basis that it was not open to a properly instructed jury to conclude guilt beyond reasonable doubt.

Fourteen years later, the use of new forensic procedures found new evidence implicating Carroll. His previous acquittal precluded another charge of murder being brought against him. The Director of Public Prosecutions decided to charge Carroll with perjury in relation to the evidence he had given at the original trial. At this trial Carroll was found guilty of perjury on the basis that his sworn evidence that he did not kill the baby was false. However, the Court of Appeal later granted a permanent stay of the proceedings, concluding that the verdict was unsafe and unsatisfactory as the trial was an abuse of process because it breached the double jeopardy rule.

The Crown appealed this decision to the High Court of Australia. The High Court dismissed the appeal and held that the Court of Appeal was correct in staying the trial for perjury as it was an abuse of process which sought to dispute Carroll's earlier acquittal on the charge of murder.

The *Carroll* case has been the subject of much media attention[1041] and in April 2003 the Commonwealth and State and Territory Attorneys-General (SCAG) met to

[1040] Ibid, p. 84 per Gaudron and Gummow JJ.
[1041] See, among others, 'Double Jeopardy – a vital safeguard,' 10 April 2003, www.abc.net.au; 'Federal laws hold key to Deidre Case,' *The Courier Mail*, 24 April 2003; 'Double Jeopardy Law Revision Debate, transcript, The World Today, 7 April 2003, www.abc.net.au; 'Double Bind,' Australian Story, 7 April 2003, www.abc.net.au.

consider the double jeopardy rule. Press reports indicate that Australian jurisdictions are divided over the issue and it was referred to MCCOC for further analysis.[1042] The UK Law Commission recently published a report dealing (inter alia) with double jeopardy.[1043]

In November 2003 MCCOC released a Discussion Paper entitled "Issue Estoppel, Double Jeopardy and Prosecution Appeals against Acquittals."[1044] That Discussion Paper specifically examines the issue of prosecution for an administration of justice offence connected to the original trial and called for submissions on this and related issues. The paper recommends that the laws on double jeopardy be changed so that a person could be prosecuted for an administration of justice offence such as perjury where that prosecution is connected to the original trial. Given that the double jeopardy rule was still being considered in detail by MCCOC when the Committee issued its Discussion Paper in October 2003, the Committee sought no submissions on this issue.

Subsequently, MCCOC met in February 2004 to discuss the submissions that had been made on the Discussion Paper. In March MCCOC released an interim report recommending that the model provisions from its Discussion Paper be implemented.[1045] At this stage MCCOC has indicated that it will not publish its final report on double jeopardy before July 2004 when the Standing Committee of Attorneys-General is expected to discuss the issue.

[1042] See press reports cited ibid and others such as 'Double Jeopardy Law on Agenda,' *Gold Coast Weekend Bulletin*, 12-13 April 2003.
[1043] The Commission recommended the retention of the rule but also the introduction of a limited extension to the effect that, "in murder cases only, the Court of Appeal should have power to quash an acquittal where there is reliable and compelling new evidence of guilt and a retrial would be in the interests of justice:" Law Reform—News from the Law Commission, 3 March 2001, p. 2.
[1044] Model Criminal Code Officers' Committee, Discussion Paper Model Criminal Code Chapter 2, 'Issue Estoppel, Double Jeopardy and Prosecution Appeals against Acquittals,' November 2003.
[1045] MCCOC Report, *Double Jeopardy*, March 2004. The paper also makes a number of recommendations on procedural and drafting issues but makes no change from its initial recommendation on double jeopardy in relation to perjury.

Sentencing

Maximum sentences

In Victoria the maximum sentence for perjury is 15 years' imprisonment [1046] whereas MCCOC has recommended that the maximum sentence for the offence should be 10 years. [1047] The maximum sentences in other Australian and overseas jurisdictions vary widely but Victoria appears to represent the "high watermark," apart from in the exceptional circumstances provided for in the Queensland, Western Australian and Northern Territory Codes noted below.

In Queensland, Western Australia and the Northern Territory the maximum sentence is 14 years.[1048] The Criminal Code Canada also provides for a maximum sentence of 14 years.[1049] However, the Queensland, Western Australian and Northern Territory Codes also provide that, to use the words of the Western Australian Code:

> if the offender commits the crime in order to procure the conviction of another person for a crime punishable with strict security life imprisonment, or with imprisonment for life, he is liable to imprisonment for life.[1050]

The maximum penalty in New South Wales is 10 years imprisonment[1051] but perjury with an intent to procure the conviction or acquittal of any person of a serious indictable offence attracts a maximum penalty of 14 years.[1052] In South Australia, the ACT, the UK and New Zealand the maximum prison sentence is 7 years[1053] and in the Commonwealth it is only 5 years. The New Zealand Act also provides that if perjury is committed to procure the conviction of a person for an offence for which the maximum punishment is at least 3 years' imprisonment, the maximum term for perjury may be for a term not exceeding 14 years.[1054]

[1046] *Crimes Act 1958 (Vic)*, s. 314.
[1047] MCCOC Discussion Paper, above note 5, p. 4. MCCOC did not give reasons for this recommendation.
[1048] *Criminal Code* 1899 (Qld), s. 124(1); *Criminal Code* 1913 (WA), s. 125; *Criminal Code Act* (NT), s. 97(1).
[1049] *Criminal Code* Canada, s. 132.
[1050] *Criminal Code* 1913 (WA), s. 125; *Criminal Code* 1899 (Qld), s. 124(2); *Criminal Code Act* (NT), s. 97(2).
[1051] *Crimes Act* 1900 (NSW), s. 327(1).
[1052] Ibid, s. 328.
[1053] *Criminal Law Consolidation Act* 1935 (SA), s. 242(1); *Crimes Act* 1900 (ACT), s. 167; *Perjury Act* 1911 (UK), s. 1(1); *Crimes Act* 1961 (NZ), s. 109(1).
[1054] *Crimes Act* 1961 (NZ), s. 109(2).

Case law on sentencing—an overview

The case law on sentencing in perjury cases indicates that it is regarded as a gravely serious offence.[1055] As one judge put it:

> The crime of perjury has always been very seriously regarded by those concerned with the administration of justice. The whole system by which accused persons are dealt with in our courts depends on witnesses speaking the truth. It is a gravely serious matter for any witness to tell an untruth on oath.[1056]

The seriousness of the offence appears to be compounded by the fact that the "victim" of the crime is the system of justice itself[1057] and that the crime is difficult to detect.[1058] Curial perjury (that is perjury in court proceedings) is regarded as more serious than non-curial perjury.[1059]

The cases also indicate that custodial sentences will normally be given.[1060] A recent Victorian Court of Appeal decision has made it clear that the seriousness of perjury was such that usually an immediate custodial sentence was justified:

> […][T]he giving of false sworn evidence in court is a very serious criminal offence. As the judge correctly put it, it can strike at the very foundation of the legal process.

[1055] Freckelton, *Criminal Law Investigations and Procedure*, above note 28, para 1.9.220.

[1056] Dunn (unreported CCA Victoria, 17 July 1979) per McIrnerney J, quoting with approval the sentencer's words. Young CJ in *R v Kellow* (unreported, Vic CCA, 17 August 1979) noted that: "the crime of perjury is a very serious one. The maximum penalty provided by law is fifteen years […] Where it is committed in curial proceedings it strikes at the very heart of the administration of justice." Both these cases are quoted in the *Victorian Sentencing Manual*, above note 47, para 26.402.

[1057] Russell LJ in *Shamji* (1989) 11 Cr App R (S) 587 put it thus: "[…] there is, it must always be remembered, in cases of this kind one victim of perjury. The victim is the course of justice and its proper administration. Justice inevitably suffers whatever the motive for the perjury and in whatever circumstances it is committed:" para 26.402.

[1058] *Simmonds* (1969) 53 Cr App R 488, p. 489 per Parker LCJ: "Many people do not realise that perjury is a very serious offence; justice could not be administered unless people spoke the truth on oath. Again it is very difficult to prove, and accordingly it must be understood that perjury, when proved, attracts a severe penalty." Quoted in the *Victorian Sentencing Manual*, above note 47, para 26.402. The case of *R v Schroen* [2001] VSCA 126, also points out that "it is not always easy or even possible to establish that perjury has been committed. Sometimes, unfortunately, the lie may not be exposed and the injustice which has been occasioned remains unrectified. No only can this have a serious effect upon those with a direct interest in the outcome of the particular matter, but it may also engender a reduction of confidence in the community in the reliability of court decisions generally. For these and a number of other good reasons, the crime of perjury, particularly when committed in a curial setting, is regarded very seriously indeed."

[1059] Freckelton, *Criminal Law Investigations and Procedure*, above note 28, para 1.9.220.

[1060] *Victorian Sentencing Manual*, above note 47, states that non-custodial sentences for perjury in Victoria are rare, although not unknown: para 26.408.

> It would be a wholly exceptional case where such an offence did not warrant an immediate custodial sentence.[1061]

The case of *R v Wacyk*[1062] indicates the "exceptional circumstances" in which the sentences may be suspended. In this case the Court wholly suspended the sentence on the basis of the personal circumstances of the appellant, including his age, his difficult childhood in a forced labour camp during the Second World War, his previous "virtually blameless life," his poor health and the psychological damage prison could cause him.[1063]

Victorian Higher Courts Sentencing Statistics on perjury

Perjury is one of the 50 offences which was the subject of more detailed analysis in the publication Victorian Higher Courts Sentencing Statistics: 1997/1998 – 2001/2002.[1064] The statistics reveal the number of perjury offences found proven and the type of sentence imposed. While the number of offences is perhaps too small to suggest overall trends, the figures seem to indicate that terms of immediate imprisonment are becoming rarer for this offence. For example, in 2001/02 the charge of perjury as a principal offence[1065] was found to be proven in seven cases. Yet the sentence was suspended in six of these cases and in the other case a community based order was made.[1066] In 2000/01 there were nine "principal proven offences" of

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[1061] *R v Patinyot* [2000] VSCA 55, 4/4/2000. This statement was approved and applied in *R v Schroen* [2001] VSCA 126. See Freckelton, *Criminal Law Investigations and Procedure*, above note 28, para 1.9.220. *c.f* the *Victorian Higher Court Sentencing Statistics*, above note 102 —see discussion below.

[1062] *R v Wacyk* (1996) 66 S.A.S.R 530.

[1063] Ibid, Perry J, with whom Millhouse J agreed, p. 536. Doyle CJ gave a dissenting judgment and would have given the appellant a short prison term, noting that "the fact that such a sentence is imposed even in a case like this is a warning to others that few indeed can expect such leniency." Despite this case, the *Victorian Sentencing Manual*, above note 47, notes that "judges imposing sentences for perjury tend not to give the same weight to personal factors which, if present in other cases, would predicate non-custodial sentences." In *Feldman* (1981) 3 Cr App R (S) 20 and *Hall* (1992) 4 Cr App R (S) 153 neither old age, ill health nor good character sufficed to move appellate courts to alter short immediate custodial sentences:" para 26.404.

[1064] *Victorian Higher Courts Sentencing Statistics*, above note 102. The 50 offences account for over 84% of the offences dealt with in Higher Courts in Victoria. Generally offences were included because they occur "frequently enough in the Higher Courts to provide meaningful sentencing statistics." However, a small number of less frequently occurring offences of particular policy interest were also included: Volume 2, p. 2, 'Using these statistics.'

[1065] Ibid, p. 3. The principal proven offence is defined as "the offence for which the defendant received the most severe penalty in the sentencing hierarchy under the *Sentencing Act 1991*(Vic). There is one principal proven offence per defendant."

[1066] Ibid, p. 205.

perjury and two sentences of imprisonment. In 1999/00 half of the perjury convictions as a principal offence resulted in a sentence of imprisonment.[1067] On the other hand, in the first two years of the survey (1997/98 and 1998/99) there were no sentences of imprisonment for the four principal offences proven and in the other the figure was one from eight.[1068]

Where defendants were sentenced to imprisonment, none of the terms of imprisonment[1069] in the period examined exceeded twelve months. In 1999/00 when there were four prison sentences handed down, the minimum sentence was three months and the average sentence was nine months.[1070]

In the Discussion Paper submissions were sought on whether the current maximum sentence in Victoria (15 years' imprisonment) is appropriate and, if not, what would be a more appropriate maximum. The Committee also sought submissions as to whether a similar provision to the ones in the Western Australian and Northern Territory Codes or in the New Zealand Act should be adopted.

Witnesses' submissions in relation to sentencing perjury

The Criminal Bar Association, the Director of Public Prosecutions and Benjamin Lindner all submitted to this Inquiry that the current 15 year maximum sentence for perjury is appropriate. Victoria Legal Aid disagreed arguing that the current maximum sentence is excessive. Those who commented on the issue agreed that there was no need to create an "aggravated class" of the offence. The Director of Public Prosecutions submitted that the current maximum penalty gave judges sufficient discretion to impose high jail terms in cases where perjury is committed in order to bring about the conviction of another person for an offence punishable by life imprisonment or similar.[1071] The DPP added:

[1067] Ibid. The number of principal proven offences in that year was 8 and the number of sentences of imprisonment was 4.
[1068] Ibid. In 1998/99 no prison sentences resulted from the 4 principal proven offences and in 1997/98 only one sentence of imprisonment was handed down from the 8 principal proven offences.
[1069] This is defined as the "maximum period of imprisonment imposed for an offence. This is sometimes referred to as the head sentence or maximum term for the offence." This term must be contrasted with the "total effective sentence" which is "the aggregate of all sentence components taking into account the court's directions about concurrent and cumulative sentences:" Ibid, p. 3.
[1070] Ibid, p. 206.
[1071] Director of Public Prosecutions, submission no. 9, p. 19.

> The generally low sentences in fact imposed for perjury in Victoria in recent years is in our view no justification for reducing the available maximum penalty.[1072]

In the DPP's view, subject to retaining the 15 year maximum penalty, a provision similar to section 125 of the Western Australian Code is not necessary and the relevant provision of the New Zealand *Crimes Act 1961* would not translate well to Victoria.[1073]

The Criminal Bar Association stated:

> The maximum sentence is appropriate. The Criminal Bar Association supports the continued freedom of sentencing judges to do justice according to the requirements of the case.[1074]

Benjamin Lindner quoted from a recent perjury case where the Court noted that:

> […] Going back to 1982, the highest sentence of imprisonment imposed for the offence before the abolition of remissions was two years and six months and, after abolition, 18 months.[1075]

Despite the low sentences imposed, Lindner agreed with the Director of Public Prosecutions that this "in itself is not a good reason to reduce the maximum,"[1076] and concluded that "the maximum of 15 years is ample in relation to the offence."[1077]

Victoria Legal Aid took a different view from the other Victorian witnesses, arguing that the current maximum penalty is excessive in the light of lower maximum penalties in other jurisdictions.[1078] VLA recommended that the sentence should be reduced to 10 years to reflect this fact and current sentence realities.[1079] VLA agreed with other Victorian witnesses that there is no need to introduce provisions of the type set out in the relevant sections of the Western Australian Criminal Code or the New Zealand *Crimes Act 1961*, arguing that "a sentencing judge can take into account any aggravating/mitigating factors in sentencing a person found guilty of perjury."[1080]

[1072] Ibid.
[1073] Ibid. The reason why the New Zealand provision would not translate well is because the maximum available penalty for all indictable offences exceeds three years' imprisonment.
[1074] Criminal Bar Association, submission no. 6, p. 15.
[1075] Benjamin Lindner, submission no. 8, p. 9.
[1076] Ibid.
[1077] Ibid.
[1078] Victoria Legal Aid, submission no. 7, p. 10.
[1079] Ibid.
[1080] Ibid.

Committee's conclusion in relation to sentencing for perjury

The Committee supports the retention of the current 15 year maximum penalty for perjury despite the fact that MCCOC recommended 10 years as the maximum. In reaching this conclusion the Committee has been influenced by the support of most Victorian stakeholders for the current maximum penalty and the desirability of making the maximum penalty for perjury the same as the Committee's recommended maximum penalty for attempting to pervert the course of justice. While in practice the penalties imposed for this offence fall well short of the 15 year maximum, the Committee agrees with witnesses that this should not be a reason in itself for reducing the maximum penalty. On the contrary, the Committee would be concerned that any reduction in the maximum penalty would further reduce the sentences imposed on perjurers in practice. Also, the Committee notes that the current 15 year maximum penalty in Victoria is near to the maximum penalty of 14 years in four other jurisdictions—Queensland, Western Australia, New South Wales and the Northern Territory.

Recommendation 27

That no change be made to the current maximum penalty of 15 years imprisonment for the offence of perjury.

Additional issues

Materiality

At common law it is a requirement that the false statement be material to the proceedings.[1081] However, this rule does not apply in Victoria due to the operation of section 315 of the *Crimes Act 1958*. That section deems all evidence to be material for the purposes of perjury.[1082]

[1081] See, for instance, *Mellifont v Attorney General(Qld)* [1991] 173 CLR 289 which discusses the materiality requirement under the Queensland Code but also notes the common law position. See Freckelton, *Criminal Law Investigations and Procedure*, above note 28, para 1.9.20.

[1082] Section 315 provides: "All evidence and proof whatsoever, whether given or made orally or by or in any affidavit examination declaration or deposition, shall be deemed and taken to be material with

MCCOC recommended a similar provision—that "the statement or interpretation relied on to support a charge of perjury need not be material in the proceeding."[1083] The Discussion Paper provides a useful summary of the arguments for and against retaining the materiality requirement:

> […] On [the] one hand, the view was put that a witness must tell the truth without any reservation even as to matters which he or she regards as immaterial. Often, it is not apparent until late in proceedings what matters are really material and there should be an incentive to witnesses to tell the truth at all times. The rule as to materiality involves technicalities that add needlessly to the Court's task. Immateriality can be taken into account on sentencing. The contrary view was that the requirement as to materiality was 'a safety valve' ameliorating what would otherwise be the harsh operation of the law of perjury; it enables the jury to acquit in cases where it had concluded that a falsehood told by the defendant had not been as to something that really mattered in the proceedings.[1084]

Three out of the four Code States impose the requirement that the evidence to support a charge of perjury must be material in the proceedings.[1085] Section 123(1) of the Queensland Code provides that false testimony must be "material to any question then depending in that proceeding, or intended to be raised in that proceeding." The identical phrase appears in the Codes of Western Australia and the Northern Territory.[1086] The requirement of materiality also applies in the Commonwealth, New South Wales and South Australian statutes[1087] and in the ACT by virtue of the common law.[1088] The Tasmanian Act is silent on the issue of materiality and it is unclear as to whether the requirement applies.[1089] The UK *Perjury Act 1911* provides

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respect to the liability of any person to be proceeded against and punished for perjury or subornation of perjury." See also Freckelton, *Criminal Law Investigations and Procedure*, above note 28, para 1.9.20. See *R v Giannerelli* (1983) 154 CLR 212 where Gibbs CJ referred to the distinction between perjury arising under the *Crimes Act 1958* and perjury under the *Royal Commissions Act*— in the former case materiality need not be proved whereas pursuant to the latter it is a requirement: p. 217.

[1083] MCCOC Discussion Paper, above note 5, p. 35.

[1084] Ibid. Submissions to MCCOC on this point were fairly evenly divided: see MCCOC Report, above note 6, p. 39.

[1085] See MCCOC Report, above note 6, p. 37.

[1086] *Criminal Code* 1913 (WA), s.124; *Criminal Code Act* (NT), s. 96.

[1087] *Crimes Act* 1914 (Cth), s. 35(1) *Crimes Act* 1900 (NSW), s. 327(1); *Criminal Law Consolidation Act* 1935 (SA), s. 242(5)(b).

[1088] MCCOC Report, above note 6, p. 37. Note that MCCOC notes that the requirement applies in Victoria too—however, for the sake of clarity, we have omitted that reference here. While the common law applies in Victoria and therefore the requirement of materiality also technically applies, that requirement has effectively been neutered by section 315 of the *Crimes Act* 1958 which deems all evidence to be "material" for the purposes of perjury.

[1089] MCCOC names Tasmania as a possible exception to its general proposition that materiality is a requirement in all Australian jurisdictions: MCCOC Report, above note 6, p. 37.

that the statement must be "material in that proceeding"[1090] but there is no reference to materiality in the New Zealand *Crimes Act 1961*.[1091]

Other Law Reform Agencies

In terms of law reform initiatives, the draft Bill prepared by the Gibbs Committee provided that materiality should be a requirement.[1092] Similarly, the UK Law Commission expressed the view that materiality should be retained.[1093] The Law Commission argued that, while it could be argued that witnesses should tell the truth as to all matters including those which are embarrassing or immaterial, it gave more weight to the countervailing factors. As the Law Commission put it:

> Material in this context means in essence material to the outcome of proceedings. If as a result of vanity a person understates his or her age in giving evidence, in many instances this would not in itself be material to the administration of justice. Again, if a witness denies in cross-examination as to credit convictions for offences occurring many years before, this may not be sufficient to show that his other evidence on oath ought not to be believed and may therefore be immaterial to the issue on which he is being examined when he makes the denial. The concept of materiality provides a means of excluding statements in these circumstances from the ambit of perjury.[1094]

Should there be a requirement that the false statement must be material to the proceedings? More specifically, should the current section 315 (which deems all evidence to be material with respect to perjury) be repealed (a return to the common law position) or alternatively should there be a statutory requirement that the false statement or interpretation relied on to support a perjury charge must be material in the proceeding? These questions from the Discussion Paper elicited a range of responses from stakeholders.

[1090] Section 1.
[1091] There is no reference to materiality in section 108 which defines perjury; nor is there any deeming provision as in Victoria.
[1092] Gibbs Committee Report, above note 85, subsection 34(7). See MCCOC Report, above note 6, p. 37.
[1093] UK Law Commission, above note 38, paragraph 2.51 and see ibid.
[1094] Ibid.

Witnesses' submissions on materiality

Victorian witnesses

Victoria Legal Aid and the Criminal Bar Association supported the re-introduction of the common law materiality requirement, long since "neutered" by the deeming provision in section 315. Victoria Legal Aid supported the materiality requirement on the grounds that "this approach will avoid the possibility of prosecution of witnesses who give false evidence on a trivial matter, which has little or no bearing on the proceedings."[1095]

The Criminal Bar Association agreed that "the breadth of section 315 creates a danger of oppressive prosecution" although it added that it was not aware of any such oppressive prosecutions. [1096] At the public hearings, Peter Morrissey, who appeared on behalf of the CBA, elaborated on this response, stating that in the abstract, oppressive prosecutions could be brought in relation to lies "about something that absolutely did not matter for reasons of great personal shame or embarrassment or for whatever reason […]"[1097] He gave the example of sexual offence victims who do not want to reveal particular details of something that happened to them during their assault.[1098]

Benjamin Lindner's suggested formulation of section 314 retains the deeming provision currently in section 315. However, Lindner does not elaborate on the reasons for retaining this. [1099]

In contrast, the Director of Public Prosecutions supports the present Victorian position, arguing that:

> The operation of that provision [section 315] is sufficiently tempered by the proper exercise of the prosecutorial discretion, pursuant to which a prosecution for perjury would not be instituted in relation to false evidence about a matter which was not material to the issues in the case and which was clearly irrelevant and quite incapable of relevantly affecting the decision-making processes of the tribunal.[1100]

[1095] Victoria Legal Aid, submission no. 7, p. 10.
[1096] Criminal Bar Association, submission no. 6, p. 15.
[1097] Peter Morrissey, *Minutes of Evidence*, 24 November 2003, p. 48.
[1098] Ibid.
[1099] Benjamin Lindner, submission no. 8, p. 7and p. 10.
[1100] Director of Public Prosecutions, submission no. 9, p. 20.

The DPP's submission goes on to point out that the present Victorian law recognises that there may be instances of perjury in relation to a matter which is not technically material but which is nevertheless substantial or significant (although not to the issues in the particular case).[1101]

Interstate witnesses

Interstate witnesses generally supported the requirement that the knowingly false evidence must be material to the proceedings in question. Mark Marien SC, who appeared on behalf of the New South Wales Attorney-General's Department, informed the Committee that there are problems with a deeming provision such as that which exists in Victoria.[1102] He acknowledged that prosecutorial discretion could operate as a safeguard, but concluded that materiality is not that difficult a concept and that "generally it is something you can recognise pretty easily, whether something matters in the case or not."[1103] Representatives of the Bar Association of Queensland also supported the retention of the materiality requirement.[1104]

Leanne Clare, Queensland Director of Public Prosecutions, submitted that prosecutorial discretion probably operated in a similar way to the materiality requirement in other jurisdictions, noting that "that would probably amount to the very same thing [as the materiality requirement] in the end in a case like this."[1105]

Committee's conclusions on materiality

Noting that Victorian witnesses are evenly split on this question, the Committee has decided to follow MCCOC's recommendation that there should be no materiality requirement. Effectively this means retaining the status quo in Victoria. The Committee agrees with the arguments advanced by MCCOC, namely that:

- there should be an incentive for witnesses to tell the truth at all times, particularly as it may not be apparent until late in a proceeding what is really material and what is not;

[1101] Ibid.
[1102] Mark Marien SC, *Minutes of Evidence*, 13 November 2003, p. 31.
[1103] Ibid.
[1104] Michael Byrne QC, Ralph Devlin, *Minutes of Evidence*, 13 November 2003, p. 91.
[1105] Leanne Clare, *Minutes of Evidence*, 13 November 2003, p. 68.

- proving materiality can be technical, making an already difficult to prove offence even more difficult to establish;
- the relative immateriality of a statement can be taken into account in sentencing.

The Committee's position on the issue of materiality is also strengthened by the fact that there is effectively no materiality requirement in Victoria currently (in that all evidence is deemed to be material) and yet there is no evidence to suggest that oppressive prosecutions have been the result. As a corollary of this, the Committee accepts the evidence of the Director of Public Prosecutions that the operation of section 315 is tempered by the proper exercise of prosecutorial discretion whereby prosecutions are not instituted in relation to evidence given about matters which are peripheral to the proceedings and incapable of relevantly affecting the decision of the Court.

In terms of the actual wording of the provision, the Committee believes that the current deeming provision (section 315) should be re-drafted, using the wording from the relevant provision in the Model Code. While the Committee is recommending that materiality should not be an element of perjury, the Committee considers that the current deeming provision is confusing as it does not specifically abrogate the common law requirement of materiality but rather renders it superfluous. Moreover, it appears to assume prior knowledge of the common law requirement of materiality. Such drafting is not consistent with the Committee's aim to enhance the transparency and clarity of the law in this area. Accordingly the Committee recommends that, the current wording of section 315 should be replaced with the wording in section 7.2.2 of the Model Criminal Code. Section 7.2.2 (1) (a) provides that for the purposes of the offence of perjury it is immaterial "whether or not the sworn statement concerned a matter material to the legal proceedings".

Recommendation 28

That the offence of perjury in section 315 of the Crimes Act 1958 (Vic) be amended to provide that it is immaterial whether or not the sworn statement concerned a matter material to the legal proceedings.

Is the question of materiality for the Court or for the Jury?

There are a number of related questions posed in the MCCOC Discussion Paper. The first is: should the question of whether the evidence is material be decided by the Court or by a jury?[1106] New South Wales is the only Australian jurisdiction to address this issue, providing that the question of materiality is a question of law and therefore for the Court to decide.[1107] The UK *Perjury Act 1911* contains a similar provision.[1108] The common law position on this question fluctuates.[1109] MCCOC made no recommendation on this issue but expresses the view that, if the materiality requirement were retained, it should be a question of fact for the jury on the basis that if it were retained it would be "to exclude cases where the falsehood was as to a matter that could reasonably be regarded as a triviality"[1110] and would therefore more appropriately be a question of fact.[1111]

Should materiality be decided by the judge or a jury?

As we have discussed, in Victoria, the current provision deems *all* evidence to be material, so this is not an issue that currently has to be decided by either the judge or the jury. As the Committee has recommended no change on this issue (apart from the drafting changes outlined above) it is unnecessary for us to consider this question.

Constitution and jurisdiction of court

Another question canvassed by MCCOC is whether the court or body before which the false evidence was given must have had jurisdiction[1112] to deal with the particular

[1106] See MCCOC Discussion Paper, above note 5, p. 35.
[1107] *Crimes Act* 1900 (NSW), s. 327(4).
[1108] *Perjury Act* 1911 (UK), s. 1(6): "The question whether a statement on which perjury was assigned was material is a question of law to be determined by the court of trial."
[1109] The Discussion Paper refers to the comment of Bray CJ in *Queen v Davies*: "Opinion has fluctuated from time to time as to whether, on a charge of perjury, the materiality of the statement assigned to perjury to the proceedings in which it was made is a question for the judge or a question for the jury:" (1974) 7 S.A.S.R 375 at p. 376, cited in MCCOC Discussion Paper, above note 5, at p. 35.
[1110] Ibid, p. 37.
[1111] Ibid.
[1112] Jurisdiction means "the scope of the court's power to examine and determine the facts, interpret and apply the law, make orders and declare judgment. Jurisdiction may be limited by geographic area,

proceeding and must have been properly constituted.[1113] It should be noted that the question of *constitution* is different from *jurisdiction*[1114] and the two issues will be dealt with separately.

Jurisdiction of the Court

'Jurisdiction' means the authority which a court has to adjudicate on the matters litigated before it.[1115] The jurisdiction of a court is generally found in the statute creating it or in the powers and procedures necessary to carry out its statutory jurisdiction.[1116] For example, a County Court judge does not have jurisdiction to conduct a murder trial as the relevant statute does not give the judge that jurisdiction.[1117] Also, subject to statutory provisions, a court has jurisdiction only over offences committed within the jurisdiction.[1118] So, a judge in Victoria, exercising state jurisdiction, generally does not have jurisdiction in relation to most offences that take place outside Victoria.[1119]

In Victoria it would appear to be the case that perjury cannot be committed where the court or tribunal lacked jurisdiction.[1120] However on this issue, MCCOC recommended that the question of whether or not a court or tribunal had jurisdiction should not be material to a charge of perjury. [1121]

MCCOC acknowledged that different views can be taken on this question but attached weight to the fact that the issue has been recognised as material by the common law and the Australian Codes. However given MCCOC's intention to apply perjury to

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the type of parties who appear, the type of relief that can be sought and the point to be decided […]:" *Butterworths Concise Australian Legal Dictionary*, above note 11, p. 251.

[1113] Ibid – this is the heading of 71.2(1)(c).

[1114] MCCOC Discussion Paper, above note 5, p. 39.

[1115] C R Williams et al, Criminal Law in *Halsbury's Laws of Australia*, [125-9].

[1116] Ibid, [130-13095]

[1117] See *County Court Act* 1958 (Vic), s.36A(1).

[1118] Ibid.

[1119] See exceptions: *Crimes Act* (1958) Vic, ss.9, 80A.

[1120] *R v Leoni* (1892) 18 VLR 469. It is presumed that the common law position applies, however in MCCOC Discussion Paper, above note 5, MCCOC notes that Archbold "suggests a contrary position under present English law…", p. 39. The UK Law Commission also refers to the difference in view that exists in English law: UK Law Commission, above note 38, para 2.48. The Gibbs Committee reviews the law in this area, noting that "in England the text writers have expressed conflicting views […]:" Gibbs Committee Report, above note 85, para 6.14.

[1121] MCCOC Discussion Paper, above note 5; p.41.

evidence taken before persons who were not courts and whose jurisdiction might be narrowly defined, MCCOC concluded that "there is a real possibility that such a person might act in excess of jurisdiction."[1122] According to MCCOC: "the substance of the offence is the deliberate telling of lies in a proceeding; whether or not the tribunal was properly constituted or had jurisdiction, should not be an element of the offence".[1123] It took the view that if a witness believes that the tribunal is not properly constituted or lacks jurisdiction the appropriate remedy is to object to the proceedings.

At common law perjury could not be committed where the court or tribunal lacked jurisdiction.[1124] This also appears to be the position in the Code States.[1125]

The UK Law Commission referred to the differing views on this question under English law but recommended that, whatever conclusion is reached, "in new legislation it should be a defence to prove that the proceedings in which perjury was alleged to have been committed were a nullity."[1126] The Gibbs Committee noted that all submissions made to it agreed that the offence of perjury should not be made out if the court or other tribunal lacked jurisdiction and concluded that a conviction for perjury would be inappropriate where a complete lack of jurisdiction vitiates the proceedings.[1127]

Witnesses' submissions on the relevance of jurisdiction of the court or tribunal

The Director of Public Prosecutions and Benjamin Lindner expressly agreed with MCCOC that the jurisdiction of the court should be irrelevant.[1128] The Director of Public Prosecutions supports MCCOC's position on the basis that it stresses the importance of the witness's subjective beliefs as to the falsity of the evidence and the competence and / or jurisdiction of the tribunal, submitting that:

> Where the deponent believes or assumes the tribunal to be acting validly and swears on oath to material which he or she does not believe to be true, criminal liability should arise. The rationale for this approach is similar to that which justifies liability arising for this offence despite the objective truth of the proposition which the

[1122] MCOCC Discussion Paper, above note 5, p. 39.
[1123] Ibid.
[1124] But see above note 1146.
[1125] Ibid. MCCOC cites *R v Smith* [1908] St.R.Q. 83 in support of this proposition.
[1126] UK Law Commission, above note 38, para 2.48.
[1127] Gibbs Committee Report, above note 85, para 6.14.
[1128] Benjamin Lindner, submission no. 8, p. 10; Director of Public Prosecutions, submission no. 9, p. 20.

> deponent, subjectively does not believe to be true. Again, the fundamental policy reasons for the existence of the offence in the first place indicate that the technical invalidity of the tribunal should be irrelevant.[1129]

The Criminal Bar Association disagrees with this view, submitting that:

> […] Only perjury committed before a competent court exercising lawful jurisdiction is perjury for the purposes of the criminal law. In other cases, a charge of attempted perjury might be appropriate.[1130]

However Victoria Legal Aid favours the approach of the Gibbs' Committee, namely that "the offence of perjury should not be made out if the court or tribunal lacked jurisdiction."[1131]

Committee's conclusions on the relevance of jurisdiction of the Court or tribunal

The Committee is not persuaded that a change on this issue is necessary. Instead, the Committee has decided to recommend the approach taken by the Gibbs Committee and supported by Victoria Legal Aid that the offence of perjury should not be made out if the court or tribunal lacked jurisdiction. In particular, the Committee agrees with the reasons given by the Gibbs' Committee that a complete lack of jurisdiction so vitiates the proceedings that a conviction for perjury would be inappropriate. Also the Committee notes that this position is consistent with the Code States.

Recommendation 29

That the offence of perjury in the Crimes Act 1958 (Vic) be amended to provide that the court, body or person dealing with the legal proceedings must have jurisdiction.

[1129] Director of Public Prosecutions, submission no. 9, p. 20.
[1130] Criminal Bar Association, submission no. 6, p. 16.
[1131] Ibid.

Should the court have to be "properly constituted?"

An associated issue examined by MCCOC is whether the offence of perjury should apply where a person gives false evidence to a court or tribunal but it is later established that the court or tribunal had not been properly constituted.[1132] Various acts and regulations specify how a court or tribunal is required to be constituted. For instance the *Supreme Court Act 1986 (Vic)* provides that three or more Judges of Appeal generally constitute the Court of Appeal. [1133] Another example is in relation to the number of jurors needed to properly constitute the jury. In Victoria a criminal trial cannot continue with less than 10 qualified jurors. [1134]

The position in Victoria as to whether, if a court or tribunal was not properly constituted, a person can be prosecuted for perjury is unclear. The *Crimes Act 1958 (Vic)* is silent on this point, however, at common law, one view is that if the court is not properly constituted it could not administer the oath and its proceedings would therefore not constitute judicial proceedings. [1135]

MCCOC recommended that the requirement that the court or tribunal be properly constituted should not be an element of the offence. [1136] It reasoned that it was not a substantive issue in the offence. [1137] The issue of substance was, according to MCCOC, the "deliberate telling of lies". [1138]

This is the position in the Code States. In five Australian jurisdictions it is immaterial whether or not the court or tribunal is properly constituted. For example section 123(5) of the *Queensland Code* provides:

> It is immaterial whether the court or tribunal is properly constituted, or is held in the proper place, or not, if it actually acts as a court or tribunal in the proceeding in which the testimony is given.

The wording of the Western Australian[1139] and Northern Territory[1140] provisions is identical and the correlating provision in Tasmania[1141] is substantially identical. The

[1132] MCCOC Discussion Paper, above note 5, p 39.
[1133] *Supreme Court Act 1986 (Vic),* s.11(1).
[1134] *Juries Act 2000 (Vic),* s. 44(3).
[1135] UK Law Commission, above note 38, para 2.48.
[1136] MCCOC Discussion Paper, above note 5, p. 39.
[1137] Ibid.
[1138] Ibid.
[1139] *Criminal Code 1913 (WA)*, s. 124.
[1140] *Criminal Code Act (NT)* s. 96(5).
[1141] *Criminal Code Act*, *1924 (Tas)*s. 94(5).

Commonwealth legislation is of similar effect but the wording of the relevant section is different.[1142] The other Australian jurisdictions, (including Victoria), do not have equivalent provisions.

The Gibbs Committee took the view that a defect such as that the Court or tribunal was not properly constituted or not held in the proper place should be immaterial.[1143]

Witnesses' submissions on the relevance of a "properly constituted" court

Three of the four witnesses who commented on this issue agreed with the MCCOC recommendation that the constitution of the court should be immaterial [1144] while the Criminal Bar Association submitted that in these kinds of cases a charge of attempted perjury might be more appropriate. [1145]

Committee's conclusions on the relevance of a "properly constituted" court or tribunal

The Committee supports the MCCOC recommendation that the constitution of the court should be immaterial. Unlike cases where the complete lack of jurisdiction renders the proceedings a nullity, the Committee considers that a different conclusion is justified in cases where there has only been some minor technical issue which should not invalidate the proceedings. The Committee takes note of the fact that in five Australian jurisdictions it is immaterial that the court is not properly constituted and that this position is supported by the majority of Victorian witnesses. In particular, the Committees agree with the reasons given by the Director of Public Prosecutions for this approach, namely that where a witness assumes a tribunal to be properly constituted, criminal liability should arise.

[1142] *Crimes Act 1914 (Cth)*, s. 35(2).
[1143] Ibid.
[1144] Victoria Legal Aid, submission no 7, p. 11. Director of Public Prosecutions, submission no. 9, p.20. Benjamin Lindner, submission no. 8, p. 10.
[1145] Criminal Bar Association, submission no. 6, p. 16.

Recommendation 30

That the offence of perjury in the Crimes Act 1958 (Vic) be amended to provide that, it is immaterial whether or not the court, body or person dealing with the legal proceedings was properly constituted or was sitting in the proper place.

Application to false statements made by a person lawfully sworn as an interpreter

In Victoria there is currently no provision in the *Crimes Act 1958 (Vic)* which specifically provides that perjury applies to lawfully sworn interpreters. However, it is generally presumed that an interpreter could be charged with the general offence of perjury where the elements of the offence were established.

On this issue MCCOC recommended that in the interests of justice:

> Perjury should apply to sworn statements[1146] by an interpreter giving an interpretation that the interpreter believes to be false or misleading or that is false or misleading and being reckless as to it being false or misleading.[1147]

MCCOC noted that interpreters may provide interpretations which are literally correct but nevertheless misleading and took the view that the interests of justice warrant a separate offence for interpreters.[1148] MCCOC distinguished interpreters from ordinary witnesses who give misleading evidence stating:

> The interpreter is ordinarily the only person in the court room who knows what the witness meant and the court, including opposing counsel, must rely on that interpretation. In the case of an ordinary witness giving misleading evidence, opposing counsel will have the opportunity in cross-examination to bring out the misleading nature of the evidence.[1149]

South Australia and Tasmania are the only Australian jurisdictions which specifically provide that perjury can apply to lawfully sworn interpreters.[1150] However, this does

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[1146] Ibid. MCCOC provided that perjury "should not be limited to interpretations of sworn statements because an interpreter may be called on to interpret, for example, a letter which, while admitted in evidence, has not been verified on oath or affirmation."
[1147] Ibid.
[1148] MCCOC Discussion Paper, above note 5, p. 31.
[1149] Ibid.
[1150] Section 242(5) of the *Criminal Law Consolidation Act 1935 (SA)* provides that "statement" includes an interpretation by an interpreter. *Criminal Code Act 1924 (Tas)*, s. 94(1): "Any person

not mean that the more general formulations in other jurisdictions do not apply to interpreters.[1151] The UK *Perjury Act* 1911 also specifically applies to interpreters.[1152]

The UK Law Commission recommended that the potential liability of interpreters should be more clearly defined.[1153] According to the Commission the key element for liability should be conduct which deliberately misleads the court, not just whether the interpretation was literal because in certain cases a literal translation will be misleading.[1154]

The submissions made to the Gibbs Committee supported this recommendation and that Committee concluded:

> The Review Committee is not aware that the need for such a provision has yet manifested itself in Australia, but considers that since interpreters play a role of great importance in proceedings before courts and tribunals now that Australia is a society many of whose members do not speak English, or do not speak it fluently, some such provision ought to be made. The Review Committee accordingly recommends that the proposed consolidating law should contain provisions to the effect that an interpreter sworn in a judicial proceeding who intentionally or recklessly gives a misleading interpretation should be guilty of the offence of perjury.[1155]

Witnesses' submissions in relation to the specific application of perjury to interpreters

On this issue, the Director of Public Prosecutions submitted that:

> Subject to the acknowledged difficulties which will arise in relation to the sufficiency of evidence of a subjective lack of belief on the part of the interpreter, we see no reason in principle why liability for perjury should not apply to interpreters in appropriate circumstances.[1156]

Victoria Legal Aid and Benjamin Lindner also agreed that the offence of perjury should specifically apply to interpreters expressly agreeing with MCCOC on this

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lawfully sworn as a witness or an interpreter in a judicial proceeding who wilfully makes a statement which he knows to be false or does not believe to be true, is guilty of a crime."

[1151] MCCOC Discussion Paper, above note 5, p. 29.

[1152] *Perjury Act 1911 (UK)*, s.1(1), "If any person lawfully sworn as a witness or as an interpreter in a judicial proceeding […]."

[1153] UK Law Commission, above note 38, para 2.84.

[1154] Ibid. This recommendation has not been adopted in the UK.

[1155] Gibbs Committee Report, above note 85, para 6.25, cited in MCCOC Discussion Paper, above note 5, p. 31.

[1156] Director of Public Prosecutions, submission no. 9, p. 21.

issue.[1157] At the public hearings Victor Stojcevski elaborated on the reasons for taking this position, pointing out that linguistically and culturally diverse communities are increasingly becoming part of the legal system and their effective engagement in the legal system relies heavily on the role of interpreters. In Mr Stojcevski view, it is worth explicitly including interpreters to suggest that they are subject to the laws of perjury.[1158]

The Criminal Bar Association disagrees, stating that:

> The interpreter's oath ("… I will well and truly interpret …") exposes the interpreter to the penalties of perjury where she interprets falsely or offers interpretation the accuracy of which she does not believe. Most practitioners would regard this oath as an undertaking by the interpreter to do her best.
>
> However, that "lack of belief" is problematic where fast-talking or difficult witnesses fall to be interpreted in pressure situations. As mentioned above, the oath must make plain to the interpreter that criminal sanctions apply.[1159]

Interstate witnesses were also split on this issue. In a response which echoes the comments of Victor Stojcevski of Victoria Legal Aid referred to above, Brian Sandland, Director Criminal Law, New South Wales Legal Aid, noted that interpreters increasingly play a role in courtrooms and that there are sometimes complaints about the quality of their services. Specifically applying the law to interpreters "might be a way of encouraging interpreters to lift their game."[1160]

In stark contrast, Tony Glynn SC representing the Queensland Bar Association, told the Committee that he believes that a specific offence of perjury by interpreters could expose interpreters to the risk of unfounded allegations of perjury: "the risks to people where a misunderstanding rather than a deliberate changing of the evidence occurs," he continued, "[…] would seem to me to put at risk most interpreters of being often wrongly accused simply based on a misunderstanding." [1161]

Queensland Legal Aid representative, Howard Posner, also questioned the need for a specific offence provision. In Posner's view, there should be no specific provision applying to interpreters because the current law of perjury already applies to

[1157] Victoria Legal Aid, submission no. 7, p. 10; Benjamin Lindner, submission no. 8, p. 10.
[1158] Victor Stojcevski, *Minutes of Evidence*, 24 November 2003, p. 11.
[1159] Criminal Bar Association, submission no. 6, p. 16.
[1160] Brian Sandland, *Minutes of Evidence*, 11 November 2003, p. 21.
[1161] Tony Glynn SC, *Minutes of Evidence*, 13 November 2003, p. 99.

interpreters.[1162] As Posner put it, "It is like saying 'Stealing Nintendo is an offence of stealing.' We know it is an offence of stealing."[1163]

Committee's conclusion in relation to the specific application of perjury to interpreters

While acknowledging the position of MCCOC which is supported by some Victorian witnesses, the Committee has decided not to recommend the introduction of a specific offence provision for perjury by interpreters. Like the Criminal Bar Association, the Committee considers that the interpreter's oath already exposes the interpreter to the penalties of perjury. Not only is a specific provision unnecessary but it may also be counter-productive. The Committee is not convinced that specific reference to interpreters in legislation relating to perjury would have the effect of encouraging interpreters to be more professional. Rather, as pointed out by the Queensland Bar Association, it may have the effect of discouraging qualified interpreters from offering their services in a court-room setting. Accordingly, the Committee does not recommend a change to the law on this issue.

Recommendation 31

That the offence of perjury in s. 314 of the Crimes Act 1958 (Vic) not be amended to specifically refer to 'perjury by an interpreter'.

[1162] Howard Posner, *Minutes of Evidence*, 13 November 2003, p. 109.
[1163] Ibid.

APPENDIX 1 – LIST OF REFERENCES

Legislation

Acts referred to in this Report are as at 31 December 2003 unless otherwise identified.

Australian Legislation

Crimes Act 1958 (Vic)

Crimes Act 1900 (NSW)

Crimes Act 1900 (ACT)

Crimes Act 1914 (Cth)

Crimes (Classification of Offences) Act 1981 (Vic)

Criminal Law Consolidation Act 1935 (SA)

Criminal Code Act 1899 (Qld)

Criminal Code 1913 (WA)

Criminal Code Act 1924 (Tas)

Criminal Code Act (NT)

Criminal Code Act 1995 (Cth)

Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Act 2000 (Cth)

Criminal Law Amendment Act 1997 (Qld)

Criminal Law Amendment Act 2002 (Qld)

Evidence Act 1958 (Vic)

Juries Act 2000 (Vic)

Police Service Administration Act 1990 (Qld)

Sentencing Act 1991 (Vic)

Summary Offences Act 1966 (Vic)

Supreme Court (General Procedure) Rules 1996 (Vic)

International Legislation

Crimes Act 1961 (NZ)

Criminal Code Canada

Criminal Law Act 1967 (UK)

Perjury Act 1911 (UK)

Police and Criminal Evidence Act 1984 (UK)

Reports / Discussion Papers

Criminal Law and Penal Methods Reform Committee of South Australia, Fourth Report, *The Substantive Criminal Law,* 1977.

Drabsch, Talina, Briefing Paper 6/2003, *Law and Order Legislation in the Australian States and Territories*, 1999-2000: a comparative survey.

Victorian Parliament Law Reform Committee, *Inquiry into Oaths and Affirmations with Reference to the Multicultural Community,* Final Report, October 2002.

Law Commission (UK), *Criminal Law—Offences Relating to Interference with the Course of Justice* (Law Com. No. 96), 1979.

Law Reform Commission of Canada, *Criminal Law: Towards a Codification* (Study Paper, 1976).

Law Reform —*News from the Law Commission,* 3 March 2001.

Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, Model Criminal Code, Chapter 7, *Administration of Justice Offences*, Discussion Paper, July 1997.

Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, Model Criminal Code, Chapter 7, *Administration of Justice Offences,* Report, July 1998.

Model Criminal Code Officers' Committee, Discussion Paper Model Criminal Code Chapter 2, *Issue Estoppel, Double Jeopardy and Prosecution Appeals against Acquittals,* November 2003.

Murray M. QC, *The Criminal Code: A General Review,* WA, 1983.

O'Regan R QC, Herlihy J and Quinn M, *Final Report of the Criminal Code Review Committee to the Attorney-General,* Queensland Criminal Code Review Committee, June 1992.

Review of Commonwealth Criminal Law, Discussion Paper No. 16, *Offences Relating to the Administration of Justice*, July 1988.

Review of Commonwealth Criminal Law*, 4th Interim Report,* November 1990.

Review of Commonwealth Criminal Law, *Interim Report—Principles of Criminal Responsibility*, July 1990.

Scrutiny of Acts and Regulations Committee, *Inquiry into the Summary Offences Act 1966*, Final Report, November 2001.

Victorian Higher Court Sentencing Statistics: 1997/1998 – 2001/2002, Department of Justice Victoria, May 2003.

Case law

*Andrews (*1992) 57 Cr App R 254

Attorney-General v Butterworth [1963] 1 QB 696

Attorney-General (Vic) v Rich [1999] 103 A Crim R 261

Crafter v Kelly [1941] SASR 237

Cuttone–Santoro v R (1982) 5 A Crim R 220

Damon v R [1985] Tas.R. 25

Dawson v R (1961) 106 CLR 1

Dietrich v R 109 ALR 385

DPP v McLeod, Bumpstead & Bumpstead, (unreported, Supreme Court of Victoria, 6 September 1999)

DPP v Scott and Kitchin [2000] VSC 247

Dunn (unreported Court of Criminal Appeal, Victoria, 17 July 1979).

Feldman (1981) 3 Cr App R (S) 20

Foord v Whiddet (1985) 16 A Crim R 464

Foord (1985) 20 A Crim R 267

Hall (1992) 4 Cr App R (S) 153

Hatty v Pilkinton (1992) 108 ALR 149

Hatty v Pilkinton (no. 2) (1992) 35 FLR 433

Healy v R (1995) 15 WAR 104

Higgins (unreported, Western Australian Court of Criminal Appeal, 25 July 1990)

Karageorge v R (1998) 146 FLR 1000

Lewis v Ogden (1984) 153 CLR 682

Love v R (1983) 9 A Crim R 1

MacKenzie v R (1996) 71 ALJR 91

Mahadeo v The King [1936] 2 All ER 813 (PC)

Meissner v The Queen 1994-1995 184 CLR 132

Mellifont v Attorney-General (Qld) [1991] 173 CLR 289

Menner v R, (unreported, Western Australian Court of Criminal Appeal, 15 December 1997)

Morex Meat Australia Pty Ltd and Doube [1995] 78 A Crim R 269

R v Ard [2000] (Unreported, NSW Court of Criminal Appeal 443)

R v Aylett [1785] 1 D&E 63

R v Barlow (1962) 79 WN (NSW)

R v Breen (1990) 99 FLR 474

R v Carroll (2002) 194 ALR 1

R v Carter and Savage; Ex parte Attorney-General (1990) 47 A Crim R 55

R v Cullerton [1999] VSC 478

R v Darby [1981-1982] 148 C.L.R 668

R v Davies (1974) 7 S.A.S.R 375

R v Dawson [1961] VR 773

R v Farquhar (unreported, New South Wales Court of Criminal Appeal, 29 May 1985)

R v Fingleton [2003] QCA 266

R v Giannerelli (1983) 154 CLR 212

R v Gibb and McKenzie [1983] 2 VR 155

R v Haslett and Another 50 NTR 17

R v Hayter [2003] EWCA Crim 1048

R v Holey [1963] 1 All ER 106

R v Hoser [1998] 2 VR 535

R v Hurley [1967] VR 526

R v Jarvis (1837) 2 Mood and R 40

R v Kellow (unreported, Victorian Court of Criminal Appeal, 17 August 1979)

R v Kemble (C.A) [1990] 1 W.L.R. 1111

R v Kiffin [1994] Crim LR 449, CA

R v Kyu Hyuk Kim [1999] VSCA 65

R v Levy [1912] 1 KB 158

R v Lineham [1921] VLR 582

R v Lowe [1917] VLR 155

R v Machin [1980] 1 WLR 763

R v McLachlan [1998] 2 VR 55

R v McKenna [1960] 1 QB 411

R v Middap (1992) 63 A Crim R 434

R v Miller [2002] VSC 456

R v Millward [1985] 2 WLR 532

R v Murphy (1985) 158 CLR 596

R v Murray (1982) 2 All ER 225

R v Panayiotou [1973] 1 WLR 1032

R v Pangallo (1991) 56 A Crim R 441

R v Patinyot [2000] VSCA 55, 4 April 2000

R v Rafique [1993] QB 843

R v Reeves (1892) 13 LR NSW

R v Rogerson (1992) 174 CLR 268

R v Rose [1961] 3 All ER 298

R v Rowell (1977) 65 Cr App R 174

R v Ryan (1914) 10 Cr App R 4

R v Schroen [2001] VSCA 126

R v Shuttleworth [1909] VLR 431

R v Selvage [1982] 1 QB 372

R v Shing Duck (1901) 7 ALR (CN) 96

R v Smith [1908] St.R.Q 83

R v Sossi 17 A Crim R 405

R v Stone [1981] V.R. 737

R v Story [1978] 140 CLR 364

R v Subramanian [2002] NSWCCA 372.

R v Sumner [1935] VLR 197

R v Tevendale [1955] VLR 95

R v T (1998) 71 SASR 265

R v Vreones [1891] 1 QB 360

R v Townley (1986) 24 A Crim R 77

R v Traino (1987) 45 SASR 473

R v Wacyk (1996) 66 S.A.S.R 530

R v Wales [2003] VSC 115 (11 April 2003)

R v Welsh [1999] VR 62

R v Westphal (unreported, Victorian Supreme Court of Appeal, 28 March 1996)

R v Williams (1932) SR (NSW) 504

R v White 16 S.A.S.R 1977 571

R v Williamson [1972] 2 N.S.W.L.R 281

R v Willmot, ex parte Attorney-General (Qld) [1987] 1 Qd R 53

Scholes (1998) 102 A Crim R 510

*Shamji (*1989) 11 Cr App R (S) 587

Simmonds (1969) 53 Cr App R 488

Soteriou v Police [2000] SASC 256

Stanton v Abernathy (1990) 19 NSWLR 656

Sykes v DPP [1962] AC 528

Walsh v Tattersall (1996) 188 CLR 77

Weatherall v R (1987) 28 A Crim R

Welsh (1998) 100 Crim R 484

Welsh (1998) 105 A Crim R 448 (Court of Appeal)

Wright (No. 1) [1968] VR 164

Books / Loose-leaf Services/ On-line Services

Archbold, *Criminal Pleading, Evidence and Practice,* 1998.

Butterworths Concise Australian Legal Dictionary, 2nd edition, 1998.

Butterworths Halsbury's Laws of Australia On-Line Service.

Fitzroy Legal Service Inc, *The Law Handbook,* 2003 edition.

Fox, *Victorian Criminal Procedure*, 10th Edition, 2000.

Freckelton Ian R, *Criminal Law Investigations and Procedure,* 2000.

Freckelton Ian R, *Indictable Offences in Victoria*, 4th ed, 1999.

Gillies, Peter, *Criminal Law*, 4th ed, LBC Information Services, 1997.

Heydon JD, *Cross on Evidence,* 6th Australian edition, 2000.

O'Regan, , *New Essays on the Australian Criminal Codes* 1988.

Ross, David QC, *Crime: Law and Practice in Criminal Courts,* 2001.

Stone, Julius and Wells, WAN, *Evidence: Its History and Policies*, Butterworths, *1991*.

Victorian Sentencing Manual, second edition, 1999.

Parliamentary Debates

New South Wales, *Parliamentary Debates*, Legislative Assembly, 17 May 1990, 3692 (Mr Dowd, Attorney-General).

Hansard, *House of Commons,* April 3 1879, vol. 245 (3rd series) Col 316.

Queensland, *Parliamentary Debates,* Legislative Assembly, 6 March 2002, 376 (Hon RJ Welford, Attorney-General and Minister for Justice).

Queensland, *Parliamentary Debates,* Legislative Assembly, 4 December 1996, 4870 (Hon D.E. Beanland, Attorney-General and Minister for Justice).

Queensland, *Parliamentary Debates,* Legislative Assembly, 21 August 2003, 3178, (Hon R. J. Welford, Attorney-General and Minister for Justice).

Articles

Arden, the Hon Justice DBE, 'Criminal Law at the Crossroads: The Impact of Human Rights from the Law Commission's perspective and the need for a Code,' [1999] *Crim L.R.* 439.

Australian Law Journal, 66 December 1992, 'Current Issues —Codifiers at Work,' 780-782.

Brown, Bernard, 'Perverting Justice,' (1996) 112 *L.Q.R,* 202-205.

Brown David, Russell Hogg, Boehringer Gill and Tubbs Michael, 'Re-presenting Justice Murphy—A contemporary inquisition,' *Legal Service Bulletin* 11(4) August 1986, 147-153.

Grant, Michael, Case and Comment, 'Sentencing and Relevance to other criminal conduct not charged—attempting to pervert the course of justice and "inept" attempts —Scholes,' *Criminal Law Journal* 24 (2) April 2000, 109-114.

Colvin, Eric, 'Unity and Diversity in Australian Criminal Law: A Comment on the Draft Commonwealth Code,' *Criminal Law Journal* (1991) 15, 82-94.

Ellard, John, 'A note on Lying and its Detection,' *The Judicial Review* (1996) 2(4), 303-314.

Frank, Mark G, 'Assessing Deception: Implications for the Courtroom,' *The Judicial Review* (1996) 2(4), 315-326.

Goode, Matthew R, 'Constructing Criminal Law Reform and the Model Criminal Code,' *Criminal Law Journal* Vol 26, June 2002, 152-174.

Goode, Matthew R, 'Codification of the Australian Criminal Law,' *Criminal Law Journal* (1992) 16, 5-19.

Kift, Sally, 'How not to amend a Criminal Code,' *Alternative Law Journal,* Vol. 22, No. 5, October 1997, 215-219.

MacKinnon, Peter and Quigley Tim, 'Developments in Canadian Criminal Law 1995,' *Criminal Law Journal* Vol 20, December 1996, 321.

MacMillan, Peter, 'Criminal Law Survey,' *Brief* 32 (10) November 1995, 22-24.

'Murphy' *LIJ* (1985) No. 59 September, 892-897.

Priest, Phillip, 'Provocation and attempted murder,' *LIJ* (1995) 69 No. 11 November, 1150.

Taylor, Greg, 'Dr Pennefather's Criminal Code for South Australia' (2002) 31(1) *CLWR* 62-102.

Newspaper articles / Press releases

'Double Jeopardy Law Revision Debate,' transcript, *The World Today,* 7 April 2003.

'Double Jeopardy Law on Agenda,' *Gold Coast Weekend Bulletin,* 12-13 April 2003.

'Federal laws hold key to Deidre Case,' *The Courier Mail,* 24 April 2003.

'Fingleton backed in High Court bid,' *The Australian,* 24 July 2003.

Queensland Police Service, *Filing of summonses against a Rockhampton man and woman at the Brisbane Magistrates' Court,* Media Release, (8 May 2003).

'Runaway's Partner on Perjury Charge.' *The Australian,* Saturday 13 December 2003, p. 9.

APPENDIX 2 - LIST OF SUBMISSIONS

No.	Date of Submission	Name	Affiliation
1	7 October 2003	Mr Peter Boardman	
2	31 October 2003	Mr Phillip La Roche	
3	31 October 2003	Mr John Magill & Ms Sue Watson	
4	5 November 2003	Mr Brendan Falzon	
5	12 November 2003	Mr John Pesutto	Group of Constituents from East Yarra Province Electorate
6	6 November 2003	Mr Peter Morrissey	Criminal Bar Association
7	18 November 2003	Mr Tony Parsons	Victoria Legal Aid
8	19 November 2003	Mr Benjamin Lindner	
9	24 November 2003	Mr Bruce Gardiner	Office of Public Prosecutions
10	26 November 2003	Dr David Neal	Victorian Bar Inc.

APPENDIX 3 - LIST OF WITNESSES

No.	Date of Meeting	Witness	Affiliation
1	11 November 2003 **Sydney**	Ms J. Shouldice	Criminal Law Committee **Law Society of New South Wales**
2		Mr B. Sandland Mr L. Fernandez	Director, Criminal Law Solicitor **Legal Aid New South Wales**
3	12 November 2003 **Sydney**	Mr M. Marien, SC	Director, Criminal Law Review **New South Wales Attorney-General's Department**
4		Mr G. Smith Mr S. Kavanagh	Deputy Director of Public Prosecutions Acting Deputy Solicitor for Public Prosecutions (Legal) **Office of the Director of Public Prosecutions**
5		Mr C. Murphy Ms P. Wright	President Vice President **New South Wales Council for Civil Liberties**
6	13 November 2003 **Brisbane**	Ms L. Clare	Director of Public Prosecutions
7		Mr A .Glynn, SC Mr M. Byrne, QC Mr R. Devlin Mr D. O'Connor	Member Member Member Chief Executive **Bar Association of Queensland**
8		Mr D. Holliday Mr H. Posner	Senior Solicitor, Crime Senior Solicitor, Crime **Legal Aid Queensland**

9	24 November 2003 **Melbourne**	Mr V. Stojcevski	Senior Policy and Research Officer **Victoria Legal Aid**
10		Dr David Neal	**Victorian Bar Inc.**
11		Mr Paul Coghlan QC	Director of Public Prosecutions
12		Mr Peter Morrisey	**Criminal Bar Association**
13		Mr Benjamin Lindner	Barrister