LAW REFORM COMMITTEE

Inquiry into administration of justice offences

Sydney–12 November 2003

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Witnesses

Mr C. Murphy, President; and

Ms P. Wright, Vice President, New South Wales Council for Civil Liberties.

The CHAIR — Pauline, welcome. We are covered by the Parliamentary Committees Act in Victoria, so when we get your evidence back to Victoria we will be in jurisdiction. Your evidence is being recorded by our two Hansard reporters. If at any point you want your evidence recorded but not published or you do not want it recorded, we are happy to accommodate that. You will get an opportunity to correct the Hansard proof.

In the time available to us perhaps you could take us to the things that are of particular interest to the New South Wales Council for Civil Liberties. Perhaps you might want to comment in the first instance on the advantages of codification — what you see them to be from a civil liberties point of view, as against the application of the common law.

Ms WRIGHT — Thank you very much for inviting us to give evidence, for a start. We do appreciate having some input into your discussions. 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 that judge knows all of those circumstances.

Legislators may try to think of how best to frame legislation to cover all circumstances but it is not possible, so the common law does give that flexibility. Obviously in New South Wales some of the public justice offences have been codified but, for instance, the old common-law offence of perverting the course of justice has been retained as a general offence. So obviously the common law still plays a big part in the way in which that offence operates in practice — and we think that is a good thing.

The CHAIR — The argument that has been put to us in relationship to codification, talking from the civil liberties perspective, is that it is an important part of the rights of all citizens to actually know the offences with which they are likely to be charged. One of the difficulties that one encounters with the common law is that the exact nature and the elements of the offence are not always clear from the common law, unless you happen to be a lawyer who has ploughed through the various cases and the textbooks* that would allow you to have a full appreciation of the offence, whereas in a codified system at least all the elements of the offence are spelled out in the statute and therefore are theoretically known to every citizen.

Ms WRIGHT — That is the attraction of codifying or having legislation that sets out offences. There is an attraction in that, of course. It makes it easier for a person who is charged to say, 'Well, I've been charged with perjury. I go to part 7 of the Crimes Act and I am able to find what that means'. In theory that is true but 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.

The CHAIR — Would you go so far as to argue that part 7 then inhibits the exercise of civil liberties in New South Wales? Are you saying that the codification, to the extent that it exists, was a detrimental step, that 1990 was a backward step from your point of view?

Ms WRIGHT — 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. There are concerns, I think, that other civil libertarians might express — that in theory the codification of those offences could result in an inflexible application of the law. In practice I do not know that it has happened, but the possibility for that happening certainly exists, because wherever there is inflexibility, then it is possible for someone's rights to be run over without that having been the intention; but where there is judicial discretion, that is less likely to happen.

The CHAIR — Just in terms of the experience of the council, are there any particular cases that have come to your attention where you feel that part 7 has proved to be inflexible and has not allowed the full exercise of rights by citizens that might have been enjoyed by them in relationship to the common law? Are there any particular concerns you have with part 7?

Ms WRIGHT — Not really. No particular cases have come to our attention since 1990. No-one that I know of has complained to us in relation to those offences. I think one of the areas you were interested in was incidence of charges and prosecutions — they are pretty low. I do not know whether that is because they are underprosecuted; I would not say that perjury, for instance, is underprosecuted. I think it is just by its nature a difficult offence to prove, so the prosecution would rarely choose to prosecute. There is a reason for that; it is obviously a very serious charge, but it is also a very difficult one to establish — to find a prima facie case is quite difficult.

That is shown in the statistics. We had a quick look at the Bureau of Crime Statistics figures for 2002. In the higher courts there were 40 people charged with 44 offences of subverting the course of justice; 20 people were charged with 24 offences against other, unspecified justice procedures — they would be other offences within part 7; I am not quite sure what they were. In the lower courts and Local courts there were 143 people charged with 146 different offences of subverting the course, and 441 people charged with 464 unspecified part 7 offences. So that is not a great deal in a year, but it is a fair number.

Looking at perjury from 1996 to 2002, from what we can see from the Judicial Commission's sentencing information statistics it looks like there were a total of 11 cases only in that period in the higher courts; and in Local courts only three were reported between April 1999 and March 2002. So clearly there are not a lot of people being charged with perjury offences. That was section 327 perjury, not the more serious section 328 ones — there is none reported of the more serious section 328 that we could find.

I do not know whether you are interested in the types of penalties that those cases attracted. In the Local Court matters, of the three cases two of them attracted community service orders and the other one was a suspended sentence. In the higher courts one case was a supervised bond of some sort, four cases were community service orders, one was a suspended sentence, one was periodic detention and the other four were prison sentences.

Mr MAUGHAN — How then do you regard those penalties, which seem to be relatively light smack-across-the-wrist ones for what would appear to be a serious offence, compromising the justice system and to that degree people losing some confidence that they are going to get a fair hearing and that they are going to get justice? Do you feel that those penalties are appropriate or should they be more severe than that?

Ms WRIGHT — It is difficult to comment on that because I am not aware of the precise circumstances of each individual case of perjury. Obviously the ones that attracted jail penalties would have been ones that seriously compromised the course of justice, whereas the ones that attracted bonds or suspended sentences will have been less serious. I think it is appropriate that there is a range of penalty available because, although perjury is serious per se and ought to attract a penalty, one can see that there can be less serious and very serious versions of that. So clearly the very serious ones do attract jail, and ought to.

The CHAIR — Perhaps we should pause at this point and introduce Cameron Murphy.

Mr MURPHY — Hello. I am sorry I am late. I have just been running from a hearing.

The CHAIR — I understand that you are stretched.

Ms WRIGHT — One thing, Cameron, that you might like to comment on and that the committee is interested in, is whether you are aware of any complaints or concerns we might have about the, perhaps, inflexibility of part 7 of the New South Wales Crimes Act and whether codification has had a negative effect on civil liberties.

Mr MURPHY — I looked at the discussion paper that you circulated with your questions, and 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. The only example that comes to mind over the last few years is our recent amendment to equalise the age of consent — that is an example of codification taking place to override the common law to provide a right to someone. Other than that, it generally means that it is quite strict, and you are reducing someone's rights and liberties.

The CHAIR — In this area, in relationship to part 7?

Mr MURPHY — Looking at your issue about codification of offences like perjury, it just means that it makes it inflexible in the way that it can be dealt with. 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 placed in the codification. It is usually absolute — you must do X or Y if this is the case.

We have had a series of recent amendments demonstrate that, for example, with bail. In this state we now have the toughest bail laws there are; we have had the presumption of bail reversed, effectively; and we have had increasingly more strict legislation put in place to almost remove discretion entirely. In the same way as it occurs in bail, it is happening in other areas. So when codification occurs the process is all about removing judicial discretion.

The CHAIR — That in a sense is a policy; it is not a natural consequence of codification that that happens. You are saying that the policy trend, at least in the New South Wales experience, has been towards limiting common-law rights rather than enhancing them?

Mr MURPHY — Yes. Let me elaborate. The reason is that this generally occurs because 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. As I say, we have not had a policy direction of codification that is about improving rights, really.

The only clear example of that has been in terms of equalisation of the age of consent. Other than that it just rarely happens. In many cases when it is codified it is not done in a way that will provide the criminal justice system with the flexibility it needs to deal with individual cases.

The CHAIR — I suppose looking at one of the particular shandies that exists in your legislation, which is the offence of perverting the course of justice — we were talking about this before — you have both the generalised offence and specific offences listed. So in a sense it seeks to graft the common law into the statute and also have the various statutory offences. Do you have any comments on the desirability of that catch-all, together with the range of specific offences or do you think it would be better just to go back to the generalised common-law position?

Mr MURPHY — What I think needs to be done and is a clear problem in New South Wales — if we take it to a different level — is that 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 when things are being codified it is often to correct, as I said, some perceived wrong in the community about the way in which the criminal law is working.

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, as 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.

We have had an inquiry resulting in legislation that proposes to change the law of manslaughter because of one single event that has not really taken into consideration the wide range of things that can fall into manslaughter. There are lots of examples of that process but it just needs to be done in a way that does protect people's rights. Often that is forgotten about in the codification. It is more about making sure that every guilty person in the view of the community is thrown behind bars and not about providing codified rights for people.

Mr MAUGHAN — It is a difficult one, is it not? Because the media whips up a campaign about a particular incident and the population out there widely accepts that and then puts pressure on the government of the day to legislate, which is democracy supposedly at its best but not leading to the best law.

Mr MURPHY — Yes. You see, the important consideration is that when the common law is there the common law is able to cope with variable situations.

Ms WRIGHT — And that is the beauty of it.

Mr MURPHY — It can make a decision about an individual case. The question really should not be: what is preferable, common law or codification? 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 is not being done. When codification is taking place because of a particular event — you get a frenzy, it is covered in the media, everyone is outraged about the way the judicial system may have handled some particular crime — then you get codification that takes place in part, that directs a particular outcome without maintaining the rights. So it is the worst of all worlds.

The CHAIR — It is not an absolute, is it? There are lots of areas in the common law where quite patently the common law has not adequately protected people's rights, which is why at various points we have not only introduced sexual discrimination acts and racial discrimination acts but we have contemplated bills of rights and so on — because the common law has been an imperfect instrument.

Mr MURPHY — Consumer protection is another example. It is not that codification is an undesirable outcome; it can be highly desirable. It just has to be done in a way that provides a balance and preserves people's rights.

Ms WRIGHT — In this particular instance, from Victoria's perspective, if you going to codify keeping a catch-all offence of the nature of perverting the course of justice, that is really the way to go because all it has done is enshrine in legislation what was the common-law offence and it then allows the courts that flexibility that we have been talking about. So if you are thinking of codifying, in our view that would be the way to go because it is not seeking to inflexibly apply some new thing. It is simply saying, 'That's an offence'.

Mr MAUGHAN — Do you regard the New South Wales law as being codified?

Ms WRIGHT — Certain offences are.

Mr MURPHY — Unpopular offences are, I suppose.

Ms WRIGHT — Yes, that is right. It is more highly codified, of course, than Victoria's but it is not a code.

Ms HADDEN — Can I make a comment in relation to section 319 of your Crimes Act, which is the general offence of perverting the course of justice? In effect the code sections, if they are not popular or successful or do not find the answer then you have a catch-all phrase, so you have two feet in either box. Is section 319 not a general offence which takes you back to your common law? Is that not saying that codifying is not the answer?

Ms WRIGHT — The short answer is yes, it does. It says that codifying is not the answer because you can never catch everything — and in my view you should not try to. To me abolishing those other sections and replacing them with the other sections in part 7 was a useless exercise. You might as well have just kept it.

Mr MURPHY — It just does not work. If you look at our recent review of the law of manslaughter, it is exactly the same problem that they came up, where the government's terms of reference were that there was a problem. We had a case where someone had killed a so-called unborn child in the course of road rage that led to a review of manslaughter, whether a so-called unborn child should be recognised in the law.

Then there were other examples of inconsistencies in sentencing for manslaughter. So the government's objective was to try to codify manslaughter, work out who was considered a living being or not, then try and work out what sort of sentences should be applied to different categories of manslaughter.

If you look at the report by Merv Findlay, it is impossible to do because there is such a wide range of offences or events that can fall into that. In the same way you could in perverting the course of justice — any attempt to try and put minimum sentences on different categories or put in place different types of offences, just does not work because you are going to be lucky if an offence meets it once in a while, and then otherwise you need to rely on a general offence. Most of the things that occur are going to fall into the general category rather then the specific. Otherwise you will end up with a code that looks like the Corporations law to try and cover everything you can think of — and I do not know whether that is desirable.

Ms WRIGHT — Really, unless you are finding there are conflicting lines of judicial authority on a particular offence that mean it is difficult to know what the law is, there is no need to codify where that offence already occurs in the common law. I am really basing this on the discussion paper that has been prepared. It seems that there are not really any conflicting lines of judicial authority. There is some obiter in one case that suggested — — I forget what it was in; I think it may have been in relation to perverting the course of justice, but it was an obiter. I cannot remember what page it was on, but I think the comment of the particular judge in that case was a throwaway line and he was not really considering the issue. So there do not seem to be conflicting lines of authority; there just does not seem to be any pressing need.

The CHAIR — We are running just a little short on time. Do you have any particular comments you would like to make about our reference or the operation of part 7?

Ms WRIGHT — I probably have a few notes, which I will give you, but just quickly on the two statements irreconcilably in conflict — section 331 — I did a little bit of research on that, too. It seems that that is not a very useful addition to the law because there have been no prosecutions of it that I could see from 1996. I just looked up *Austlii* and found one Supreme Court case that vaguely referred to it — that is, *DPP v Atallah*, which related to an unsuccessful attempt to prosecute a person under section 87 of the ICAC act.

It was about evidence given at the commission hearing which is, to the knowledge of the person, false or misleading in a material particular. It was relevant to section 331 in that the witness gave false evidence on day one, corrected it on day two and reaffirmed on day three that what they had said on day one was untrue.

The ICAC act does not have a similar provision to section 331. It may be that if there was a section 331 in there, that that person may have declined to correct the earlier untruth: one does not know. That is obviously a concern, so I do not know that that kind of offence is a particularly useful one. I have made some notes on accessory stuff that you can have.

The CHAIR — I think the reason for that seems to be that where contradictory statements on oath have been made under section 331, the prosecution is generally under section 330, because it says here:

> The jury may make a special finding to that effect —

about contradictory statements on oath —

> and find the accused guilty of perjury or of an offence under section 330, as appropriate ...

So probably the prosecutions have been under section 330.

Ms WRIGHT — Right, or 327.

The CHAIR — Of course it is coming up in a slightly different context now with — of course it is outside our terms of reference — the Carroll case and double jeopardy in relationship to someone having been acquitted of murder and then the subsequent question of whether or not they perjured themselves and whether they can be charged with perjury or whether there should be a quashing of that decision. You are about to get a discussion submission in — —

Mr MURPHY — Which we can furnish you with if you like, if you would be interested in that.

The CHAIR — We would be interested to see that.

Mr DALLA-RIVA — We will have to guess which way you are going on it, but I do not know; I will wait until I read the submission.

Mr MURPHY — Essentially it is a bad idea. The legislation we have got at the moment on double jeopardy is modelled on UK legislation that is changing at a mile a minute over there. It is changing from the view that someone should not be tried twice to they will not be tried thrice, or who knows what else. It has got a lot of problems with it, though it is not the subject of the inquiry today.

The CHAIR — Are there other comments that you have, Pauline?

Ms WRIGHT — I have made a couple of notes on accessory offences. Just in brief, my view is that accessory after the fact ought only apply to principal offences which are serious, indictable offences. I have a view about that simply because it is a serious offence. Perverting the course of justice is something that should be directed to serious things, not to summary things. If an accessory after the event to a summary offence did amount to a serious perversion of the course of justice, then that section — section 319 of the Crimes Act — would enable prosecution of the serious perversion in those circumstances. So that is my view.

Similarly with the intention, it is my view that the person ought to have the knowledge or belief that the principal offender was guilty of the principal offence in particular. The person really ought to have known of all of the facts and circumstances that led to the finding of guilt for the principal offence. I think there is some mention of whether it could give rise to murder or manslaughter. I do not think that is material — it does not matter, as long as the accessory knew of all the facts and circumstances that gave rise to that offence. That is important, and I do not think they should be convicted of being an accessory unless they did know all those facts and circumstances.

The CHAIR — If you are happy to pass that over, it is up to you as to what its status is, because I know you made it more as an aide-mémoire for yourself, but we can perhaps use it to support the comments you have made here today.

Ms WRIGHT — You are very welcome to use it on that basis. It is just an aide-mémoire, but you are welcome to use it.

The CHAIR — Thank you very much for taking the time to come and speak to us. We know you are very stretched as a voluntary organisation, carrying out your professional job and also — —

Mr MURPHY — We would be happy to accept some funding!

The CHAIR — We are meeting with your New South Wales colleagues now, so we can pass on that recommendation.

Committee adjourned.