**LAW REFORM COMMITTEE**

**Inquiry into administration of justice offences**

Sydney – 11 November 2003

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Mr B. Sandland, Director, Criminal Law; and

Mr L. Fernandez, Legal Aid New South Wales.

**The CHAIR** — Welcome. I think you have been introduced to everyone. For the record, we have Brian Sandland, the acting director, criminal law, with Legal Aid New South Wales— —

**Mr SANDLAND** — I should just correct the record — I got the job so I am now the director.

**The CHAIR** — Congratulations — and his colleague, Lester Fernandez.

Our proceedings are subject to the Parliamentary Committees Act so when we get your evidence back to Victoria it will be subject to parliamentary privilege. You will receive from us a Hansard record of what you have said and you will have the capacity to correct it. If there is anything you want to say in camera, you should let us know at different points in the proceedings. Otherwise everything you have given in evidence will be on the public record and available on our web site and in published form. Thank you for coming along. Perhaps we will start off with questions. Perhaps you could give some comment to us about the advantages and disadvantages of codifying common-law offences in relation to the administration of justice.

**Mr SANDLAND** — Lester and I have agreed to roughly split these questions up and I am going to take the first one.

I guess firstly as a practitioner I should go to the situation that applies in New South Wales in relation to the disposal of offences against justice. They can be dealt with summarily. Some are referred to as table 1 offences — they are regarded as the less serious forms of offences against justice. However, they can be dealt with in higher courts if the defence or the prosecution elects. The advantage, as I see it, in relation to having that system as opposed to common-law offences which, in New South Wales at least, were normally dealt with on indictment, is ease of disposition: they can be dealt with summarily, and they can usually 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.

The break-up of offences according to table 1 and the strictly indictable offences as well as a more general offence of perverting the course of justice means that you have a clearer penalty schedule. The Parliament has actually indicated those offences which it regards as more serious by virtue of maximum penalties and it is a bit of a guide to the courts in relation to dealing with the more serious general provision of perverting the course of justice to see that penalty regime. The Parliament has spoken. I think it is a clearer penalty regime and it has those advantages of ease of disposition with efficiencies for the whole criminal justice system.

There are other advantages which are of a more general kind in relation to codification and which are referred to in an article that Lester very kindly dug out for me. It is from the *Criminal Law Journal* 1992 — that is a New South Wales criminal law journal, is it, Lester?

**Mr FERNANDEZ** — It was actually one of the references in the discussion paper. I thought I would get out the original document to have a look at it.

**Mr SANDLAND** — It is titled 'Codification of the Australian criminal law' and it refers to a number of obvious advantages of codification such as accessibility and ease of understanding. It refers to it as 'cheap to buy', but I think by that it means you are not going to be paying huge amounts to your lawyer to interpret whether or not you fit within some vague or specific common-law offence. Lastly, it is democratically made and amended. There were some useful quotes that I extracted from the article. I do not know if it is appropriate to read them onto the record, but they articulate the points in support of those general headings in a far more eloquent way than I can do, and they come from the various sources that you would have been looking to such as the Mitchell report, the Gibbs report and one in England, and I think Canada as well.

**The CHAIR** — I think we have summarised in our document those various arguments so it might be worth receiving that.

**Ms GILES** — I will have a copy of that.

**Mr SANDLAND** — If you have a copy that is fine.

**Ms GILES** — What you are saying is you agree with the arguments in that document.

**Mr SANDLAND** — I think they have some weight. Firstly, in terms of if you have the one source of an offence rather than looking to a combination of case law and text to find out what a particular common law offence may be and whether the circumstances of your case fit within it, it is going to be far easier to go to the one source.

Secondly, as long as it is expressed — usually there is an emphasis on plain language these days in the drafting of legislation — it will be easier for the public to understand it as well; of course not everyone is fortunate enough to have representation. Thirdly, I have already indicated that I think there are overall benefits both to the individual in terms of having a summary charge to answer which is clearly defined by statute as opposed to a general common-law offence which might have to go all the way up to the equivalent of our District Court — do you call it the County Court?

**Ms GILES** — Yes.

**Mr SANDLAND** — It may well reduce the possibility of appeals and have benefits in that regard as well and, of course, there are those general arguments that this is the reflection through a democratic process of what the public wants by way of a legislated codification of the law in this area. It can be done neatly. These are a discrete bundle of offences that you can codify within your existing system as well as having some common law offences leftover. I think you indicated, Lester, that there are still some residual common-law offences in any event.

**Mr FERNANDEZ** — There are. In New South Wales section 341 indicates which common law offences are abolished and they are very much replaced by the offences contained in sections 311 to 343A of our Crimes Act. However, there are still some common-law offences in New South Wales in relation to public justice which have not been abolished. They are referred to in section 343. Those specific offences are: Escape from Lawful Custody, Assisting a Person to Escape from Lawful Custody, and Refusing to Assist a Peace Officer in the Execution of his or her Duty in Preventing a Breach of the Peace.

By way of interest to the committee, when the legislation came before the New South Wales Parliament in 1990 most of the discussion about amending the law and abolishing the common law and replacing it with statute was in relation to that particular offence of assisting a peace officer. A number of parliamentarians said we still had to allow that support for police.

**Mr SANDLAND** — Those parliamentarians were ex-police officers, as I recall.

**Mr FERNANDEZ** — Two of them were.

**Mr DALLA-RIVA** — Hear, hear!

**The CHAIR** — Brian, I understand that you have worked under both the common law and obviously now under the codified arrangements in New South Wales. Perhaps you could comment on the differences between the two systems as you have experienced them over that time?

**Mr SANDLAND** — My experience has been mostly in the Local Court jurisdiction. Under the old regime — prior to 1990, or whenever it was that the raft of reforms came in — we had what was referred to by the then Attorney-General in his first-reading speech as a hotchpotch of laws relating to the common-law offences regarding offences against justice. They could be dealt with only on indictment. 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 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 the prosecution and/or defence side of 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. There was also a consultation process that went on, so the law society and the bar association were ready for what was coming and the DPP people were also able, as I understand it, to quite adequately deal with the matters that came thereafter.

Lester is going to talk to you with some statistical information about penalties that have been imposed, which goes to another question of the adequacy of the common-law arrangements in relation to maximum penalties. My feel, from having worked in the 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.

**Mr MAUGHAN** — Would it be fair then to say that the legal profession generally supports the new arrangements as opposed to the old?

**Mr SANDLAND** — Yes. And in fact during the consultation process, with a few notable exceptions in relation to specific provisions, the law society's response, through the criminal law committee, was in the main supportive, I think it would be fair to say. I think it was before Lester's time and it was before my time. Lester has been able to obtain the document that was prepared by the criminal law committee of the law society in response to the Attorney-General. As I say, it was overwhelmingly supportive of the reforms.

**Mr MAUGHAN** — That was then, but now in practice is that still the view?

**Mr SANDLAND** — My understanding is that there have been no difficulties. When I spoke to people within my organisation about it, the things they referred to were the certainty in relation to the procedure and not facing an unknown — not an unknown penalty, but if you have any offence against justice which can be thrown into the conspiracy-to-pervert basket with a very high maximum penalty, you are going to have some anxiety going up to the District Court with no jurisdictional limit up to the 25 years, thinking, 'I wonder what view this particular judge is going to take of this particular offence?'. It is far more difficult to predict the result in those circumstances and, I think, far greater potential for having results that might be regarded as anomalous, or perverse, even.

**Ms HADDEN** — When you talk about it being better understood — I accept that — and about it being more accessible, what do you mean by accessible?

**Mr SANDLAND** — Accessible in that it is there in one source, with commentary as far as judicial interpretation since the legislation was introduced, whereas the elements of a common-law offence may be found in various cases. There may be disagreement or various lines of authority about the elements of the offence, so you have sources regarding textbooks and case law which attempt to clarify what the law is, but if have you it there in a section of an act that is a pretty good starting point, as opposed to having to comb through the case law and the legal texts.

**The CHAIR** — Is it an appropriate time to present those statistics? Do you want to talk about those at this point?

**Mr FERNANDEZ** — Can I add two quick points in relation to what Brian has just mentioned? I will just make an observation that not all the administration of justice offences are contained in the Crimes Act. There are administration of justice offences in other Acts as well.

**Ms HADDEN** — So it is not actually codified in one act?

**Mr FERNANDEZ** — No. For example, the offence of Bribing a Police Officer, which is a public justice offence, is contained in section 200 of the Police Act; Soliciting Information From a Juror is contained in section 68A of the Jury Act. So within the Crimes Act is the majority of the administration of justice offences, but not all of them. Brian has just referred to a Law Society of New South Wales submission. That was in relation to the Model Criminal Code, which is referred to throughout the Discussion Paper. A number of issues raised in the Law Society's submission are raised in the Discussion Paper. I might just hand it over for the benefit of the committee. There is a bit of highlighted text.

**The CHAIR** — One of the questions relates to the incidence of these offences and whether under either a common-law or codified system there is any difference in the level or rate of prosecutions. Are you able to comment on that in relationship to the New South Wales experience?

**Mr FERNANDEZ** — We can comment in relation to the matters that have been finalised, but not in relation to the matters that have been prosecuted. We do not have that particular information. In relation to the matters that have been finalised in New South Wales, it is possible to get the statistics for sentences that have been imposed in the Children's Court, the Local Court and the higher courts. I will now hand those over. These are the sentencing statistics for offences relating to public administration offences dealt with in the Children's Court, the Local Court and the higher courts.

I will just touch upon what is contained there. This is bearing in mind that these are finalised matters where people have pleaded guilty to the offences or have been found guilty. It indicates that these offences are not particularly prevalent — for example, for an offence we have in New South Wales of Conceal Serious Offence under section 316(1) of the Crimes Act, between April 1999 and March 2003 there were 101 offences finalised in the Local Court and 58 such offences finalised in higher courts. In relation to an offence of Attempt to Pervert the Course of Justice, between January 1996 and December 2002 there were 96 cases finalised in the higher courts — these are matters which have proceeded to sentence.

The question refers specifically to Perjury being underprosecuted and that is also referred to in the Discussion Paper. In relation to Perjury, our equivalent is section 327 of the Crimes Act which carries a maximum penalty of 10 years. There were no finalised Perjury offences in the Children's Court. There were 3 in the Local Court between 1 April 1999 and March 2003 and there were 11 in the higher courts between January 1996 and December 2002. Those finalised matters indicate that these offences are not particularly prevalent offences.

**Mr MAUGHAN** — Does it mean that or does it mean that charges are not laid, that there is not sufficient priority given to laying charges?

**Mr FERNANDEZ** — There are probably two different answers. I suppose the first question is the question of proof in a matter such as Perjury. It is raised in the Discussion Paper as to how one proves that offence. There is an article that was referred to in the discussion paper from the *Judicial Review*. It was in relation to lies and what happens with the finding out of lies within the court proceeding. For the benefit of the committee I have that full article and I might just hand it over.

**Ms GILES** — Please. I am just trying to remember which one it is.

**Mr SANDLAND** — It is quite interesting in terms of cross-examination technique. I know now what to look out for in terms of body language.

**Mr DALLA-RIVA** — Can I ask what the name of the article is for the record?

**Mr FERNANDEZ** — It is by Mark G. Frank and the name of the article is 'Assessing Deception: Implications for the Courtroom'. It was reported in the *Judicial Review* of 1996.

**The CHAIR** — So it is not prosecuted very often?

**Mr FERNANDEZ** — I am not sure whether we can say it is not prosecuted very often because we do not have the statistics on the amount of prosecution — —

**The CHAIR** — In your experience though?

**Mr FERNANDEZ** — In my anecdotal experience, no, it is not prosecuted very often. On the occasions that it is, it is probably improperly prosecuted. I have had matters where people have been charged with perverting the course of justice where it is simply not an offence of perverting the course of justice. I can give you one example to indicate that.

**The CHAIR** — Please do.

**Mr FERNANDEZ** — I had a client who was a young woman who stole some trousers from David Jones and then she returned to David Jones and asked for a refund or to replace those trousers with a stereo system. She was charged with Perverting the Course of Justice.

**Ms HADDEN** — It is a bit of overkill, isn't it?

**Mr FERNANDEZ** — Yes. Obviously it was not that offence, it was offences of Larceny and Attempt to Obtain Benefit By Deception, which is how it was finalised. It is interesting that that is what the police started off with.

**Mr DALLA-RIVA** — Do you think that could be one of the outcomes when you codify a new law or you codify a law that is very vague to law enforcement and prosecution — that all of a sudden it becomes codified and they start to run these sorts of test cases, as it were, on what could be classed as trivial issues? Did that ever occur or is that not the example? You may wish to expand on it, but you mentioned earlier that it is more accessible and more easily understood by everyone. I will put the police and the prosecution in that basket because that would mean therefore there is a new law — well, not a new law but it is now easily understood and we are now going to charge this person with pinching trousers for this crime rather than the ordinary statute crime.

**Mr SANDLAND** — It sounds to me that in that example there was a certain element of vindictiveness about the choice of charge. I do not know whether that came through. It has not been my experience that police have been as confused as that example suggests.

**Mr FERNANDEZ** — In relation to that question, one of the benefits that Brian was talking about is that it is easily found — for example, there are specific provisions in relation to public justice offences which are clearly contained within the New South Wales legislation. The meaning of 'pervert the course of justice' is itself defined in the New South Wales legislation — that is, in section 312. There are general provisions applicable to perjury and false statements and they are contained in section 334. There are some restrictions on prosecutions and they are contained in section 338. I will not go on, but the point is that when a law is codified it is easily found and it is usually or preferably easily stated. That is not always the case with the common law and it is usually not the case with the common law.

**The CHAIR** — So you would prefer in general that the specific offences that are part of perverting the course of justice were spelt out in the code?

**Mr FERNANDEZ** — It is not so much the particular offences, but it is defined and it is defined quite specifically.

**Mr SANDLAND** — I was just thinking it sorts of leads onto the next question where in New South Wales they left the general offence but created the specific offences. I guess they did a significant amount of research to determine what were the common forms of attempting to interfere with the course of justice and came up with those specific offences, but there was reference again in the first and second-reading speeches to the ingeniousness of the criminal mind and not being able to cater for every scenario and not wanting to, I guess, let go of a catch-all offence. There remains a backstop offence. If we can stray into question 3 I think, aside from that example of Lester's, that is probably an appropriate way for the legislation to go, particularly if you are concerned about letting go of the flexibility of a common-law system. I might have cut across you there, Lester.

**Mr FERNANDEZ** — That is fine.

**Mr SANDLAND** — There was one other point I was going to make in relation to the prosecution of these matters and that is that they are referred, are they not, to the Attorney-General for approval as well as to the Director of Public Prosecutions. In terms of ease of prosecution, you kind of have two hoops to jump through. I think that is correct, is it not?

**Mr FERNANDEZ** — That is specifically in relation to the offence of Perjury as set out in section 338. The offence is either prosecuted by the Director of Public Prosecutions at the direction of the Attorney-General or with the leave of the Supreme Court.

**Mr SANDLAND** — Anecdotally, I have often finished a case with the magistrate saying, 'I do not accept the evidence of the defendant', because the departure or the degree of constructing a case has been so obvious that it has thought to amount to a deliberate attempt at perjury. Usually they are careful about the way they express themselves. Magistrates in the main are pretty realistic that people will be confronted with a situation and they will almost talk themselves into a situation that is consistent with a defence and then they will convincingly deliver a version of events that they believe to be true. It is not for us to determine that; that is, of course, for the bench to determine. We give them the benefit of our professional advice and you always bring a degree of rigour to bear in relation to your instructions. But in the main magistrates, I think, are understanding of what is involved in as general a term as human nature in terms of giving one version or another. Of course there is that old saying that if four people witnessed an accident you would get four different versions of that event. So there is something of that in the approach that magistrates bring to bear. There is also something of magistrates, I think, reserving the most serious of those cases where it seems obvious to them that there has been some deliberate attempt to lie or mislead the court, and they will refer the papers on to the Attorney-General. That has happened very, very rarely.

**Mr MAUGHAN** — Would you care to comment on whether there is an increasing incidence of people feeling less morally inclined to tell the truth — that the 'I promise to tell the truth, the whole truth and nothing but the truth' is no longer as powerful as it was 50 or 100 years ago?

**Mr SANDLAND** — I do not know whether I am in a position to really answer that. You probably need a social historian with a degree in psychology. I think I would have to pass. The reality is that you have someone in your office who will tell you one version of events, you subject it to scrutiny and you will quite often cross-examine them yourself, you will have access to the brief and you will give them the benefit of the brief. Often the pressure of being at court will secure a different version of events. Whether that happened in the good old days, I do not know. It is just really a function of people, I guess, procrastinating with the truth. I think people basically still understand the solemnity of the process and the role of the courts.

**Mr FERNANDEZ** — I suppose the question is as referred to in the Discussion Paper: does the oath bind the conscience? It would be a hard question to answer on the general level.

**Mr MAUGHAN** — Yes.

**The CHAIR** — Do you think if the judge was routinely giving a warning that, 'We are taking evidence on oath and if you do tell lies to the court it is perjury and it is a criminal offence', that would help, as a standard warning from the bench?

**Mr SANDLAND** — I do not know. Having read the article that Lester has tabled, there are people who are very anxious to get across their version of what they believe to be the truth, people who are nervous enough, about whom you could misread their body language 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'. I do not know. It is a fine balancing act and I have not really thought that through. It is a tactic often used in cross-examination, if you think you have someone on the ropes, to plough in with, 'And by the way, you are on oath. Just remember that you are on oath before this next question, because I am going to show you a document'. There are those sorts of tactics. I think magistrates and judges prefer in a way to stay out of the arena and simply adjudicate. They have to ensure fairness. So I would be concerned about that approach is my gut reaction

**Mr FERNANDEZ** — It happens with children who give evidence in court, usually as complainants. They have to understand that they are to be truthful and these are serious proceedings. So it happens in that specific exception, for example. But more generally it is probably worthy of more consideration.

**Mr DALLA-RIVA** — It is an issue that has raised some discussion in groups where I have spoken about this issue. Where an accused is put in the dock, I guess, to give sworn evidence — let us say, for example, as I have used it before, murder — and that evidence is an outright untruth, it is totally lies, but he or she is going down the path of giving sworn evidence in giving their events. I will not go into specifics, but that would be a situation. Subsequently the accused is acquitted. What is your view on whether that person would be then presented again with a charge of perjury?

**Mr FERNANDEZ** — That happened in Carroll's case.

**Mr DALLA-RIVA** — That is why I am asking.

**Mr SANDLAND** — I actually do not know the result of the perjury — —

**Ms HADDEN** — It was thrown out; double jeopardy was the result.

**The CHAIR** — In some senses it is beyond the reach of this inquiry. We are not looking specifically at double jeopardy. It is probably something that is the subject of a much bigger inquiry.

**Mr SANDLAND** — We are looking at it here in New South Wales at the moment.

**Ms GILES** — The Model Criminal Code Officers Committee is currently looking at that issue.

**Ms HADDEN** — As a result of Carroll?

**Ms GILES** — Yes, as a result of Carroll.

**Mr SANDLAND** — It probably requires a bit of research and a detailed answer. I would not like to go on the public record with an off-the-cuff response.

**Ms HADDEN** — The High Court determined Carroll. Was that a Queensland case?

**Mr SANDLAND** — It came out of Queensland.

**The CHAIR** — Just getting back to some of the specific justice offences, the maximum penalty for perverting the course of justice in New South Wales is 14 years; in Victoria it is 25 years. Have you got any comments on the severity of those sentences?

**Mr FERNANDEZ** — I have some statistics and some cases in New South Wales. I might refer to both of those. I will hand over the statistics for attempting to pervert the course of justice in higher courts. These statistics indicate both the type of penalty and the range of penalties that are imposed.

**Ms HADDEN** — That is 'attempting'. You do not have a 'perverting', do you?

**Mr FERNANDEZ** — It is under section 319 and it is referred to as Perverting the Course of Justice, but in New South Wales an offence of Attempt to Pervert the Course of Justice is a substantive offence. The attempt is an offence in itself.

**The CHAIR** — So the vast range, just looking at this in terms of the higher courts, seem to fall within the range of 12 to 24 months.

**Mr FERNANDEZ** — It shows a very wide spread.

**Mr SANDLAND** — It does not get anywhere near your maximum.

**The CHAIR** — And nowhere near yours.

**Mr SANDLAND** — No.

**Mr FERNANDEZ** — It shows that only 31 per cent of people dealt with in the higher courts received full-time imprisonment to start off with. It is possible then to break up those 31 sentences into the full length of the sentences, which show a range of six months to five years. In New South Wales there are two parts of the sentence: there is the full term of the sentence and there is the non-parole period, which is the amount of time to actually be spent in jail. The non-parole periods for those offences vary from six months to four years. Notwithstanding the maximum penalty being 14 years, the longest full sentence or head sentence is one of five years.

**Mr DALLA-RIVA** — What percentage went to jail?

**Mr FERNANDEZ** — Thirty-one per cent — 30 out of 96 people went into custody full time.

**The CHAIR** — Of those 31, just looking quickly at the statistics, it seems that certainly 24 received three years or less.

**Mr FERNANDEZ** — The full spectrum of sentencing options open to a court were utilised for this offence from the most minimal intervention, which is a section 10 dismissal — dismissal without a caution — right through to fines, community service as well as alternatives to full-time imprisonment, being suspended sentences and periodic detention.

**Mr SANDLAND** — It is a reasonable number of cases to assess it on too.

**Mr FERNANDEZ** — One of the observations to make in respect of offences of perverting the course of justice is they cover an extremely wide range of activity, which is probably the explanation for the wide range of penalties. I have here three decisions of the Court of Criminal Appeal in New South Wales and one of the Supreme Court. I will hand those over and for the record I will indicate the names of these cases. There is the matter of Chapman, an unreported decision of the New South Wales Court of Criminal Appeal of 21 May 1998. There is a decision of Patison in the Supreme Court of New South Wales. It was a decision of Mr Justice Dunford and the citation is [2002] NSW SC 1248. There is a decision of Taouk, reported in the *Australian Criminal Reports*, volume 65, commencing at page 387. Finally, there is a decision of the Court of Criminal Appeal in Giang; the citation is [2001] NSW CCA 276.

I will hand those over, but perhaps I can briefly refer to what those cases were about. Chapman was a case where a police officer gave false evidence in court. Patison was a case involving a police officer who among his course of conduct was accepting bribes and laying lesser charges against other people. Taouk was a case which involved an attempt to bribe a District Court judge to impose a certain sentence. Giang was a case where someone was going to give false evidence on behalf of another. There are only four cases, but they do illustrate that variety of conduct which can constitute the offence of perverting the course of justice.

Just while I am answering that question in relation to your maximum penalty, could I just make some observations that in New South Wales our equivalent offence carries 14 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; choke, 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 and enter. Those are the kinds of offences for which in New South Wales our Parliament has seen fit to put a maximum penalty of 25 years.

**The CHAIR** — We take telling the truth very seriously indeed.

**Ms HADDEN** — But we do not prosecute too many.

**Mr FERNANDEZ** — In New South Wales any offence that carries a maximum penalty of 25 years is an offence which if committed by a child must be dealt with in the District Court, must be dealt with on indictment and must be dealt with according to law, so it cannot be dealt with under the specific regime we have for children. That is just an observation in respect of offences involving penalties of 25 years.

**The CHAIR** — Perhaps if we move back to perjury. In New South Wales you have a particular section, section 327, which provides that if you knew or you had a lack of belief that the statement was true, that would be sufficient to prove perjury, whereas in other jurisdictions there is a requirement of the fault element of perjury that the defendant knows that the statement is false. How does that work in practice? What do you think of those provisions in the light of their application here in New South Wales?

**Mr SANDLAND** — I have had no actual experience of it. I think, however, the definition is consistent with what one would think perjury is, although, as I understand it, our law society took the view that there should be a narrower definition consistent with the common-law view that it must actually be false. I did think, however, that the way it is defined in New South Wales now is consistent with an older formulation that I think was quoted in your discussion paper — from Kenny or Russell, one of those old commentators on the law. It seemed to me that that captured the essence of the offence. Although the law society had an objection to a wider definition, anecdotally I am not aware of any problems that that has created since.

**Ms GILES** — Is that page 109?

**Mr SANDLAND** — Page 109.

**Ms GILES** — With William Traino.

**Mr SANDLAND** — That is right.

**Ms GILES** — The 'was false to the knowledge of the deponent, or was not believed by him to be true'.

**Mr SANDLAND** — Quoting Russell. To that extent, my own view when I looked at it was that I was quite comfortable with the encapsulation of the law in New South Wales although our law society, through the criminal law committee, hoped for something more restrictive and consistent with the common law. In practice and anecdotally since then I am not aware of any problems having been presented by that wider definition. I do not know if you are, Lester.

**Mr FERNANDEZ** — No, I am not. That would be probably hard to prove.

**The CHAIR** — In relation to interpreters, the South Australian and Tasmanian legislation specifically extends the law of perjury to interpreters, the New South Wales legislation does not. Would that be something you would regard as a useful addition?

**Mr SANDLAND** — Lester and I spoke about this and I think I agreed to go first on this question. My view is that given that interpreters are increasingly playing a role in courtrooms, that they take an oath before interpreting and that I as a practitioner with a significant amount of experience, at least in the Local Court, have had incidences of complaints about the nature of interpreting services given, feel that it might be a way of encouraging interpreters to lift their game. We have all had the kind of experience where you deliver the short question and get a very long interpretation of that question and the short question with a very long answer and a very short interpreted response. You then have to be on the lookout all the time, but we must also allow for the fact that there is a little bit of art as opposed to science in interpreting — there may not always be precise words that correspond, particularly in legal terms, with a particular answer.

However, in general terms, given the multicultural nature of at least our two communities in New South Wales and Victoria, but increasingly across the commonwealth as well, interpreters play a very important role. They play an important role in the investigative stage and in court itself. My own view was I would be supportive of an extension to interpreters, but I say so with some caution because of those nuances that can often come into a translation,

particularly if there is a word that does not correspond. Usually there are members of a person's family or community in court who keep an effective check and alert the advocate to what is going on, but once you are armed with that information what do you do with it? You do not have the skills unless you happen to have that language in your repertoire and it would be a matter in a serious case of reporting it to the police. My view was that it would be a way of getting interpreters to lift their game. I do not think we can always rely on it being a training issue and allowing that process to take its course. I do not know if you have anything to add to that, Lester.

**The CHAIR** — In relation to the current penalty for perjury — I am wondering if we are going to get a slight re-run here in terms of perverting the course of justice — you probably have some stats which indicate that the actual penalties are well below the maximum?

**Mr FERNANDEZ** — I do. These are the statistics for the higher courts for the offence of perjury under section 327, indicating that between January 1996 and December 2002 11 cases were dealt with in a higher court. In 4 of those 11 cases people were given sentences of full-time imprisonment. Of those four, two each received the same head sentence: two of those four received sentences of three years imprisonment as a head sentence and two of those four received maximum terms of six months. So it certainly indicates that, firstly, it is not a prevalent offence that has been finalised to sentence, and secondly, the sentences are not at the high end of the scale at all.

**The CHAIR** — In Victoria, as in New South Wales, the offence of accessory, mostly known as accessory after the fact in other jurisdictions, applies to only principal offences, which are serious indictable offences in New South Wales, and in other jurisdictions, such as Queensland, it can constitute the principal offence for the purpose of accessory. Do you have any comments on that?

**Mr SANDLAND** — I would be reluctant, as a defence lawyer, to be supportive of an extension of that definition. I must admit that we agreed that Lester might field that question.

**Mr FERNANDEZ** — It is a difficult question because it is an additional element of proof required at prosecution. There has actually been a useful decision, not specifically in relation to accessories, but in relation to our public justice offences legislation, where serious indictable offences are referred to. That was the decision of the Court of Criminal Appeal in El-Zeyat [2002] NSW CCA 138. I might hand up a copy.

I suppose it is a question where perhaps there is not any particularly strong view, but when it is a serious indictable offence that is an additional element that must be proved that the person who is an accessory knew that that principal offence was an offence of a certain character, as opposed to an offence of any general character. I suppose as defence lawyers we would prefer that to remain as it is.

**Mr SANDLAND** — That was my general view. Firstly, we would not be in the business of advocating an extension of the offence for fear of the net widening. Secondly, as Lester indicated, it is really aimed at the person who assists in relation to more serious matters. There becomes a problem of detection in relation to less serious matters. What do you do if a sibling tells you that 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.

**Mr FERNANDEZ** — In New South Wales we have a specific section, called 'Conceal Serious Offence', section 316 of the Crimes Act. But that refers specifically to a serious indictable offence, not just any offence.

**Mr SANDLAND** — But that was a section capturing the misprision of felony offence that has created some difficulties in New South Wales because of a perception that the police use it as a means of extracting information by way of threat of, 'If you don't talk to me, regardless of your right to silence', in terms of not incriminating that person themselves, 'then I'll charge you with this more serious offence'. Lester, I think, has yet another paper in relation to that section.

**Mr FERNANDEZ** — Our Law Reform Commission reviewed section 316 in 1999 and advocated for the repeal of that section. I will hand over the relevant parts of the report. What the Law Reform Commission referred to was the difference between a legal duty and a moral duty. The substance of that discussion is contained in that Discussion Paper, so I will hand that over.

**The CHAIR** — Thank you very much. Are there any other general comments you would like to make in relation to the reference?

**Mr SANDLAND** — No, not on my part. I think the opening remark about the advantages of the system in terms of ease of disposition, certainty of penalty, a package that involves a catch- all offence as well as the specific offences has a lot to commend itself. Given that it seems to have been introduced into New South Wales without there being too many problems that I am aware of from either side, that is prosecution or defence, suggests to me that it has a fair bit to commend itself. That has only been brought home by the statistical information that Lester has given and also the case law around perverting the course of justice, which seems to cover a variety of scenarios. So the flexibility is still there. Those problems of the rigidity of a codified system do not seem to apply when you get the best of both worlds.

**The CHAIR** — Thank you very much. It has been incredibly interesting. You have given us a lot of interesting statistics and documentation to support what has happened here. We appreciate your taking the time to come to speak to us.

**Committee adjourned.**