LAW REFORM COMMITTEE

Inquiry into administration of justice offences

Sydney — 12 November 2003

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Mr M. Marien, S.C., Director, Criminal Law Review Division, New South Wales Attorney-General's Department.

The CHAIR — Thank you for coming along. Welcome to this inquiry into the administration of justice offences. Our work, at least in Victoria, is covered by the Parliamentary Committees Act and any evidence that you give us is subject to parliamentary privilege. It is being recorded by our able Hansard reporters. I think you have met the other members of the committee: Richard Dalla-Riva; Noel Maughan, who is the deputy chair; myself, Rob Hudson; Kristin Giles, the research officer for this particular reference; and Merrin Mason, the executive officer for the committee. You will get a transcript of what you say and you will have an opportunity to make any alterations to it. If there is anything that you want to be in camera it would be useful if you could indicate that at various points as we go through if you do not really want it on the public record; otherwise all the material is available both on our web site and in printed form.

We have kicked off by asking everyone the golden question — that is, what do you think about codification and what do you see as the advantages and disadvantages of codification as against a common-law system of justice offences? I wonder if you have any views on that.

Mr MARIEN — Can I say that before coming here today I read your discussion paper and also the Model Criminal Code Officers Committee report and discussion paper and traversed again all of the arguments for and against codification. I should state at the outset that I am also a member of MCCOC, not that that necessarily colours my views about the subject in that obviously New South Wales is represented on the committee — as is each jurisdiction — by people who have some expertise in the criminal law. However, I have read a lot of what Matthew Goode has said about the idea of codification and I think generally I agree with him that with the serious sanctions that go with the criminal law there is a great advantage in the law being understandable and accessible to the community.

In my research in the last couple of days before coming here today it just shows up again when one looks at the common-law offence of perverting the course of justice or attempting to pervert the course of justice and the myriad decisions the court has brought down on questions such as what is the nature of the tendency, does there have to be a substantial tendency or just a risk. I think generally I am in favour of codification. As to whether I am in favour of total codification — that is, complete exclusion of the common law — I probably sit on the fence a bit on that one. I think there are still advantages in principles of the common law being imported into the interpretation and construction of statutory provisions, as we have in New South Wales.

The CHAIR — New South Wales has minimalist codification in that it has some steps, but it does not by any stretch of the imagination spell out the various elements of the offences and so on. Do you think that what you have is adequate or do you think there could be clearer definition of the offences? Bearing in mind, of course, that whatever statute law is passed there will always be some interpretive and expansive element that is applied by the courts in interpretation of the statute.

Mr MARIEN — Can I just say by way of disclaimer that before coming here today I directed my attention to some of the questions I thought you would be looking at today. I have not systematically gone through every provision in part 7 of the Crimes Act to determine the deficiencies of those provisions. However, as you all know, these amendments to part 7, which came in in 1990, established in New South Wales some codification and statutory offences titled public justice offences. We repealed common-law offences, so to some extent we have provided for specific offences which formerly may have fallen within the general catch-all offence of perverting the course of justice or attempting to pervert the course of justice. I think generally those provisions seem to be working. One of the questions on the list you have given me today that I have looked at is problems with the workings of these provisions. I must say that I am not aware of any specific problems. One of the things you have asked is: is there any provision that has been the subject of any comment? The only one I have been able to find is section 316. Do you have that report?

The CHAIR — Yes. We had a fairly extensive discussion on section 316 yesterday, but we would be interested in your views on it.

Mr MARIEN — Did you get a copy of the press release that came with the report? That press release is very useful. It really summarises it.

The CHAIR — That would be great.

Mr MARIEN — The press release points out the kinds of problems with the old misprision of felony — a common-law offence. The press release summarises the kinds of practical problems that could arise: particularly in the situation of domestic violence, for example, where a victim does not report an assault; where a person confided in family members about sex offences committed against a child and they did not report the information, the

family would also commit the offence; inhibition of important research; and also suggestions that police could improperly use threatening to use this offence to obtain information from potential witnesses.

I think there is a lot to be said in a lot of those arguments. The Law Reform Commission did, however, recommend that subsections (2) and (3) be retained, which are the provisions whereby a person solicits, accepts or agrees to accept any benefit for himself or somebody else in consideration of doing something that would be an offence under subsection (1). So it is going that step further than actually just failing to report or provide information about a serious indictable offence, by doing an act to ensure that somebody does that. The Law Reform Commission, I think rightly, recommends that those offences be retained. I will not say anything more about section 316. Obviously you have heard a lot about that from prior submissions.

Going back to what we have done in New South Wales in part 7, as I say, I have not been able to find, in my limited researches in the last couple of days, any particular problems. No doubt they are there. Just the general problem, I would still maintain, in section 319 — that is, doing an act with the intention to pervert the course of justice — obviously does cause problems. I would certainly recommend to this committee that if such a catch-all provision is to be adopted in your jurisdiction a closer look be given to the drafting of that section to deal with the kinds of issues which have arisen in the cases which are referred to in the discussion paper, particularly the issue about the nature of the act and the distinction of authority in New South Wales, that all the act has to be is a step along the way and you do not even have to look at whether there is a prospect at all, to cases where there must be some prospect of it perverting the course of justice, even only a risk but at least some prospect. The answer as to which one you pick is a difficult question.

The CHAIR — Did you have any experience of the system pre-1990? How would you compare the operation of the system under the common-law regime with codification, and were there any difficulties with the transition from common law to codification?

Mr MARIEN — I really have to say that I did not have a great deal of experience before 1990 in prosecuting or defending these kinds of offences, so it has certainly been post-1990, and really my experience has been in dealing with part 7. But, as I say, I think the problems that would still flow from section 319 would certainly have been problems before 1990.

Mr DALLA-RIVA — We had a preliminary discussion before. As you know, we are going through the process of looking at whether we should do it, but with the codification of these laws and in reference to part 7, if a blank sheet of paper was placed in front of you and with one stroke of the pen you could create these laws — I do not mind if you go through certain parts and say that in section 311 there are some good parts — I do not know, through the Chair, whether this is okay, but I would like to get your view of each of the sections. You may wish to pass over them, but I would like to just get an idea of what you would do if given that opportunity. You may not want to do so, but you have already indicated sections 316 and 319. I wonder for the committee's sake if there are other sections that have come up in your experience and you would say, 'If we'd done that it would have been better'?

Mr MARIEN — As I say, I cannot say from direct experience, but can I say in looking at part 7 I think the general aim here was to as much as possible create specific offences which may formerly have fallen under the general offence of perverting the course of justice and then to leave the catch-all provision for those which are not specifically caught up in specific offences. I think generally the part does that. First of all, the first provisions of the part deal with hindering a police investigation and the offence of making a false accusation. I do not have any difficulty with those kinds of provisions. I think the law is clear that those kinds of provisions do fall within the general area of administration of justice offences.

We have spoken about concealing serious offences. We then go on to tampering with evidence in section 317, and section 318, using false official instruments. Again I have no difficulty with those being seen as part of administration of justice offences.

Section 319, pervert the course of justice — I have made comments about that. We then move on to the corruption of witness and jurors — again I think that is an appropriate area — threatening or intimidating; influencing witnesses; reprisals against judges, witnesses, jurors. I noted one of the questions was arising from the Fingleton case. I must say I do not support the import into that section of what they have in Queensland of 'without reasonable excuse', the reason being that I think anyone who gives evidence as a witness should be completely free of any interference at all for whatever reason, as a result of the fact they have given evidence. I think Di Fingleton raised the reasonable excuse that she had to do this: because of the fact she had given evidence they could not work

together.

In my view if a witness gives evidence they should be completely free — this is a note I have made — from any interference whatever as a result of having given that evidence, whether it be for a reasonable excuse or not. Also it is very hard to contemplate a kind of situation where the reprisal under our section 326 is the threat of any injury or detriment on account of the person having given evidence.

It really is 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. For that reason, that it is very hard to imagine a case, as well as for the policy reason — that a witness should be completely free from any interference — I would not support the Queensland approach. I do not know if anything had been said to you; I would be interested to know what the policy reason behind that in Queensland was.

Ms GILES — We are going to Brisbane tomorrow. Do you think she would have been prosecuted in New South Wales?

Mr MARIEN — I think only Nick Cowdrey could answer that question.

Ms GILES — I will put a question mark beside that question.

Mr MARIEN — I do not know if Nick Cowdrey is coming to the — —

Ms GILES — No.

Mr MARIEN — But you have some of his people. Yes, I think if the allegation had been made, it certainly would have been seriously looked at by the DPP. As to whether it would be prosecuted, obviously I cannot express a view. But we have not been shy in New South Wales of prosecuting cases where judicial officers may have been seen to be either putting pressure on another judicial officer or — I am talking about the Foord cases and the Murphy case, although the Murphy case was the commonwealth DPP and I think the Foord case was a state case; I do not think that was commonwealth, I am not sure. I think it was the state DPP, yes. I am interested to hear what the people from the DPP would say in answer to that question. We then move on to — —

MR DALLA-RIVA — Just on that issue, there was a discussion about providing further protection for people like the defence and prosecutors, to avoid them being threatened or intimidated. What is your view on that? Would you see that as a good addition, given the opportunity?

Mr MARIEN — Can I just say that we made some amendments to our provisions on assault which obviously would be more the case of a threat — a physical threat — to cover solicitors and prosecutors, but if we are just talking about a — —

Ms GILES — Paragraph (c) refers to a public justice official. What do you understand by that term?

Mr MARIEN — We are looking at section?

Ms GILES — Section 326(c). It refers to witnesses, jurors, judicial officers and public justice officials.

Mr MARIEN — Is it defined?

Ms GILES — Yes, it is, in the first section. It means — —

Ms HADDEN — 'Other than as a judicial officer' — —

Mr MARIEN — 'Or prosecution of offenders'.

Ms GILES — That would cover them.

Mr MARIEN — Yes, that would cover them. It would not cover public defenders, though. If their clients were convicted — it would be unlikely if they were acquitted — they may be the subject of — —

Ms MERRIN — It was in the context of the public, not their clients, threatening them as a consequence of an acquittal.

Mr MARIEN — Yes.

The CHAIR — It can work both ways.

Ms HADDEN — It can. It could be the family of the victim of the subject of the acquittal.

Mr MAUGHAN — It could also be defending somebody who the public sees as clearly committing a — —

Ms HADDEN — An atrocious crime.

Mr MAUGHAN — Exactly.

Mr MARIEN — Yes, I think there is a lot to be said in that argument. If it covers prosecutors I would support that. But it should also cover — —

Mr MAUGHAN — Defence counsel.

Mr MARIEN — Defence counsel.

The CHAIR — Are you saying the amendments you make to assault cover — —

Mr MARIEN — Only prosecutors.

The CHAIR — Not defence counsel?

Mr MARIEN — No, it does not. It just imposes a slightly higher penalty than the normal assault.

Ms HADDEN — Can I just go back to that one just quickly? What would have been the policy reason behind only covering prosecutors as opposed to defence counsel?

Mr MARIEN — Because — —

Ms HADDEN — You stand in the shoes of the Crown — is that it, perhaps?

Mr MARIEN — The policy reason was that it flowed on from — — Sorry, we already had slightly higher penalty for assault on police officers. The policy reason was that we should extend that to other law enforcement officers, not just police officers. Hence it was extended to Sheriff's officers, corrections officers — although they are not strictly law enforcement officers — and, at the request of the DPP, prosecutors as well. The second-reading speech, when the amendments came through, referred to further protections for those who investigate and prosecute crime. So that was the policy consideration, and therefore no-one would have really thought of that area, of defence counsel.

But, as I said, that is purely for assault. But if we are talking about a threat by way of some kind of financial detriment, which may not be technically an assault, that would not be covered by those provisions anyway. But I think that is a good idea, that 'public justice official' should include legal representatives of an accused person or however you want to draft it.

The CHAIR — Do you want to still keep going through part 7, or have you exhausted that?

Mr MARIEN — I think after that we came onto perjury and all the provisions relating to perjury and restriction on prosecutions.

The CHAIR — Do you have any comments on section 327, which basically only covers false statements and documents made in connection with judicial proceedings, which is not the case in Victoria? Do you have any views about that?

Mr MARIEN — In Victoria it is 'at large', so that if it is — —

The CHAIR — Any statement on oath.

Ms GILES — Yes, affidavits, whatever. Perjury is extended that wide in Victoria.

Mr MARIEN — But I am just trying to think in what kind of situation — if we are talking about an affidavit, that would usually be concerned with judicial proceedings — would we have statements on oath that are not connected to judicial proceedings? Given that we have a very wide definition of judicial proceedings in our act, which would include, as I understand it, before — —

Ms GILES — It also includes statutory declarations.

Ms MASON — There are quite a few of those. Every time you sign a tax office document or something.

Ms GILES — 'Whereby or under any act it is required or authorised that facts, matters or things be verified or otherwise assured or ascertained by or upon the oath, affirmation, declaration or affidavit or some' et cetera. So it is very, very broad.

Mr MARIEN — Yes.

Ms GILES — So even someone who goes down to the chemist and signs a statutory declaration — —

Ms HADDEN — For Medicare, even.

Ms GILES — That is right. On our statutory declaration there is in small print a warning about perjury. I do not think a lot of people are aware of that, but technically it is 15 years in prison for lying on a statutory declaration.

Mr MARIEN — Fifteen years?

Ms HADDEN — We do not muck around in Victoria.

Ms GILES — I suppose the question is: what do you think of that in New South Wales?

The CHAIR — Is that a loophole? Is that something you would contemplate?

Mr MARIEN — I do not think so. We have a specific provision in section 330 of making a false statement on oath, which may not be perjury — although that does not cover a statutory declaration. I think there would be an offence under the Oaths Act for making a false statutory declaration. I just do not know off the top of my head what the penalty is. It would seem to me on policy grounds that there is some justification for differentiating between a statutory declaration and a statement on oath.

The CHAIR — Before a court?

Mr MARIEN — Before a court or in an affidavit in relation to judicial proceedings, given the wide definition of judicial proceedings that we have. Yes, I think there is an argument there that there is justification for differentiation in penalty.

Ms GILES — On the basis that a statutory declaration is a lesser document, less important?

Mr MARIEN — Yes, and that it is not being used in judicial proceedings. The whole purpose of these provisions is in relation to striking at the heart of justice.

The CHAIR — I think the other thing we found yesterday was that notwithstanding even your maximum penalty for perjury the range was two to four years. There were very few convictions for longer than four years, even though you have a 14-year maximum and we have a 25-year maximum. We have to pull out the stats in Victoria.

Mr MARIEN — What is your maximum in Victoria for perverting the course of justice?

Ms GILES — Twenty-five years.

Mr MARIEN — And perjury is 15 years?

Ms GILES — Yes.

Mr MARIEN — Were the stats you were just talking about for perjury or for perverting the course of justice?

The CHAIR — They were for perjury. The stats we got yesterday were for New South Wales, where there have been only 16 prosecutions for perjury in 20 years.

Mr MARIEN — I did come along armed with some statistics. I was going to ask our research officer to go back again and see if we can get them before January 1996. This is from the Judicial Commission, from January 1996 to December 2002. What was the period of the statistics you had yesterday?

The CHAIR — It was for 20 years. There were 16 successful perjury convictions since 1983.

Mr MARIEN — Who gave you those stats?

Ms GILES — Legal aid gave us these.

The CHAIR — What have you got there?

Mr MARIEN — I have a breakdown for that period for all the offences in part 7 in both the higher courts and the Magistrates Court. Perjury in the higher courts in that period were 11 convictions. It says, 'number of cases, 11' — but I think that means 11 convictions. It does not mean that there were just 11 cases.

Ms MASON — Legal aid gave those figures, too. It was only successful prosecutions that they had stats for.

Mr MARIEN — That is only convictions. It would be nice to know — and we could find out the statistics on the number of cases there were through the Bureau of Crime Statistics Australia. In the Magistrates Court there were three.

Ms HADDEN — That was over only a three-year period, from 1999 to 2002, I thought.

Mr MARIEN — Yes, that is from 1999 to 2003.

Mr DALLA-RIVA — How many offences under section 316?

Mr MARIEN — In the higher courts that is a well-prosecuted offence: 58 convictions; and 101 in the Local Court.

Ms HADDEN — That is over the same period?

Mr MARIEN — Yes, 1999 to 2003 for the lower courts and 1996 to 2002 for the higher courts.

Mr DALLA-RIVA — Was it the highest compared to all the others?

Mr MARIEN — Yes.

Mr DALLA-RIVA — So one could argue that it is the defence barristers getting a bit upset because they are losing the cases for their clients?

Mr MARIEN — In that period April 1999 to March 2003, the total number of convictions in the Local Court for part 7 offences was 273, and 101 of those were under section 316(1).

Mr DALLA-RIVA — And in the higher courts?

Mr MARIEN — The total was 250; 58 convictions. In the higher courts the most convictions are for perverting the course of justice, under section 319. The next is section 316. I will give you those statistics.

The CHAIR — Thank you.

Mr MAUGHAN — Given the anecdotal evidence that counsel frequently say that they know that a witness is clearly not telling the truth, why is it that there are so relatively few prosecutions and even less convictions?

Mr MARIEN — I must say I have not seen the statistics as to the number of cases to see what proportion of perjury prosecutions are successful by way of getting a conviction — if that is the way you define success, which defence counsel may not. I just do not know on the stats — it would be interesting to see the number of perjury

cases, say in the higher courts, and the number of convictions.

One of the problems is, of course, the issue about the evidentiary rule that you need corroboration for a perjury prosecution, so it cannot simply be word against word. The fact that a jury may have accepted the word of one person over the word of another does not constitute perjury. It is the requirement to have that corroboration. I query, of course, the need for that. I may be wrong. My recollection is that the MCCOC report raised the possibility that that may not necessarily be a requirement, corroboration.

Ms GILES — It is certainly an issue that we are looking at. That is one of our questions as well, as is the materiality question, which perhaps you would like to comment on as well. That is one of our interests because it is not a requirement in Victoria currently. All evidence is deemed to be material, so effectively it has been neutered, as it were, whereas it is in New South Wales. What do you think of the Victorian position?

Mr MARIEN — Again I looked at the arguments in your discussion paper and went back to the MCCOC report. In some way we have dealt with the problem in New South Wales by getting the materiality issue away from the jury, so that it is a question of law. So that where something technically may be material a jury may just take a view that: technically it might have been material — and the judge is telling us what materiality means, that it means it is something that matters, but we do not think this really matters very much, so we will acquit — the merciful verdict.

It has been taken out of the hands of the jury to the judge, a question of law as to whether it is material or not. I think that is appropriate. I think that is a question of law as to whether particular evidence is material to the issues in a case. The example of someone being shy about revealing their true age or their sexuality or some issue of that kind and wanting to lie about it when it has absolutely nothing to do with the proceedings is a substantial argument. I think my inclination is towards the retaining of the issue of materiality. I have some problems with the deeming provision to say that everything is material. The view can be taken that you can have the deeming provision and there will be prosecutorial discretion and also you have to have the approval of the Director of Public Prosecutions or the Attorney-General. That is a safeguard. However, I think materiality is not that difficult a concept. I think generally it is something you can recognise pretty easily, whether something matters in the case or not. The views of the person giving the evidence are irrelevant — they do not know what the issues in the case are — so it is an objective test as to the materiality. What the person says may not be material in the case at the time, but later in the case it does become material because of some other issue that has arisen. I would support the keeping of the materiality requirement and that it actually be material. I would not support the deeming provision.

Returning to the corroboration issue, I am not convinced that we need to throw the baby out with the bathwater on that. There are arguments, but I think one of the issues — I do not know if I am going to express this correctly — is to do with jury verdicts and controverting a jury verdict. The fact that a jury is able to simply believe one person over another 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 requirement of corroboration is a sensible one. Sometimes the common law is sensible. It is an age-old principle of the common law. Although the issue is raised in the MCCOC report it does not really seem to argue it through as to why it should be done away with. I support retention of corroboration.

Ms HADDEN — Subsection (4) of section 316 says a prosecution under section 316 — concealing a serious indictable offence — is not to be commenced without the approval of the Attorney-General. How does that work in fact? Is it simply a rubber stamp or does the Attorney-General get advice separate from that of the prosecutors who no doubt are submitting the request that the prosecution commence?

Mr MARIEN — What this subsection is directing at is the case of professional counsellors — a sexual assault counsellor, for example — who gets information in the course of their profession. Can I say I am simply not aware of any such prosecution taking place since this part commenced of somebody who obtained the information in their professional capacity. The point of this subsection is that if you do want to prosecute somebody for that you require the approval of the Attorney-General.

Ms HADDEN — There have been no prosecutions.

Mr MARIEN — I do not know of any. I would be really surprised if there had been. The policy considerations behind that subsection are pretty powerful. I say that I do not think there has been a prosecution of a person in their professional capacity. Also can I say these professions are prescribed by regulation. It is not just

anybody — you know, a real estate agent in the course of his profession — they are particular categories of professions such as sexual assault counsellors.

The CHAIR — Presumably there are other provisions in your children and young persons act in relation to child protection matters in terms of mandatory reporting.

Mr MARIEN — Yes, indeed. That is right. While they may not be prosecuted under section 316 they may be in breach of other obligations under that legislation.

The CHAIR — We have jumped around a little bit, but maybe if we could just return to accessory after the fact where the offence of accessory after the fact only applies to serious indictable offences in New South Wales but not in Queensland where any offence can constitute the principal offence. What is your view about the operation of this section in New South Wales?

Mr MARIEN — First of all, I do not think the restriction to serious indictable offence is such a restriction given that it is restricted to offences of five years or more so that is pretty much a lot of our Crimes Act. If we are talking about offences with maximums under five years we are talking about generally less serious offences. I think the policy reason underlying that is there 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 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 resources on those kind of prosecutions? As I understand it that is the policy consideration behind that restriction. It is also to do with finality for less serious criminal offences. However, there would still be the route of attempting to pervert the course of justice which would not require the prosecution to prove the commission of the principal offence.

The CHAIR — Then you have this overlap with section 316 which is a different section but which certainly tends to catch out a lot of people?

Mr MARIEN — Yes. I would support the retention of that restriction on accessory after the fact.

Ms MASON — The public defenders suggested that it should be changed to make it a more serious offence requirement. They took your view that five years really incorporates almost all of the offences and thought — —

Mr MARIEN — It should go up?

Ms MASON — Yes. What would you say?

Mr MARIEN — Well, they would, wouldn't they?

Ms HADDEN — And you would not.

Mr MARIEN — No, I am only joking. Strike that from the record! The concept of a serious indictable offence is well entrenched in our Crimes Act, which is an offence carrying five years or more.

Ms MASON — So it is convenient.

Mr MARIEN — Yes. The practicalities of it are that we would have very much to rewrite the Crimes Act in lots of respects. I think the present restriction is fine and, taken in line with proper exercise of prosecutorial discretion, we should be fine.

The CHAIR — Have you got any other comments you want to make about the operation of the code in New South Wales?

Mr MARIEN — I think I have very much covered the things that I wanted to say. There is just one thing I might add quickly, for your information, with respect to the offence of perjury. People from the office of the Director of Public Prosecutions, who I think are coming later today, contacted me. It may be one of the questions that is on their list and they just did not feel that they had enough information. It has to do with the interaction between perjury offences and double jeopardy and the decision in Carroll in Queensland, which went to the High Court. The fellow was acquitted of murdering the little girl and later fresh forensic evidence came to light which was not available at the time of the first trial. Because of the rule against double jeopardy — that is, Mr Carroll had been acquitted of murder — they could not take him again for murder so they brought a prosecution for perjury on

the basis that he had lied when he said that he had not murdered the little girl. Again the High Court said, 'No, you cannot do that either' — that is, that is also breaching the rule against double jeopardy because you are asking a jury at the second trial to say that he lied at his first trial when the first jury has already found him not guilty on that very issue. So it is controverting the first acquittal.

In New South Wales we presently have a bill out for consultation, which should be introduced after that consultation period, making amendments to the rule against double jeopardy in New South Wales. There is also a discussion paper on double jeopardy which will be released this week by the Model Criminal Code Officers Committee. It is probably in the paper today, is it?

Mr DALLA-RIVA — Yes, it is on page 5 of the *Australian*.

The CHAIR — What sorts of amendments are being contemplated?

Mr MARIEN — Without going into all the detail, which is unnecessary for your purposes, but just how it deals with perjury, the MCCOC bill which will be released this week at the Standing Committee of Attorneys-General meeting in Hobart proposes that when a case like Carroll comes up again — that is, if following an acquittal for a serious offence, and there is a definition of what a serious offence is: an offence carrying 15 years or more — if there is fresh evidence the prosecution can either make an application to have the original acquittal quashed and have a retrial on the original charge of, say, murder, or bring a prosecution for perjury. They can take either of those courses. That is dealing directly with the problem that arose in that Carroll case which went to the High Court.

In New South Wales we are taking a different stand from the model bill in that if fresh and compelling evidence comes to light after the first acquittal the prosecution can only seek to quash the acquittal and have a retrial on the original charge. We cannot seek to bring a perjury charge. So they are restricted to simply having the original acquittal quashed and the Court of Criminal Appeal ordering a retrial on the original charge of murder. The prosecution will not have the option of bringing a charge of, say, perjury against the accused if such a charge would fall within the general rule against double jeopardy which presently applies. That is the main difference between the two bills. I just raise that because of the relevance of perjury.

The other issue is for both the model bill and the New South Wales bill if the original acquittal was what is called a tainted acquittal — that is, the acquittal was obtained through the commission of an administration of justice offence, such as the bribing of a witness, a juror or the judge. If evidence comes to light after the acquittal that the acquittal was obtained through those means, then there can be an application that the original acquittal was a tainted acquittal, it will be quashed and there can be a retrial on the original charge.

The tainted acquittal aspect is not really controversial. It is very hard to mount arguments if an acquittal was obtained through suborning a witness or a juror or the judge. It is the fresh evidence double jeopardy change that is going to be more controversial. I do not know what line the *Australian* is taking on it today, but it will be interesting to see.

Ms HADDEN — In relation to Carroll I understood that the jury did not acquit him, that the Queensland Court of Appeal directed an acquittal.

Mr MARIEN — On the original trial?

Ms HADDEN — Yes.

Mr MARIEN — No, but I could be wrong.

Ms HADDEN — There is something unusual about that case.

Mr MARIEN — There are lots of unusual things about that case.

Ms HADDEN — It never went back to a jury to consider.

Mr MARIEN — I do not think the original trial was directed.

Ms HADDEN — Then he appealed and the appeal directed an acquittal. It never went back for a retrial.

Mr MARIEN — You are right. What happened was that the prosecution tried to bring the charge of perjury at the second trial and I think it then went on appeal before it actually got to the jury and then it went on from the Court of Appeal to the High Court.

Ms HADDEN — It was not fresh evidence; it was just that they had read it wrongly in the first place, 20 or 30 years ago.

Mr MARIEN — There was fresh evidence. There was a confession.

Ms HADDEN — Yes, but they had read the teeth marks upside down. That was the reality of it. There were all those issues.

Mr MARIEN — That was all I wanted to say.

The CHAIR — Thank you for coming along, Mark. We appreciate your time.

Mr MARIEN — I think I have given you everything I wanted to give you. We were going to see if we can get statistics prior to that period from 1990. That was all we could get yesterday. If I can get them, I will get them for you.

The CHAIR — Thank you very much.

Witness withdrew.