LAW REFORM COMMITTEE

Inquiry into administration of justice offences

Sydney — 12 November 2003

Members

Ms D. A. Beard
Mr A. R. Brideson
Mr R. Dalla-Riva
Ms D. G. Hadden
Mr R. J. Hudson
Mr A. G. Lupton
Mr N. J. Maughan

Chair: Mr R. J. Hudson
Deputy Chair: Mr N. J. Maughan

Staff

Executive Officer: Ms M. Mason
Research Officer: Ms K. Giles

Witnesses

Mr G. Smith, Deputy Director of Public Prosecutions; and

Mr S. Kavanagh, Acting Deputy Solicitor for Public Prosecutions (Legal), Office of the Director of Public Prosecutions.

The CHAIR — Welcome. Can I introduce you to my parliamentary colleagues. I am Rob Hudson, I am the chair of the committee. We have Dianne Hadden, a member of the Legislative Council for Ballarat Province; Richard Dalla-Riva, a member of the Legislative Council for East Yarra Province; Noel Maughan, a member of the Legislative Assembly for Rodney; Kristin Giles, the research officer for this particular reference; and Merrin Mason, the executive officer of the committee; and Maria and Linden from Hansard who are recording the proceedings. We are covered by the Parliamentary Committees Act, at least in Victoria, so when your evidence is taken back to Victoria it will be covered by the act; I do not know about our extraterritorial reach up here.

Mr SMITH — I doubt if it exists.

The CHAIR — Indeed. We are recording everything. However, if there is any aspect of your evidence that you want to be in camera you can inform us and we will respect that. Otherwise it will all be published on the Internet and in written form. You will get an opportunity to amend the transcript prior to publication.

Perhaps we could start off with a question we have asked everyone: what are your perceptions of the advantages and disadvantages of codification as against the common law in relation to justice offences?

Mr SMITH — I think with the codification, if you can call it that — I suppose you do call it that; we have a bit of reluctance about the word 'code' because we do not have a code here — it does appear that a number of these offences have certainly taken the place of the common law and the common law has been specifically abrogated in relation to them, so I suppose it is an accurate classification. We think that has a better educative effect in the sense that it is easier to find — it is set out in the act — whereas the common law is something where sometimes you have to read the 18th and 19th century law books to identify or have access to books such as Archbold. In our Watson, Blackmore and Hosking we do have a common-law section; its predecessor had a similar section which was somewhat bigger. The general public, police and other people would not have access to that to know what are offences.

The old common law of attempting to pervert the course of justice probably caught some of this activity which is now the subject of specific statutory offences. We think it is a good thing that those offences be set out because it may have a greater deterrent effect for people to know that if you interfere with witnesses or other processes in the justice system there are specific penalties. The other thing about the common law is that there are indeterminate sentences applying whereas these have specific maximum sentences so, again, it is clearer for people to know about anyhow.

I also think there are some greater advantages in the statutory provisions compared to the common law, such as a wider definition of 'the course of justice' and matters of that sort which do help to catch what is really criminal behaviour which may have just avoided it in the past or been the subject of some minor summary offence which you may not have been able to prosecute because it was statute barred by the time you discovered it, such as the traffic-type matters that came up in that case of R V Selvaged Morgan. I will be drawing your attention to a case here of Subramanian where the course of justice was interpreted as applying to a statutory declaration to an infringement bureau if need be. It was considered that that was an alternative way in which the course of justice had been perverted. Steve and I are appearing in the High Court on Friday resisting a special leave application in that case; that is how it came to my attention. That is my initial comment.

The CHAIR — So you are saying that was a false declaration?

Mr SMITH — The allegation is that a prominent solicitor's car was booked for speeding on the red-light camera and then she persuaded one of her staff to take her place as the driver who put in a statutory declaration saying, 'It was me really', because that staff member had no infringement points recorded against her licence whereas the solicitor could have lost her licence.

Ms HADDEN — That has been in the media in Melbourne.

Mr SMITH — It got quite a bit of publicity at the time. There were various arguments. I have a document here which I will table if you like. It is a 1½ page extract from that judgment, but it seeks to set out what the court said in relation to that argument that it was an unreasonable verdict. In the last couple of paragraphs of that quote there is reference to the extended definition of the course of justice.

Mr KAVANAGH — The extended definition taking in the notion of the administration of the law, which, under the common-law principles, may not have been attracted in this case, but the Court of Criminal Appeal was prepared to accept it on the facts of this case. What the accused did was interfere with the administration of the

law even though it was just dealing with the Traffic Infringement Bureau. At common law we probably would not have succeeded in the prosecution, but under the extended definition in the act we have been successful so far.

Mr SMITH — The appeal is not based on that question, it is more on the refusal to stay the prosecution. The woman became quite mentally disturbed as a result of the pressures of the prosecution. She had a special hearing rather than a trial, having been declared unfit to plead and it arises out of whether or not there should have been a stay granted.

The CHAIR — So she was prosecuted under this section rather than under other relevant sections that might relate to making a false declaration, for example?

Mr SMITH — I think the main reason she was prosecuted was that she was posing as the accused, in a sense. It was not just the declaration; it was giving evidence. I think she gave evidence in the original proceedings.

Mr KAVANAGH — I think she did.

Mr SMITH — In the District Court of Appeal that arose out of the conviction. They were not very well organised in this case, in the sense that even though the solicitor asked for a hearing rather than just sending a cheque off with a stat dec from the staff member, she had not persuaded the staff member or anybody to do anything at that stage. When it was set down for hearing, it was at that stage that a stat dec was tendered, but they did not get to any hearing. The solicitor was convicted in her absence and then there was this appeal in the District Court and it was there that the witness, the applicant in the High Court, gave evidence. The judge cross-examined her quite extensively about her knowing that she was the driver. So she lied then and she was also charged with false swearing. But it was the culmination of putting in a false statutory declaration plus representing in court that she was the driver.

The CHAIR — Was any action taken again the solicitor who had persuaded her?

Mr SMITH — She beat the case at committal.

Mr KAVANAGH — She was charged with perverting the course of justice.

Mr SMITH — That was quite a controversial decision.

The CHAIR — Indeed.

Ms HADDEN — That was before a magistrate?

Mr SMITH — Yes.

The CHAIR — You have sections relating to influencing witnesses et cetera.

Ms HADDEN — It must have been compelling evidence, was it?

Mr SMITH — She was well represented by a very aggressive counsel. I do not know; there might have been a little bit of favour shown to her too. I have not investigated why we did not ex officio it; normally we would in a case like that.

Mr KAVANAGH — I think the Law Society was going to take a good look at what had occurred, as well.

Mr SMITH — She still practises.

Mr DALLA-RIVA — This issue was raised yesterday by a couple of witnesses about the introduction of the statute, where there are still judges or magistrates who have grown up with a common-law understanding, so there is a sort of difficulty to apply a fairly commonsense application of the statute law, bearing in mind they grew up on the teat of common law. Have you found that a problem in terms of your experiences, where there are some judges — not commenting about judges specifically, but the judiciary, how have they dealt with the common law versus the statute law on these issues?

Mr SMITH — I think there is still some debate as to whether section 319, the perversion of the course of justice provision, requires proof of a tendency to pervert the course of justice. The wording in the section does not

say it.

The CHAIR — It says 'intends in any way'.

Mr SMITH — Of course you always had to have the intent. So that even judges of the Court of Criminal Appeal have said that that ingredient still exists, the intendancy. There is the case of Charles CCA 23.3.1998 and the case of Karageorge [1998] 103 A Crim R 157, particularly Justice Sully at page 169 and Justice Levine at pages 170 to 174. That was another solicitor.

But in the textbook by Watson, Blackmore and Hosking at paragraph 2.31572, referring to Gillies *Criminal Law*, 3rd edition at pages 814 to 816, there is the argument that there is no longer a need to prove a tendency to pervert the course of justice. I had that because we had to consider these issues in the prosecution of a policeman not so long ago.

Mr KAVANAGH — Overall I would not think that magistrates and judges would have any great difficulties in applying the statute law. We have had it here now for 13 years. I imagine that most of the people who have been appointed to the bench — particularly at magistrates level and even at District Court level — came to the bench after these provisions were enacted. So their experience, as judicial officers anyway, would be based on having to deal with the statute rather than the common law.

I am in charge of a unit in the office which is responsible for appealing to the Supreme Court on questions of law against any erroneous decisions by magistrates. As far as I can recall I have probably had only one case in 13 years where somebody has arguably made a legal error in connection with the interpretation of the statute. So it does not indicate that there is a big problem there.

From our point of view the advantage of having the statute over the common law is that it provides greater clarity for, I suppose, the foot soldiers who are responsible for enforcing this law. There is an advantage for the police in that when confronted with a particular set of facts they can look through the statute and they have their options. They do not need to have a detailed knowledge of what the common law is. So it gives them an advantage in the field. It gives us an advantage when we come to prosecute the matters. We do not prosecute all these matters because some can be dealt with summarily in the Local Court and police prosecutors do that. We do not get involved.

The CHAIR — So for summary prosecutions it would be a distinct advantage.

Mr KAVANAGH — That is right. Most are indictable offences, some of which are capable of being dealt with summarily. If they are capable of being dealt with summarily and are dealt with summarily, the police prosecutors do it. If they go on indictment, we do it. Again there is an advantage in having statutory provisions because it enables the lawyer to look at it, look at what the ingredients of the offence are, check whether there is evidence to support each of those ingredients, and run with it. There was always an element of guesswork associated with common-law offences. I know that some would argue that it provides you with flexibility.

The disadvantage is that you would need to have a detailed knowledge of the common law. As Greg has mentioned, that might necessitate really getting into the textbooks and going back centuries to find out exactly what was and what was not perverting the course of justice. It is a lot easier to pick up a statute.

Mr SMITH — We pushed it out from where the common law had previously said it was limited. I was involved in Rogerson from the beginning to the end, as junior counsel helping the investigation and then committal, trial and High Court.

The CHAIR — I suppose that raises also that question about the utility or effectiveness of the change. Have there been any comparative studies done on the application of the law prior to the introduction of the statute? You have provided some anecdotal evidence about the utility or prosecution under the code, but is there any statistical information about that from your perspective?

Mr SMITH — Steve has some sentencing statistics.

Mr KAVANAGH — As far as we know there has not been a study done on the effectiveness of the 1990 amendments. We are probably not the right people to ask — our essential role is prosecuting. We have other bodies under the control of the Attorney-General's department that do analyse crime figures and do comparisons and come up with conclusions, in particular the Bureau of Crime Statistics and Research. It does a lot of very useful analysis of crime figures. I have some figures for you from them. They come in under question 2 about statistical

information. I am not aware of any official studies having been done. It may be that the Attorney-General's department has done something.

The CHAIR — No.

Ms GILES — We just heard from Mark Marien.

Mr KAVANAGH — Are they more effective?

The CHAIR — Just from your own experience in prosecutions.

Ms GILES — Is it very difficult to prosecute these?

Mr KAVANAGH — No, not at all. I was in the organisation at that time in 1990 and I think, if anything, it probably clarified the law and made it easier.

The CHAIR — You have talked about one case. From you experience are there a range of other cases or particular offences where you have found it easier to bring a prosecution with greater certainty of the law?

Mr SMITH — I think yes. The 1980s particularly saw constant purges of the corrupt police officers. There were not really sufficient offences for some of the activities. Official misconduct was used, which I think still applies in Victoria — I see there is a penalty for it. Official misconduct by a public officer is a very vague offence, although useful because sometimes that is all you can charge them with.

Mr KAVANAGH — A catch-all.

Mr SMITH — Yes. Nevertheless it is sometimes hard to convince judges that it is still an offence. The perversion of the course of justice offences were used against some of the police. Often it was specific — supplying drugs or taking bribes or seeking bribes. This was only part of a two-phased plan: The second phase was supposed to be offences about bribing public officials and judges and things like that too — as the Attorney-General said in his second-reading speech — but that never came. I do not know why, maybe the mood changed. The Independent Commission Against Corruption (ICAC) was established and there was a change of government. It was the new government which brought all of this. I think this was part of the push to change.

As far as prosecuting goes, I think we are much more likely to use these offences than we were previously against persons other than police. I mean with the police in those days you often had a task force looking at them, we had lawyers specifically allocated to work on those cases — I was one of them for a while — and you became specialist in that type of criminality. These other offences are much more user friendly for the general interference with cases from ordinary criminals; interfering with witnesses is one of the major problems we always face, but to some extent that has been got around with the changes in our Evidence Act which allow prosecutors to have witnesses declared unfavourable and cross-examine their own witnesses so that evidence goes in as evidence of the truth. That has been a big change. That has probably meant fewer prosecutions for false swearing or perjury because often we have been able to sort it out on the spot and at least put in their earlier statement even if they will not admit that they are now lying and often the jury will convict on their earlier statement anyhow if there is other evidence supporting that version. There have been other changes which have perhaps cut down the number of prosecutions, but I think in a sense it has been easier to use, as Steve said before, for police and other people.

Mr MAUGHAN — In view of your comments, do you then believe that second phase should be added to the act?

Mr SMITH — Yes. I think having prosecuted people under both the common law and the secret commissions provisions they are too complex for juries and it would be much clearer if we had some statutory offences. The bribing of a policeman is an offence under what used to be called the Police Services Act; I do not know what it is in now. That was a summary offence and then there was a common-law offence for the same thing. Sometimes you got into arguments about 'There should be a stay because he should have been prosecuted for the summary offence', which claimed we were just using the common law to get around the time limits and things like that. You need to clarify all that. In some of the common-law cases such as the Bill Allen case — Deputy Police Commissioner Bill Allen; I have forgotten the reference, but you will probably be able to get access to it — and others there was confusion because, as I said, with the common law you have to look up a lot of things whereas if it is in the practice books, there is a section there, the courts are clearly interpreting that section and there is much more guidance as you go along.

Mr MAUGHAN — It seems a fairly compelling argument for codification.

Mr SMITH — Yes, I think so.

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

The CHAIR — Yes. It is all summarised in one book.

Mr MAUGHAN — It can go back to the jury to understand and come to a reasonable decision.

Mr KAVANAGH — Yes.

Mr SMITH — It is hard enough, with all the directions jurors are given on law if the elements of the offence are not clear. That is one good thing about all this.

The CHAIR — We had put to us yesterday that it might also be desirable to have some extra provisions which prevent threats being made against the prosecuting or defence counsel, in addition to witnesses. Have you got any views about that in your experience or have you had any concerns in that area?

Mr KAVANAGH — I was under the impression, perhaps wrongly, that there is an offence.

Mr SMITH — Somewhere in here there is an offence of threatening a public justice official.

Ms MASON — Which covers prosecutors but not defence counsel.

Mr KAVANAGH — They never get threatened, do they?

The CHAIR — According to them, they do.

Mr KAVANAGH — That would be fine; there would be no objection to them being included in the definition.

The CHAIR — We notice that they have got short shrift from both the Attorney-General's office and the DPP.

Mr SMITH — They should report it to the police.

The CHAIR — Indeed. Perhaps just returning to perverting the course of justice — we have traversed that a bit — in our discussion paper we looked at the various approaches to perverting the course of justice. There are three options set out in the discussion paper. Of those options you have clearly opted for option (b), which is the retention of the general offence which is enshrined in the legislation, but with specific offences falling out of that. Has that worked satisfactorily from your point of view and do you have any comments on the other approaches that are suggested in the discussion paper?

Mr SMITH — I think it would be a mistake to abolish the general offence, in the sense that there are some things that are caught by perverting the course of justice that you have not dreamt of almost in your other legislation. We looked at one today before we came here, a case of Orcher [1999] 48 NSWLR 273, in which a chap was charged with offences under section 326(1)(c) of threatening to kill some police if they did not leave him alone or something. He had been drunk and disorderly in a hotel in Burke and he was charged. Then a bail condition was put on him to stay away from the publican and the hotel. He was back later that day, so they went and arrested him and he was threatening to kill and do other things to the police. They charged him with section 326(1):

> A person who threatens to do or cause ... an injury or detriment to any person on account of anything lawfully done by a person:
>
> ...
>
> (c) as a public justice official in or in connection with any judicial proceeding.

Whilst the court had no difficulty in finding that police officers were public justice officials, they said this activity at the police station of him threatening had no connection or was not in connection with any judicial proceeding.

Even though he had already been charged, it did not really affect the proceeding. They did say it would seem to be caught by the administration of justice. I think that certainly administration of the law may catch that sort of behaviour. Whether this is an appropriate case to do that rather than just charging him with assault and things like that, because he was probably as drunk as anything, and whether he is responsible — when he dries out he might be a reasonable person, I do not know. That might be overdoing it, but that would still be an available provision, perverting the course of justice perhaps. So I think that is useful. You mentioned also the accessory after the fact-type offences.

The CHAIR — He was not charged with the general offence of perverting the course of justice?

Mr SMITH — No, he was not; he was charged with the wrong offence.

The CHAIR — Can you charge in the alternative?

Mr SMITH — He could have been charged with that, too, but he was not.

The CHAIR — If we go back to our argument about certainty, does it not mean that you are having it a little bit both ways in this section, because you have all these specific offences which are designed to bring certainty, but then you have a catch-all which is equivalent to the common law and which allows you to scoop up anything else? Is that to a certain extent a bit defeating, in terms of the idea that the code makes clear the specific type and range of offences anyone can be charged with? You seem to have grafted in a catch-all common-law definition with a range of specific statutory provisions.

Mr KAVANAGH — I do not think we really regard our legislation as being a code, though.

Mr SMITH — There are other common-law offences that you could use for some of this conduct. As I said, official misconduct is another one that still exists that you could use for some of the bullies, and perversions, for example. I take your point, but I think when you legislate something — and I think the point has made in this report — sometimes you do not cover every situation that might arise that society would consider criminal, whereas if you have a general provision you do not have that problem, as long as you can latch it into the course of justice somehow. Usually offences against police are specifically punishable by other provisions.

Mr KAVANAGH — If the facts meet the ingredients of the statutory offences then we would prosecute the statutory offence. If we cannot fit it in there, we have the general offence to fall back on. That is the option. One would think, anecdotally, that in most of our cases most of the facts can be fitted within the statutory offences. If a juror is threatened in the course of a judicial proceeding, we go straight to 326(1)(a); we do not need to worry about anything else. In Orcher's case perhaps a mistake was made in charging. That was a matter that was prosecuted by police. It may be that they thought a police officer at the time of the arrest procedure was covered by the statutory provision.

Mr DALLA-RIVA — When was the charge made, in the early 1990s?

Mr KAVANAGH — No, in the last couple of years.

Mr SMITH — The offence was in 1997.

Mr DALLA-RIVA — That is a risk you run. You can always try something new. Can I ask for clarification because you have said a couple of times now — I do not know if I am quoting you correctly — 'I don't think this is a code'. Could you just elaborate substantially what you mean? I am curious about that sort of statement.

Mr MAUGHAN — Could I add to that question: if you get stage 2 enacted by the New South Wales government, would you then consider you are a code state?

Mr KAVANAGH — The bribery and corruption provisions?

Mr MAUGHAN — Yes.

Mr SMITH — We will never be a code state unless we have a code that covers most criminal offences and pushes away the common law. There has been no attempt here to stop the common law applying. It applies in its interpretation of various aspects of the procedure. They are always relying on common-law cases like Rogerson

to interpret these provisions. You should not do that in a code state. There is a discussion in the discussion paper about it.

Usually you would apply the common law for code provisions under the criminal codes only where it is clear that the elements of the common-law offence have just been transfused into the code and they can get some guidance from the common law as it is developed because you have the same elements if you have different types of offences. I do not think these are code-type offences like the Queensland or Western Australian codes — that is what we mean. You still have the common law sniffing around the edges. Even though it has been partly abrogated it has not been fully abrogated.

Mr KAVANAGH — In a sense we have a foot in both camps — specific statutory offences backed up by general offences, if necessary.

Mr DALLA-RIVA — Do you have that with common-law assault or things like that still?

Mr SMITH — Assault is a statutory offence.

Mr DALLA-RIVA — You do not have common law assault?

Mr SMITH — No.

Mr DALLA-RIVA — Victoria still does.

Mr SMITH — Conspiracy is a common-law offence; we still use those sorts of inchoate offences, but we do not prosecute a lot of common-law offences such as bestiality or blasphemy — things like that — that are rare offences at any time. Keeping a brothel — we have run a few of those — is still a common-law offence, things like that. But we generally have in our acts — in the Crimes Act, particularly — the cover-all for most forms of criminal conduct. Drugs are dealt with separately. We are not trying to be cute by cutting out the code idea, but it is not a codification in the sense of the Queensland, Western Australian and Tasmanian codes, we say.

The CHAIR — Do you think it would be more desirable to — —

Mr SMITH — Go that way?

The CHAIR — Well, not to be half-pregnant.

Mr SMITH — No, I think we have the best of both worlds. I think we have flexibility.

The CHAIR — We will not pursue the analogy: you cannot be half pregnant. What I mean is you would not see it as more desirable? You mentioned there is a stage 2 and outlined what that involved. But you would not see a sort of Griffith-type code as being more desirable in New South Wales?

Mr SMITH — No. We have done the same things with sexual offences. We have cut out rape, the common-law offence of rape or whatever it was, and put in all these specific sexual offences. We do not consider that a code; it is just the law of New South Wales. The common law is used to interpret it and there might still be some lingering common-law offences out there that you can occasionally use, like wilful exposure — flashers, things like that — or something like that — —

Mr KAVANAGH — I do not think New South Wales generally has really favoured the idea of codifying the law. That is not really a decision that we take in the DPP; that is a decision that the Attorney-General's department and the Law Reform Commission and Parliamentary Counsel probably take the policy decisions on things like that. It is just my impression that New South Wales has never gone down the path of codification in the same way that other states have.

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

I think our public justice offences — forget about bribery and corruption; just take the ones we have got at the moment — probably cover 80 to 90 per cent of the factual situations that are going to arise. If we cannot fit it in — if it is one of the 20 per cent we cannot attach a statutory provision to — we have a backup.

Mr DALLA-RIVA — Do you think that is effective in combating corruption and corrupt activities, if you have both?

Mr SMITH — Yes. I mean the main problem with corruption and corrupt activities is that people are greedy and dishonest. Unless you can change the culture of society, criminal offences are not going to solve the problem. They might deter and punish from time to time. The honest people know that you should not do this; the dishonest people just work out another way of getting around it, unfortunately.

Mr KAVANAGH — Bribery is still a common-law offence in New South Wales because — that was mentioned in part 2 of the government proposals, but nothing developed as a result of what the Attorney-General was talking about back in 1990 — my recollection, and this is one possible explanation for why they have not introduced legislation, is that that was about the time when the Independent Commission Against Corruption (ICAC) started. I do not know; it is just possible they wanted to see how ICAC panned out before they changed the law.

Mr SMITH — And it brought down the Premier.

Mr KAVANAGH — Yes, indeed.

Mr SMITH — So ICAC to some extent lost its support after that.

Mr KAVANAGH — In relation to question 2, the statistical and anecdotal information, we did print off some statistics for you. You might have got them from another source.

Ms HADDEN — We have got some from some sources, but that would be great.

Mr KAVANAGH — There are some stats from the Bureau of Crime Statistics and Research which indicate the number of offences that have been prosecuted and the various sections that are relied upon. They are the Local Court statistics and these are the higher court statistics. So that will give you some idea of the number of offences, because one of the questions was whether perjury is underprosecuted.

The CHAIR — Almost inevitably yes, probably.

Mr KAVANAGH — It probably is, but it is still prosecuted.

Mr SMITH — It is very difficult to prove, that is the problem, unless they admit it.

Mr KAVANAGH — Yes. So there are those statistics. That is the number of charges that were laid. The Bureau of Crime Statistics, as I understand it, get their stats from the Local Court and the District and Supreme courts. Then our Judicial Commission produce statistics of the penalties that are imposed. So they show charges laid, then we have the consequences for those that were convicted and what sort of penalties were imposed.

Ms HADDEN — Who prepares that document?

Mr KAVANAGH — This is from the Judicial Commission of New South Wales. I do not know whether they are coming down to talk to you.

Ms GILES — No.

Mr KAVANAGH — They gather together a lot of very useful information. One way in which you can examine how often these matters are prosecuted and what the results are is to look firstly at what crimes statistics produce. Then a separate organisation, the Judicial Commission, look at penalty provisions.

Mr SMITH — Didn't we think the figures are a bit under the mark?

Mr KAVANAGH — Yes. When we printed these figures off the other day and looked at them in relation of perjury and prosecutions under section 87 of the ICAC act — which is giving false and misleading information to ICAC — the figures looked to be wrong. I have made a few inquiries around the office, because we prosecuted most of those matters, and representations are being made to the judicial commission that the figures are wrong. So by and large their figures are good, but we have discovered a chink in the system — again, it is Local Court and higher court.

The CHAIR — Excellent.

Mr KAVANAGH — The sections of the Act are up the top — top left-hand side.

Mr DALLA-RIVA — It is interesting that the first document provided does not have reference to our favourite one that has been discussed — that is, 316 , concealing a serious indictable offence — and in particular, subsection 1. We have had some — —

The CHAIR — Adverse comment.

Mr DALLA-RIVA — Views from certain groups.

Mr SMITH — From defence counsel.

Mr DALLA-RIVA — Some witnesses — I can only give their initials.

Mr SMITH — It is a great provision, I think.

Mr DALLA-RIVA — The statistics that were provided show quite clearly that it has one of the highest incidence of convictions, certainly in the lower courts, and the second highest in the higher courts. What is the DPP's point of view, because there were allegations that this particular offence is used a bit for the wallopers? As my colleague would say, it is used a bit as an intimidatory tool during interrogation.

Mr SMITH — It has been effective. Let's put it this way: misprision of felony was rarely used. It had complications to it. I think we had a case about 10 years ago where the courts recognised it still existed but it was not much use, whereas this particular section basically stops people from lying to the police and effectively covering up offences. I reckon that that is a much better provision than accessory after the fact, which is mentioned in your report. That is a difficult provision to prosecute, I have found, because under our law, anyhow, you have to show that they knew that someone had murdered someone or killed someone.

If it is a murder case, often that is very hard to show without admission or having a telephone intercept on or something like that. This provision does not require that sort of proof. I think it has been effective in getting to the truth of a lot of serious offences. People tend to plead to that rather than to being involved in a murder or as an accessory after the fact, and they will give evidence. I think that is good for society.

The CHAIR — We had a case described to us yesterday of someone who was the girlfriend of an accused. She was not present at the scene but she was at home and the offender — —

Mr DALLA-RIVA — An off-duty policeman.

Ms HADDEN — Forsythe.

The CHAIR — Yes. The offender came home and made reference to some elements of the incident but not all of them; it was very hard for her to discern the exact nature of the offence, but she was prosecuted under section 316.

Mr SMITH — Did she plead guilty or did she defend it?

The CHAIR — I cannot recall that. But they were raising this as an instance where she was in effect saying, 'I thought there was something wrong' but she did not know for sure, did not know whether this was an element of boasting or exaggeration, and yet she was found to be guilty of the offence. This was raised as an example of where the application of that section — —

Mr SMITH — Did that case of her conviction go to the Court of Criminal Appeal?

The CHAIR — I do not think so.

Mr SMITH — They are just saying that the provisions act unfairly for people in that they are too vague — you do not have to specifically know — —

The CHAIR — They drew particular attention to the words:

> ... knows or believes that the offence has been committed and that he or she has information which might be of material assistance ...

Those two elements, the 'knows or believes' and the 'might' were seen as being a bit vague.

Mr SMITH — Well, we have no complaints about it. I can understand that if it is getting down to vague opinion then it may well be not a fair provision the way it is currently worded. But I have not heard that criticism before, I must say. We would prosecute that only if we had a good case and if it is in the area where it appears the person had some suspicion — —

The CHAIR — Concealment seems to imply some active element, does it not?

Mr SMITH — Yes, it does. We would not prosecute, as far as I am concerned. Accessory after the fact — there is an opinion aspect to that as well if you 'believe' rather than 'suspect'. I have not got section 347 here. That can have, let us say, nasty ramifications for a member of a family or someone who helps cover up, although a wife is protected. In New South Wales a wife still cannot be prosecuted for accessory after the fact, but anyone else can be.

Mr MAUGHAN — A husband?

Mr SMITH — A husband can be.

The CHAIR — It must be different in Victoria.

Mr SMITH — We follow what used to be the English situation.

The CHAIR — There were the Wales-King murders.

Ms HADDEN — We amended ours years ago.

Mr SMITH — We have never amended. I did a court case in the Court of Criminal Appeal where we tried to argue that the common law by the passing of time had changed and that wives were no longer protected like that because that was a law that came in at the time when the common-law principle of coercion was involved and things like that. We lost. They never thought it was a great problem so they have not amended it. We recommend it.

Mr KAVANAGH — Can I just say in relation to the crime statistics from the bureau that I am not sure why 316 is not there. It might be an oversight. We could make inquiries, if you want.

The CHAIR — Yes, that would be very useful.

Mr KAVANAGH — I have the contacts. I will be happy to make some inquiries, and I will pass that on.

The CHAIR — Thank you very much for those statistics; they are very helpful. Perhaps we will move on to offences in relationship to interference with evidence of witnesses. In our questions we draw attention to the fact that the mental element of the offence of tampering with evidence in your section 317 is with intent to mislead any judicial tribunal in any judicial proceeding. The MCCOC formulation is different from that, in that it refers to 'with intent to prevent the bringing of judicial proceedings' or 'to influence the outcome of current or future judicial proceedings'. Do you have any comments on that formulation and your experience of it?

Mr SMITH — It would catch perhaps activities such as a policeman tipping off Robert Trimboli to get out of Australia because the Stewart royal commission was going to crucify him. A man called Brian Alexander, who also was involved in the Mr Asia syndicate, was supposed to have ended up being fed to the sharks. If you have seen that show called *Blue Murder* you will have seen that he had a stove attached to his leg — he was out on a drinking session with all his copper mates and they threw him overboard. It was terrible. I worked for that royal commission. I remember they were searching high and low and they thought they saw a body of a man with red hair floating some miles off the heads. That was one of the things we heard at the time.

You might catch people like that but I think it is a little bit too wide. I think it is better if you have something on foot — I suppose if you had a murder and you just covered everything up and got rid of clothing with blood on it and things like that. There are offences such as 317, but also it could be perverting the course of justice, again — you could be caught by that.

When you are going right back, do you say it should be caught by a criminal justice offence if someone is going to be called before a judicial inquiry which has no powers of punishment, except for contempt, which is too far removed from the ultimate judicial process or the administration of justice? They are investigations, so this happens before the investigation even serves a subpoena on you — you have gone to Ireland or somewhere. That is what that provision would seem to do. I think it is drawing a very long bow myself, but that is just my feeling on it.

Mr KAVANAGH — Just one comment on that: we also have section 315 in our act, which concerns hindering investigations, which is another weapon in the armoury of the police. I have a note here about section 546(c) of the Crimes Act.

Mr SMITH — 'Hindering investigations' under section 315 has to be serious offences or whatever it is, whereas the other section picks up other criminal offences.

Mr KAVANAGH — Yes, 546C.

Mr SMITH — There is section 33B, I think, in the Crimes Act, which picks up hindering police investigations.

Mr KAVANAGH — So it is just possible that the Model Criminal Code in fact constitutes an amalgam of all of those statutory provisions we have and then maybe adds something on top.

The CHAIR — We have had some discussion about the Fingleton case, but did you want to make any comment on your section 7 in relation to reprisals against witnesses, as compared to Queensland?

Mr SMITH — Section 326, is it?

The CHAIR — Yes, section 326.

Mr SMITH — I personally do not think Fingleton would have been prosecuted down here; she would have been dealt with on a disciplinary basis. It is a bit difficult when she has been appointed because she is one of the gang, as it appears to be the case — she is the Chief Magistrate; she has strong connections with the party in power. That happens on both sides of the record I am afraid.

Whether there would be fair disciplinary proceedings, I do not know, but I think there would and I really thought, although it seemed serious, that it certainly did not sound like a criminal offence. It is something that happens. It is like, in a sense, the ICAC inquiry that led to the former Premier's dismissal because he offered Metherall a job at the EPA, or something, if he supported the timber bill or something. That is wrong, but it goes on a lot, and I do not know that you would say it is a criminal offence — it is misconduct. I think her behaviour was more in the area of misconduct in a disciplinary way.

The CHAIR — So you do not believe — —

Mr SMITH — We would tell our prosecutor to prosecute.

The CHAIR — In effect, it is saying to Gribbin, the coordinating magistrate, 'I am going to — — '. She stated:

> This and the other example I refer to above, manifest to me a clear lack of confidence by you in me as Chief Magistrate. In the circumstances, I ask you to show cause within seven days as to why you should remain in the position.

Then of course, she threatened Griffin with demotion. You do not see that as coming within the realms of threatening a witness?

Mr SMITH — Was it a witness? Was that why she was threatening him, or was she threatening him?

Mr KAVANAGH — I think he had become a witness by virtue of the legislation in that he had sworn an affidavit in relation to proceedings before: was it the judicial committee?

Mr SMITH — I do not know if it is a proper approach for a New South Wales DPP official to be commenting too much on a Queensland matter as far as criticising it is concerned. I am not criticising what they did: they had an offence that could catch it.

Mr KAVANAGH — The other thing is I am not sure whether in Queensland they have the equivalent of our Judicial Commission which can investigate complaints against judicial officers for misconduct.

Ms GILES — There is the Crime and Misconduct Commission — I am not sure whether they can do that; I think probably.

Ms MASON — They did, though.

Ms GILES — They recommended prosecution.

The CHAIR —What we could ask you to comment on, though, is the difference between your section 326 and section 19B of the Queensland Criminal Code, which is that in New South Wales there is no requirement that the threat to the witnesses' detriment be without reasonable cause. Do you have any views about that?

Mr SMITH — In Queensland it is 'without reasonable cause', but here it is not?

Mr KAVANAGH — And here it is not. One comment I would make in relation to that — and it is something I picked up from your paper which caused me to think about the issue — is the distinction that is drawn in the paper, I think on page 86, between reprisals in connection with criminal matters and civil matters.

It is an interesting point which, I must say, I had not thought about before, as to whether in relation to, say, a civil matter where there is a lawsuit between two parties — perhaps arising out of a commercial dispute — and the defendant to the proceedings says, 'You have sued me. This is not the way I want to do business; you are not the sort of person I want to do business with any more, and I will not be doing business with you again as a result of this'.

I had never thought about the criminal law perhaps attaching to that type of situation and in that scenario charging a person with one of these offences under section 326 because he took retaliatory commercial action against a person with whom he found himself in civil litigation. I do not know that the section was ever envisaged to extend that far.

Mr MAUGHAN — It does not seem to be a proper use of the law, but if it is like in the case in Queensland, where they were both judicial officials, I think that is different.

Mr KAVANAGH — Yes — each case on its own facts, I suppose. I think our office would be reluctant to prosecute in the commercial situation I have just outlined.

The CHAIR — ... draws it more tightly and says it should only apply to those proceedings where people are required to participate in the justice system — which, in a sense, criminal prosecution involves, whereas civil proceedings are different.

Mr KAVANAGH — So if you introduce the notion that it is without reasonable cause, I suppose in the commercial situation the use of the phrase 'without reasonable cause' would provide a defence to the accused, the defence being, 'I have got a reasonable excuse or cause for terminating the contract. I simply cannot do business with someone who is suing me'.

Mr MAUGHAN — I suppose in Fingleton you could argue if she had taken the action after the legal proceedings were determined, then it would be 'reasonable cause'.

Ms HADDEN — I disagree there. I think you would still have problems.

Mr KAVANAGH — On the other hand it is difficult to think of a situation — for example, where there is a retaliatory threat against a witness in a criminal proceeding — where there would be a reasonable excuse for the conduct.

Mr SMITH — I brought along an extract from an ICAC report to do with a gaming squad detective-sergeant who basically informed on his colleagues when they acted corruptly. His name was Kim Cook. He was absolutely sent to Coventry. There was a cartoon sort of thing that was put up on his desk and on the noticeboards, which belittled him. It is just an example of retaliation over someone cooperating with authorities.

We had an allegation during a Police Integrity Commission hearing that the commissioner of police of the day, Peter Ryan, had demoted or sacked Ed Chadbourne, who was the head of his personnel area, because of

evidence he had given to the Police Integrity Commission disagreeing with the commissioner. That was in the press; I do not know if anything came of it. There are provisions in the various acts like the Police Integrity Commission Act and the Independent Commission Against Corruption Act that punish retaliation, somewhat similar to 326, and also the Protected Disclosures Act, which is for whistleblowers, section 20.

There are provisions aimed more at punishing people for helping tribunals in criminal-type matters or getting to the bottom of criminal-type matters. I suppose the problem that I have with that other case we have mentioned from Queensland was that it was not really in relation to criminal activity or a witness in a trial or anything like that. I just find it difficult to use the criminal law to punish what would normally be seen as disciplinary misbehaviour. In the industrial area, of course, governments have for years had legislation — or the commonwealth Crimes Act had provisions — that allowed punishment over industrial actions but they never used it. They might have used it 50 years ago but they just decided that the community would not accept the use of those provisions. Whether the question can arise for judicial officers and people like that, rather than using judicial commission-type hearings to discipline them, kick them out, expel them and all that sort of thing — which we have had.

Mr KAVANAGH — I looked up Fingleton on the system the other day. The CCA decision was handed down in June and she has applied for special leave to appeal to the High Court. I do not think it has been heard yet.

Ms GILES — Not as far as I know, but that is something we are checking on for the final report on this.

Mr KAVANAGH — She just might get special leave. That is just my opinion.

The CHAIR — On perjury, have you got any comments in relationship to the requirement in New South Wales and Queensland around it being objectively false or actually false, in terms of the truth of the statement that is made in a defence to a charge of perjury? That is somewhat different from the Victorian position, which is that the truth of the statement is no defence to a charge of perjury if you believed it to be false or were reckless as to whether it was true or false.

Mr SMITH — If the purpose of the law is to seek the truth, which I think it is, then the Victorian section seems to be dragging that out beyond the realms in which it should be. I am just trying to think of other examples where you might have thought you killed someone. Say you thought you hit someone on the road and it was actually a dog, and you drove off. Have you got to go and put yourself in to the police for killing a person because you believed it was a person, rather than a dog?

There might be some minor offence for leaving the scene of an accident if you kill a dog, but of course if you killed a person there is a specific offence for that. You might be up for dangerous driving causing death, which carries 14 years in some circumstances. You could go to other laws that have those situations, where you say, 'Well'. I know with drugs sometimes if you pay money over, believing you are getting heroin and it is really chalk, you can be guilty of supply, or somebody can be, because it is represented as that, but that is for the specific reason to discourage promotion and sale of drugs and all that sort of thing. I suppose you could say the Victorian provision is encouraging people to tell what they believe is the truth but I think it is getting a bit tough to be up for an indictable offence and a jail sentence if what you said was true anyhow.

Mr MAUGHAN — That is an interesting one.

Mr SMITH — There was one case we wanted to mention that you should take with you — that is Lowe. This was a case under section 322A, threatening a witness in circumstances of aggravation. Have you looked at that? This was a woman who was a witness in judicial proceedings in Melbourne, a rape case. She had been raped. This fellow, Lowe, was a private detective representing the interests of the accused in that case, who was I think well connected in Victoria. In fact, so well connected that I think he had that bloke giving evidence for him that runs *How to be a Millionaire*, who whatever it is.

The CHAIR — Eddie McGuire.

Mr SMITH — Eddie McGuire was a witness in that case. This woman was basically tracked down by this private detective, seduced, given cocaine, and it all was videotaped. That was used as blackmail for her not to give evidence in a Victorian trial. He stood trial for a number of offences including that one of threatening a witness. The Court of Criminal Appeal let him off that one because of jurisdictional problems. I think it is one worth having a look at because I think the states need to get their act together on jurisdiction for these sorts of offences. It must be happening all the time, with people, including witnesses, moving across borders. They have got

here and they are virtually exempt from any prosecution.

Mr MAUGHAN — It is the bane of my life. I represent an area that is on the border, Echuca. Those cross-border issues in law, health and a range of matters, drive us mad.

Mr KAVANAGH — They left open the option for the Victorians to prosecute. We do not know what happened.

Mr SMITH — There did not seem to be a lot of interest because I think the guy had beaten the rape charge — but that was the whole point.

The CHAIR — Your law also makes a distinction between the offence of perjury and an offence of perjury with intent to procure conviction or acquittal and there are different penalties that apply in relationship to those two offences. The former is 10 years and the latter is 14 years. Has that proved to be a useful distinction?

Mr SMITH — I am certainly not sure that we have run the more serious charge very often on that one.

Mr KAVANAGH — No.

Mr SMITH — We had *MacKenzie v. R.* . Simon MacKenzie was another solicitor who gave evidence for his Calabrian client about some fingerprints on something — it might have been an agreement. He was convicted of perjury. He obviously did it to save his client's neck — to get him off — which he did not do. He ended up winning in the High Court mainly I think because of the directions given at the trial, or something like that. Steve might have other views on that. He was well connected, too.

Ms HADDEN — It is a worry, is it not?

Mr SMITH — Yes.

Mr KAVANAGH — No, I am sorry; I am not aware of any problems in relation to those statutory penalties. There is often a problem in prosecuting the more serious form in proving the intent. The principal problem that I see, which I think you have alluded to in your paper, is: what happens if as a consequence of the perjury somebody beats a capital offence? He beats a murder charge, for example. Putting aside the problems from the Carroll decision, the maximum he would face under New South Wales law would be 14 years. If he had been convicted of murder he might have got life. That is an issue that may represent a loophole in our law.

That might be addressed in the near future. As a result of the Carroll decision in the High Court I understand that our Criminal Law Review Division of the Attorney-General's department is looking at reviewing the law, and I think the Model Criminal Code people are looking at it too.

Ms GILES — This week it is due to come out apparently, according to Mark Marien.

Mr KAVANAGH — So the option might be there to re-prosecute somebody who manages to avoid conviction at his first trial — the option might be there to have a retrial if fresh evidence becomes available. So you would prosecute for the substantive offence, I think, rather than perjury. So to the extent that there might be a problem with our maximum penalties we might be getting around it shortly by these new provisions.

The CHAIR — Here in New South Wales, along with Queensland — you are one of only two jurisdictions, I think — you have a specific provision to allow prosecution for two statements which are in irreconcilable conflict where it is not clear which one is false and which is in contrast, obviously, to other jurisdictions. It has been argued that this could deter witnesses from correcting the record subsequently. Do you have any particular comments on the operation of that provision here in New South Wales and whether it has any undesirable impacts?

Mr KAVANAGH — Perjury in New South Wales cannot be prosecuted except by the DPP — the Attorney-General has the power to do it, but he does not do it; it is really the DPP. Those sorts of issues arise occasionally in perjury matters, where somebody does correct the record. The most likely way in which a perjury matter will probably emerge is that the judge or magistrate will refer the papers to the Attorney-General for consideration of whether or not an offence may have been committed. Those papers are then forwarded to the DPP.

We do not investigate matters. What we would ordinarily do is not prosecute without getting the police involved. That may be no more in a case like this than sending the police out to interview the witness and see whether they

are prepared to provide an explanation. That explanation would then be taken into account in deciding whether or not we are going to prosecute. So it comes down to the exercise of a discretion by the DPP as to whether we would prosecute where, on the face of it, there are two irreconcilable statements on oath. There may be an innocent explanation which was simply not explored in the course of the proceedings.

Mr MAUGHAN — Where the first statement was false and they subsequently corrected that, would you prosecute under those circumstances?

Mr KAVANAGH — It would depend. The answer is possibly. The reason for that is, again it would be an exercise of discretion as to whether we prosecute — it would depend on all of the facts. One example which I will rely upon — and it is probably not a bad example of the exercise of the discretion — involved a young woman who had been, on our understanding of it, forced into marriage at an early age to an abusive husband who beat her up.

She gave evidence in some Local Court proceedings in support of an apprehended violence order application, and the proceedings were adjourned. When she came back on the following occasion she told the court that everything she had said previously was a lie; that in fact her husband had never beaten her up; and that she wanted to withdraw the proceedings. The magistrate dismissed the complaint against the husband and the papers were then referred to the office as to whether we should prosecute the woman for perjury.

My recollection is that the police went and interviewed her and she did not wish to be interviewed. She was obviously in a difficult domestic situation. We did not prosecute that. The public interest is not served by prosecuting a person in those circumstances.

But there could be other examples where it is not just a case of correcting the record; it is a case, on our impression, of a witness realising, as the case goes on from the way in which the evidence is emerging, that his lie is about to be found out, and his deciding to spill the beans in the hope that he will not be forced into a position of having to perpetuate the lie.

Examples of that would probably be in personal injury cases and workers compensation cases, where defence counsel will lock the applicant for compensation into a particular position — that he was injured on a particular day, that he is incapable of working, he cannot do this, he cannot do that — and suddenly the next witness who appears is the private investigatory agent or the current employer or the photographer or whatever. Then leave is sought to introduce a video machine into the court room.

Mr MAUGHAN — And everyone gulps.

Mr KAVANAGH — Yes, and then the response is, 'Now I remember what really happened'. In a case like that we might prosecute.

Mr MAUGHAN — Why 'might'? Should there not be a 'should' there? It seems to me that that is a deliberate attempt, in the example you have given, to pervert the course of justice, which seems to me to be a serious offence?

Mr KAVANAGH — Yes. May I say we almost certainly would prosecute in that situation.

Mr MAUGHAN — I suppose it comes back to what you were saying earlier about use of scarce resources, how serious it is. I note that in the statistics you provided to us in relation to section 331, which is about contradictory statements on oath, that there are no statistics available either for the higher court or for the lower court in relationship to that offence?

Mr SMITH — That is just an evidentiary provision; it does not create an offence.

Mr KAVANAGH — The offence is perjury.

Ms GILES — But it allows you to get around the corroboration requirement?

Mr KAVANAGH — Yes. We do not have to worry about the two-witness rule.

Ms GILES — Do you find that useful, the fact that that has been modified?

Mr KAVANAGH — Yes. It is particularly useful. Part of the problem — if there is a problem — is that there is no equivalent of 331 in our ICAC legislation or in the Police Integrity Commission legislation. I

understand that that might be rectified, or that people are looking at the possibility of rectifying both those Acts, because those two venues — the Police Integrity Commission and ICAC — are both places where people are on oath, often under a bit of pressure, and there are irreconcilable stories being given. At the moment we have to prove what the true situation is.

Ms GILES — Right. Whereas in, say, the Supreme Court you do not have to do that, because of the operation of this section.

Mr KAVANAGH — That is right — because of 331.

The CHAIR — There is a provision, even so, under 330 — there have only been four prosecutions in the Higher Courts between January 1996 and December 2002; and in the lower courts, four between April 1999 and March 2002. Nevertheless, there are not a lot of prosecutions.

Mr KAVANAGH — There are not a lot of them: 327 prosecutions in the local courts, just looking roughly at the figures, there have been about 40 prosecutions since 1993; in the higher courts, a few more — probably about 45 to 50 in that period.

Mr SMITH — Do you know that there is a similar provision to that covering larceny and receiving? You probably have the same — around 128, or something — of the Crimes Act. If you find someone in possession of stolen goods, you do not know whether they have stolen them or received them, so you charge both — the alternative — and this provision lets the jury convict even if they are not sure what they are guilty of, one or the other. They are unusual provisions.

With perjury, in a lot of cases you would not get the clear direct opposite. You get a lot of prevarication of blaming the police, 'No, I didn't really say that', and all that sort of thing. That has been my experience, anyhow — so you often cannot get a clear shot at them for that sort of provision to apply.

The CHAIR — That has been incredibly helpful. Have you got any other comments you would like to make in relationship to our reference?

Mr KAVANAGH — I do not.

Mr SMITH — Good luck. I think it is good to be looking at all this. Experience shows that if you review these provisions from time to time you can catch the latest way the criminals are manipulating the justice system — sometimes. They work out ways of getting around the current rules and sometimes you just have to try to keep up with them.

The CHAIR — Thank you very much.

Witnesses withdrew.