LAW REFORM COMMITTEE

Administration of Justice Offences Subcommittee

Inquiry into administration of justice offences

Brisbane – 13 November 2003

Members

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Mr R. Dalla-Riva
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Mr A. Glynn, SC;

Mr M. Byrne, QC;

Mr R. Devlin, and

Mr D. O'Connor, Chief Executive, Bar Association of Queensland.

The CHAIR — Thank you very much for joining us. Our committee is undertaking a reference in relation to the administration of justice offences. As you know, we are a common-law state and you are of particular interest to us because of your longstanding code in this area.

As a committee we are subject to the Parliamentary Committees Act and whatever you say to us attracts the full benefits of parliamentary privilege. We have with us two reporters from Hansard who will take down your evidence. Of course if there is any aspect of your evidence that you do not wish to be on the public record or you wish to give in camera, you can do so. You can do that subsequent to this hearing. You can ask at any time for the tape to be stopped while you talk to us off the record. In addition to that, once we have completed the hearing you will get a copy of the draft Hansard transcript and you will have an opportunity to amend that. You could indicate to us then if there were aspects of it that you did not wish to have on the public record. Beyond that the material will be available on our web site and in publishable form to anyone who requests it from the committee. I assume you have met my colleagues: Richard Dalla-Riva, MLC; Dianne Hadden, MLC; Kristin Giles, the research and policy officer for this particular reference; and our executive officer, Merrin Mason.

Thank you for your time. I think you had an opportunity to look at some of the questions that we circulated. One of the things we are interested in is the particular advantages and disadvantages of codification. Obviously as the bar association you are involved in the actual application of the law. I am wondering whether you have any comments to make about the fact that the law is written down in statute as compared to the common-law system that applies in Victoria.

Mr GLYNN — The difficulty for most of us is never having practised in a common-law jurisdiction it is very hard to compare. However, the beauty particularly of a code as compared to a series of statutes — it is probably one of convenience — is you have most of the criminal law collected in one connected tome. As time goes on, of course, things get added in other acts which are related back. The code affects the prosecution of almost all offences because the general principles in relation to liability apply across the statutes. I suppose having grown up with it we find it particularly convenient as against the somewhat lesser certainty, it seems to me, of the common law, although I am sure that in many areas of the common law rules and offences are so well established that there probably is not much uncertainty as to what they mean or how they are applied.

Of course even with a code you still have the second stage problem — that is, how it is actually applied and interpreted by judges. For example, section 23 of our code really wandered along with great variety about its meaning until about the middle of the 1990s.

The CHAIR — The eggshell skull cases.

Mr GLYNN — We got what was a definitive judgment which the legislature then promptly turned on its head. However, at least at that stage we had what could be said to be a fairly definitive judgment in relation to the application of section 23.

The CHAIR — Just taking that issue of criminal responsibility, although it is slightly outside our terms of reference, one of the issues we have been grappling with as a committee is the extent to which the legislature can change what might be the accepted law in a particular area. So one of the things we are weighing up is that over time you have had a long evolution of judge-made law — and there are strong attachments to that in Victoria — and the concern that there might be changes to a code through the capricious acts, I suppose, of a Parliament. What do you see as the checks and balances here? Do you feel as barristers that you have an opportunity to feed in to those kinds of changes and do you feel that any changes that are made to the code are ones that enjoy broad support across the legal fraternity and the public or are there instances where you feel that the code is perhaps too subject to change by the political process?

Mr DEVLIN — It is worth pointing out that historically the code was not changed a lot until probably the last decade and a half, so changes to the code were pretty rare up to a certain point.

Mr GLYNN — Up until the mid-to-late-1980s virtually all you got was occasionally a minor change in maximum penalties. That was about it.

Mr DEVLIN — Yes — appeals by the Attorney-General, but they were pretty rare.

Mr GLYNN — Yes. Odd things that were brought in, but not much.

Mr DEVLIN — We face here the possibility of a huge change where the government has flagged its intention to drop what might be called minor indictable offences down to summary offences. That will give rise to tremendous debate because it will take away the right to trial by jury on a large range of offences. I do not think we will have seen the like of that until that debate occurs. It has just been flagged.

Ms HADDEN — So they have issued a discussion paper and asked for comment?

Mr DEVLIN — Not yet.

Mr GLYNN — No. It is one of those things that has been on and off the agenda for about six years.

Ms HADDEN — What sort of offences are flagged to reduce?

Mr GLYNN — Particularly in relation to lesser dishonesty and lesser assaults.

Mr DEVLIN — But in a sense we would characterise that as being budgetary driven — take away the need to give someone legal aid for shop stealing or for a minor unlawful use of a motor vehicle and put it on the Magistrates Court and pay less for their defence.

Mr BYRNE — The magistrates courts are a lot cheaper to run than district courts.

The CHAIR — That can obviously happen in our system as well.

Mr GLYNN — Yes. I do not think there is any real difference. In the bringing about of change, whether you are changing the common law or the code, if you get statutory alteration by the legislature the process is much the same and the question of what input you have probably depends to some extent on who the current Attorney-General is and, I have to say, in recent years what sort of public furore there is in relation to the particular issue.

Ms HADDEN — Before or after?

Mr BYRNE — As prompting a change.

Ms HADDEN — So it is a reaction?

Mr GLYNN — Usually. That has been our experience.

Mr DEVLIN — One of the perceptions that I have always imagined that a common-law jurisdiction has is that if it is not in the code, it does not exist as an offence. I do not know whether that is one of the perceptions that a different jurisdiction has. But I would have thought our experience is that really it is such a well-written code generally, as a template, that Griffiths just about thought of everything. That would be my attitude to it. I do not know whether the other two share that view.

Mr BYRNE — I fully agree.

Mr GLYNN — One of the reasons why there was so little amendment of the code for the first 85 years was because Griffiths's foresight was amazing.

The CHAIR — Yet there was a significant attempt, was there not, in about 1995 or thereabouts, to substantially rewrite the code? It was only a change of government that actually — —

Mr GLYNN — If you had read that you would know why you do not try and do it. There were some just amazingly stupid mistakes made in it. I remember pointing out one that related to criminal liability, which is section 7. It was going to turn the whole law of criminal liability on its head. I was going nowhere trying to explain to them. I was neither in favour nor against. What I was trying to point out was that they were changing something that was so well established. As you will have noticed, that attempt was recognised for what it was because even when there was a change back there was no attempt to apply it.

The CHAIR — From a law-making perspective do you think that in terms of changes to the code there is adequate engagement of the stakeholders? For example, obviously there has been an updating of the code in relationship to sexual offences and the treatment of women, I suppose, under the judicial system, but there are tinkerings with the code. For example, in attempting to pervert the course of justice these words 'in any way not

specifically defined in this code' have now been dropped as of two weeks ago. It has not yet been proclaimed.

Mr DEVLIN — In Queensland?

The CHAIR — Yes.

Mr GLYNN — It is news to all of us.

The CHAIR — The penalty has been increased from two to seven years.

Mr GLYNN — That was well overdue. Two years for attempting to pervert the course of justice is ludicrous — not to say everybody should get seven, but when it is the maximum for what really is a very serious offence — —

The CHAIR — Our maximum is 25 years.

Mr BYRNE — I do not know whether that was part of the Fingleton fallout. As you would know, there were alternate charges: attempting to pervert as well as 119(b), I think it was.

Ms HADDEN — Apparently they have been looking at it for a while. It has been a long time.

Mr GLYNN — It certainly has never been run past the bar, to my knowledge.

Mr DALLA-RIVA — Which was the issue that I was raising before in discussion, that with common law at least you have the checks and balances of an independent — I use the word in the context of this argument — arbitrator who will vary the law according to the issues or facts before it, whereas when you have a code state, and as you have indicated before it seems to have become more prevalent in the last decade and a half, you have basically had a situation where I think it is section 140 of your code has been changed without anyone knowing about it, including us. It is in our discussion paper.

As I said to the witness before: with the greatest of respect, what is to stop the whim of another bureaucrat wishing to change the law in this state because it is popular at the time? Whilst there is some discussion about it, I would like to know what your views are, given that these things can be very political because of the nature of the offences, because we are talking about the nature of the crimes that have been committed and the interplay of politicians, political forces, judiciary, community emotion and media hype and just how the common law seems to ride above all that, as opposed to the codifying of the law. What are your general views, because that is one of the things I am grappling with after listening to the evidence yesterday and certainly this morning?

Mr GLYNN — I am not sure if the common law rides above it any more than a code does. For example, you may have a common-law offence of perverting the course of justice. There is simply nothing to stop a government legislating and passing an administration of justice (attempts to pervert) bill and thereby effectively changing the common law quite dramatically. What the common law does stop is minor tinkering of the sort we are seeing here. I am not quite sure how minor the tinkering is because I have not had a chance to absorb it. What you do not get with the common law is that sort of tinkering at the edges because you have to introduce a bill to bring about the change. That is an advantage of the common law.

Mr BYRNE — To give an example slightly removed from the criminal code per se, we have — and I assume you have something similar — the Penalties and Sentences Act which codifies, for want of a better term, the sentencing procedures. That has been a good example up here where governments can react almost instantly to perceived changes, to bring in Aboriginal rights, to bring in factors that have to be taken into account by sentencing courts in relation to sexual offences, to bring in all sorts of bits and pieces. They happen on quite a regular basis. I do not know whether that is the point you were going to, but it allows almost instant intervention and reaction to perceived at least public viewpoints.

Mr DALLA-RIVA — I just draw it in the context of the nature of these types of offences — the relationship often with political involvement, media et cetera — and I just sought your views on that particular issue.

Mr GLYNN — I have no doubt that most changes in the criminal law in Queensland in recent times — not all but most — have been the product of newspaper-generated activity or of very small pressure groups getting a hearing in government.

Mr DEVLIN — In 1985 the largest number of amendments in the modern era arose out of events which started with the arrest of one of Brisbane's most popular radio personalities for paedophile-type offences, followed by a inquiry by Des Sturgess who was then the new director of prosecutions, followed by his draft amendments to the code on sexual offences against children. All of those events led to the Fitzgerald inquiry. In the middle of all that came the largest wholesale changes to that time to the criminal code — it was all publicly driven.

Ms HADDEN — So it is a reaction.

Mr DEVLIN — And it was probably well over time. We often have to defend on charges that are 20, 30, 40 years old and when you go back to those sections you think, 'My goodness, how did we deal with it then?'. Now it is everything that opens and shuts basically.

The CHAIR — While we are on attempting to pervert the course of justice, you, a bit like New South Wales in its section 7, have all the specific offences that relate to perverting the course of justice and then you have this catch-all — which is what we have been talking about — in section 140. In our discussion paper we look at the various options: whether you just have the catch-all; whether you have all the specific offences without the catch-all; or whether you have the specific offences and then the catch-all just in case there is something you have not thought of. The change we are really talking about which has been passed by your Parliament recently is to make sure, I suppose, that there is not that interpretation by the judiciary that you have to first try and slot them into one of the specific offences before you can generally charge them with attempting to pervert the course of justice. Do you have a view about whether or not the specific offences are adequate or whether it is good to have that fallback to the general, I suppose you could say, common-law definition of attempting to pervert the course of justice?

Mr BYRNE — I believe our system has worked reasonably well because there have been defined and not extensive specific offences. Where there are going to be — foreshadowed with the Di Fingleton thing — specific other offences brought in for threatening witnesses or that, the more one multiplies the specific offences the more difficult it becomes to apply the general. Perhaps that is one of the reasons behind the foreshadowed amendment. For myself, I think the system has worked well.

Mr DEVLIN — I agree.

Mr GLYNN — I think it has worked reasonably well. I have to say that it is a rarely prosecuted offence in Queensland.

Mr DEVLIN — You asked the question in your paper about whether perjury is a seldom prosecuted offence. Historically, up until the rash of Fitzgerald cases, that was probably so. Historically, directors of prosecutions in this state or their counterparts in earlier times took the view that, for example, to prosecute an accused who told lies in his trial was only going to discourage accused from giving evidence. That was a policy decision which underlay the fact that perjury charges were fairly rare up until the early 1990s. I think it would be fair to say it is prosecuted more frequently now.

Mr GLYNN — However, there is a notable distinction: the only people who get prosecuted are those on the defence side. Prosecution witnesses never get prosecuted. No matter how blatant, no matter how overt their lies, no matter how badly they are caught, they never, never, never get prosecuted.

Ms HADDEN — That comes back to a question I had with the evidence we heard in New South Wales that codification might work well in principle — it is desirable, it is clear, it is more accessible — but there is a real risk of it being inflexible, absolute and treading on the rights of the ordinary citizen in the state.

Mr DEVLIN — It is more about the policy of prosecutions than whether it is a code or common law.

Mr GLYNN — It is seriously misused in Queensland. Where it is most used is they drag people along to inquiries where they have a bundle of evidence to use against them. They know the people are going to tell lies and they literally drive them to perjury. They have a choice, of course, but most people are not going to give themselves up. After having trapped them they then confront them, get them to admit it and prosecute them and put them in jail for many years. I think it is a complete abuse of the system. That is the most prosecuted form of perjury in Queensland.

Ms HADDEN — It is in effect entrapment, but that is not codified.

Mr GLYNN — It is clear entrapment and there is no defence.

The CHAIR — Over three years there were only 20 cases.

Mr GLYNN — Every one of those would come from that sort of thing.

Mr DALLA-RIVA — The other issue we have is we are looking at, in relation to perjury, whether it is sufficient to have somebody holding the bible up and swearing that they are intending to tell the truth given the current way that people are moving in our society with a lessening of the religious implications and the like. You can be holding up a book and saying you intend to tell the truth when really you do not care and maybe there ought to be a more significant advisory stage when a person, irrespective of whether they are prosecution or defence, is warned a bit more about their rights and obligations to perjury — that is, an automatic assumption that getting up in the witness box, holding the bible and saying you are going to tell the truth has significant implications. I want your views on that given the statements you made about the coercive powers of compelling witnesses to give evidence.

Mr GLYNN — Even in those cases usually the people are warned, threatened, whatever you like, at some fairly early stage when it is obvious they are going to tell lies.

The CHAIR — Certainly by the prosecutors.

Mr GLYNN — The difficulty is unless you swear each witness in in the absence of the jury it creates, I suppose evenly, an atmosphere of if the judge feels it necessary to warn this witness very carefully it may have some effect on the jury's perception of the person's evidence.

Mr DEVLIN — It would certainly slow trials down.

Mr GLYNN — It would slow them down quite dramatically.

Ms HADDEN — It would bring appeal points too on the way the warning was given.

Mr GLYNN — I think most people understand that if they give evidence on the bible they are liable for perjury. What I have said should not be taken to say I do not think people should not be prosecuted for perjury. I think perjury should be prosecuted more widely, to be perfectly honest. It occurs more often than is even investigated.

Mr BYRNE — More widely and more evenly.

The CHAIR — Just while we are on perjury, in relation to your provision which, I think, is section 123A in relation to two statements which are in irreconcilable conflict, you are only one of two jurisdictions that has that provision where out of the two statements one of them has to be false. How does that section work in practice from your point of view?

Mr GLYNN — It works very well. It stops the ludicrous situation of a person swearing one thing on one occasion and a different thing on another occasion and in the absence of evidence to show which was the lie it cannot be prosecuted. In my view that should not be an escape hatch. I thought that was a very sensible and very workable amendment to the law.

Mr BYRNE — To answer the question raised in your paper, it does not discourage people from coming forward because that seems to come down to, again, prosecutorial discretion. We recently had an electoral inquiry up here and I know at least one lawyer appeared and gave false evidence on one day and came back and recanted on the second day. No prosecution action was taken against her on the recommendation of the presiding member, but disciplinary action was brought. I think it comes down to how one exercises the discretion.

Mr GLYNN — Very often what happens is that it is not because people recant; it is because they say one thing at one inquiry and then on a later occasion, having forgotten the lie they have told on the prior occasion, they tell probably what is a second lie on the second occasion. They then have two statements on the record.

The CHAIR — You have the additional requirement of materiality, which does not exist in Victoria. Any statement made in the course of judicial proceedings theoretically makes you liable to perjury.

Mr BYRNE — That becomes very dangerous, where you have the recklessness over and above knowing it was false.

Mr DEVLIN — I think it is fair to say that the debate on materiality is often waged in the context of a perjury trial. I am a bit surprised it does not exist in most jurisdictions, actually.

Mr DALLA-RIVA — Are you saying it bogs down trials?

Mr GLYNN — No. It simply becomes very often the most fundamental issue in the trial as to whether or not the false statement is material.

Mr DEVLIN — Is it a lie that fundamentally undermines justice or is it a fib that we should not be troubled with?

Ms HADDEN — Is it a big lie or a little lie?

Mr GLYNN — Yes. Is it a lie that may affect, in effect, the course of the proceedings? That is, as I understand it, the reason we have always had materiality in. Someone might be asked, 'Now, where were you on 6 June?'. It may have absolutely nothing to do with it, but he may tell a lie because he was with someone that he does not want his wife or girlfriend or whatever to know about.

Mr DALLA-RIVA — Or somebody might be asked, 'Which state were you in at the time of the alleged commission of the murder?'. He might say a state where it did not occur.

The CHAIR — That would be material if you are talking about Carroll.

Mr GLYNN — Yes, that would be material.

Mr DALLA-RIVA — But the High Court seemed not to deal with that.

Mr GLYNN — I think Michael's point is a good one. Yours is particularly dangerous where you do not even require knowledge and it does not have to be material. I find that very troubling.

Ms HADDEN — I do not think we do too many of them in Victoria, any way.

The CHAIR — In practice. It probably gets exercised again through prosecutorial discretion.

Ms HADDEN — They weigh up whether it is worth the effort and the risks.

Mr GLYNN — I think it is probably even more fundamental, that no-one ever reports it. I can only recall ever seeing a judge make a report of perjury on one occasion, and it was a judge in the Family Court.

The CHAIR — There is a distinction made also between perjury and perjury which is designed to procure the conviction or acquittal of another person for a crime that is liable to imprisonment. There is a differential in New South Wales, I think in the Northern Territory — —

Mr BYRNE — We have one, too, actually.

Mr GLYNN — We do have a provision that if you perjure yourself for a life offence — I think it is to bring about the conviction of a person on life.

Mr BYRNE — That is why Carroll was only 14 years and not life — it was perjury to get off, rather than to convict someone.

The CHAIR — You are saying that perjury in relationship to the conviction or acquittal of someone else in fact attracts a higher penalty?

Mr BYRNE — It does. It is life imprisonment.

Mr GLYNN — It is life for a life offence.

Ms HADDEN — Section 124(2).

Mr DALLA-RIVA — Can I ask a question which relates to the issue of perjury? It is an issue that has concerned me with the Carroll matter and I have asked this before. Perhaps the bar association would be able to explain. What would now preclude an offender getting up, jumping in the box and giving sworn evidence knowing

that they could lie their teeth off without any threat of prosecution for perjury?

The CHAIR — In the event that they are acquitted of the crime, as in Carroll's case?

Mr DALLA-RIVA — If I was a defence barrister, I would have the client jump in the box every time now, because he can sit there and say whatever he likes and not be subject to perjury.

Mr GLYNN — I have to say the last thing that crosses your mind in making a decision as to whether your client will get in the witness box is whether he will expose himself to a charge of perjury — much more whether he will expose himself to being convicted of the offence that is currently before the court.

Mr DEVLIN — Sometimes as a matter of practicality if you have a client who insists on giving evidence and the evidence is plainly wrong or flawed but they are insisting on exercising their right, we give them a friendly reminder about perjury. But against that background is this longstanding prosecutorial attitude that you just do not prosecute accused persons who get in to fib on their own trial.

Ms HADDEN — Is that because a judge on that second hearing would see it as being vindictive and a waste of public time and resources?

Mr DEVLIN — The way it has been explained to me is this overarching policy to, as a matter of policy, pursue everybody. For a start, there would be no end to it, there would be a lot of resources thrown at it; and secondly, you are discouraging the accused from giving evidence and often they are their own worst enemy and the prosecution want them in there.

Mr BYRNE — To go back to your question, Richard, I disclose my bias, because I prosecuted Carroll at first instance and on appeal. There is that gap; there is now no sanction for falsely swearing the ultimate issue by an accused person. Whatever view you take, particularly given advances in scientific evidence that can later prove the lie, that is a policy problem.

Mr DEVLIN — This is what all our Attorneys-General are grappling with in Melbourne today.

Ms HADDEN — With Carroll, did he give sworn evidence at his first trial?

Mr BYRNE — Yes, he did. He swore he did not murder Deidre Kennedy, and that was the particularised perjury.

Ms MASON — Even without giving evidence, his not guilty plea would have amounted to the same matter for him. If he pleads not guilty, he is saying he did not do it. Even without giving evidence he is effectively — —

Mr GLYNN — But he is not on oath and that is the difference.

Ms HADDEN — Unless in his interview he said, 'I didn't do it'.

Mr BYRNE — He is still not on oath.

Ms HADDEN — But he has been warned, though.

Mr GLYNN — Yes, but only warned about the use of it, not about perjury. And because he is not on oath he can never be charged.

The CHAIR — Perhaps we will come back to offences relating to interference with evidence and witnesses, which obviously have been of substantial interest here in recent times. One of the questions we have is in relation to sections 126 and 129 which deal with fabricating and destroying evidence and the MCCOC report which suggests that it might be useful also to have a provision relating to the alteration of evidence. In terms of your practice, is that a useful distinction to make?

Mr DEVLIN — I think it is. I think there have been cases where the facts have fallen between the two. I have often thought it is a gap in the code because they are pretty definitive words, are they not, 'destroying' and 'fabricating'? 'Altering' suggests something different.

Mr GLYNN — I am not as convinced that altering does not amount to fabrication but when in doubt,

clarify. I would not see that there is any objection to amending to cover that.

Mr DEVLIN — It depends on whether fabrication ultimately amounts to creating something anew.

Mr BYRNE — You can think of examples, like if you alter a digital photo to make it appear something else, that is fabricating.

Mr DEVLIN — It is hard to come up with a description, is it not?

The CHAIR — Yes, whether it covers it.

Mr GLYNN — The simple answer is add the additional activity. I do not see any problem.

The CHAIR — But to take up your point, Ralph, have there been cases that you have been involved in where the outcome of the case swung on that point?

Mr DEVLIN — In terms of having a set of facts, going to those two sections and thinking, 'I think I'm going to fall between the two here', yes. I cannot give you chapter and verse, but I have adverted to this point before. Your suggestion about putting in a different concept fits neatly in with what I experienced some time ago as a gap.

The CHAIR — Even though it may not have been ultimately tested in the court, you thought it could be?

Mr DEVLIN — It was about framing charges against someone who had tinkered with an exhibit — it was in that context — but it never went to court because we did not have enough on the facts to fit it into either one of the two available tools.

Ms HADDEN — That would mean an acquittal if it did proceed.

Mr DEVLIN — The charge could not be laid. I was in the special prosecutor's office after the Fitzgerald framing charges. I suspect it was in that period where we had some evidence and knew someone who altered something, and it was neither destroying nor fabricating. That was the view taken at the time.

Ms HADDEN — If that instance comes up a lot, how is that dealt with?

Mr DEVLIN — I would not say that it comes up a lot thought.

Ms HADDEN — Does it not?

Mr GLYNN — It is a fairly infrequently prosecuted charge. This is an area of the law — this whole area of the administration of justice that usually only arises with any frequency when you have had an inquiry into particularly, say, the police force, or an inquiry into somebody who has been corrupting people who have the power to award contracts and make significant decisions. It is really about the only time you see much in the way of this sort of change.

The CHAIR — I move on to a recent addition to your code, which was subject to some debate before it was inserted in the code and has now become the subject of considerable discussion afterwards, the whole question of reprisals against witnesses after they have given evidence and the qualifying clause 'without reasonable cause', which Di Fingleton argued in her case unsuccessfully. Do you have any views about the application of this particular section and whether or not that qualification has been a useful one from the point of view of the administration of justice in Queensland?

Mr GLYNN — I think it is critical — for example, the classic would be if you have an employee who gives evidence against you in something and later on that employee starts to steal from you, they become abusive at work, they do whatever, and if you sack them theoretically you are in breach of the section. But it would seem to me, provided you are satisfied that you have reasonable cause, you have got protection.

Mr DEVLIN — Another example I thought of was a harmless argument between an observer of a trial and a witness, where there is absolutely no intention to influence the witness in some way. A citizen, just thinking that he or she was entitled to have an argument with, say, a witness that they knew — without the phrase 'without reasonable cause' — could suddenly be a risk.

Mr GLYNN — I think in response to a threat by the other party, for example. If the complainant in the case had made a threat and you made a responding threat, that would be a very possible set of circumstances. Whether you could otherwise come within the provision with each of these might be arguable, but the reasonable cause certainly gives you a fairly good protection. We have it in our extortion provision, which is where it really does have significance, where what is sought is, say, the payment of money. If that is without reasonable cause — if the demand is without reasonable cause — that leaves you open to prosecution. But if it is not, if there is a reasonable cause, then you have a defence.

Mr BYRNE — I agree. I think it is crucial. The example that came to mind for me was if someone honestly believes a witness perjured himself or herself. Without that clause in there you threaten to report them to the police, and I think you are guilty of the offence. I think it is crucial.

The CHAIR — Presumably without that Di Fingleton would not have had any defence.

Mr BYRNE — No.

Mr GLYNN — I do not think she had one — —

The CHAIR — I was interested in whether presumably it has not necessarily prompted further debate on the meaning of this as a result of that case.

Mr GLYNN — No, because there was nothing in what was argued there would cause you to think that they should not have that provision. In fact quite the reverse. If anything it would encourage you to the idea that people may make these threats, but there may also be something in their mind that justifies it. The question then is whether it is reasonable.

Mr DALLA-RIVA — On that, New South Wales has a provision that allows for concern where an interference is or threats are made to the prosecution — in other words, the lawyers — and that the defenders and some of the others argued that there ought to be that protection afforded to the defence lawyers as well because they are equally subject to intimidation and threats subsequent to or during a trial. What is your view on that.

Mr GLYNN — I am afraid I think I have been threatened once in the entire time I have practised. I have never seen it as a major issue. Have you?

Mr BYRNE — I think it is a good argument for what we were saying before about wigs and gowns frankly, because people who threaten you — for me it has been from the public gallery up above you from behind — do not know who you are when you walk out the door.

Mr DALLA-RIVA — Which is what they said. It could be often the public who are engaging in it, certainly if you are a defence lawyer.

Mr GLYNN — I have had the husband of a woman who was killed in a motor vehicle accident, and my client was acquitted. The husband was threatening towards me in a funny sort of way. I just kept walking, because I felt very sorry for him. He did not understand the process and he was distressed. I suppose I do not have to make a complaint, even if the provision is there. I just think you would be silent rather than complaining about things that are unnecessary. I do not really see any need for it, to be perfectly honest.

Mr BYRNE — And Dan makes the point too, that if it is in court it is a contempt.

Mr GLYNN — It is a contempt of court if it is related as thought, if you really feel strongly about it. I think most of these things are best dealt with by either telling the person to pull their head in or just say nothing and moving on.

Mr DEVLIN — I agree from a different aspect. One of my jobs in the Fitzgerald inquiry was over a number of years investigating and prosecuting a couple of crime figures, one of whom was regarded as being dangerous. The worst I got from him was a Christmas card. I did not particularly enjoy it.

Ms HADDEN — What was in it?

Mr DEVLIN — A very backhanded greeting. He spent the next one in jail. But that perception is often much greater than the reality, and, as Tony says, it really comes with the furniture. Surely the law should deal with

protecting witnesses who are in a very vulnerable position.

Mr GLYNN — They are not there by choice; we are there by choice. I see them as being in a different position to us.

The CHAIR — Obviously you have a different position in relation to accessory after the fact from Victoria where your must relate to the principal offence. In Victoria it can relate to any offence.

Ms GILES — Other way around.

The CHAIR — Sorry. Is it?

Ms GILES — Yes.

The CHAIR — No, it is not — the knowledge that the principal has committed the actual offence; in Victoria it said that the principal is the serious indictable offence.

Mr DEVLIN — I thought that could have ramifications. I do not think we have ever had any problem at all applying that law here.

Mr GLYNN — It is harder on the prosecution, is it not? You have to show they knew.

Mr BYRNE — It is usually not much of a problem.

Mr DEVLIN — No, I do not think it is.

Mr BYRNE — You do not prosecute an accessory unless you are pretty sure what the principal offender has done.

Mr GLYNN — Accessories after the fact in Queensland are usually — I think it is fair to say — only prosecuted in murder cases, and in murder cases usually what they have done is helped dispose of a body or something like that where there is not the slightest bit of doubt about what the principal offence is, or that they are aware of the principal offence.

Mr DEVLIN — The test would be whether someone who has really helped out after an offence has escaped in Queensland — in the case of a serious offence — and I cannot think of any situation where that has occurred. It seems to me the other way around would potentially open the floodgates.

The CHAIR — In practice it has to be a serious indictable offence anyway.

Mr GLYNN — If the definition of serious indictable offence is as wide in Victoria as it is Queensland, that does not cut much out.

The CHAIR — It scoops up a lot.

Mr GLYNN — In Queensland it would scoop up almost the entire criminal code.

Ms HADDEN — Ours is, what? Five years?

Mr GLYNN — I think ours is five or seven years, and just about everything in that code, unless dealt with summarily, carries five or seven years or more.

The CHAIR — What do you think of the MCCOC recommendation? Have you got any comments on that? It is recommending that it should be sufficient that the accessory had a belief that another offence had been committed but that the believed offence must be related to the actual offence.

Mr GLYNN — I just see that as creating an unnecessary complication — and a dangerous one. If you are being charged as an accessory after the fact to murder, you should have to believe that the person committed murder. You should not have to believe that they committed some sort of an offence.

The CHAIR — What if you were not sure whether they had committed murder or it turned out to be manslaughter or grievous bodily harm?

Mr GLYNN — No. 1, usually it is prosecuted at the time when the principal offender is dealt with; and no. 2, there is nothing to stop the prosecution charging in the alternative. That would be a very narrow distinction, but again it would turn on what you believed had happened. In other words — I think I am right in this — it would be subjective, not objective.

Mr BYRNE — Yes.

Mr GLYNN — It would be your subjective view that he had murdered him, as against unlawfully killed him in a way that falls short of murder. I think it is not unimportant that the prosecution should have to prove the specific offence, partly for simplicity of sentencing. If you are dealing with an accessory after the fact to some unspecified but serious offence, it leaves the judge with a more difficult task of working out what offence you are accessory to and therefore what is an appropriate sentence. In Queensland, for example, for an accessory after the fact to murder offence the range of sentence varies between 5 and, I think, up to 12 years — or up to 11 years anyway has been given — whereas I think in Victoria it probably runs, on some cases I looked at recently, up to about 3 years. You want a distinction drawn.

Mr DEVLIN — I had a client recently given a suspended sentence for accessory when she disposed of the body but she had had her jaw broken by the murderer the night before.

Ms HADDEN — I was going to say if someone is going to assist with the disposal of a body it is either voluntary or they are under duress?

Mr GLYNN — Yes.

The CHAIR — The alternative argument is to say that in fact they know that a criminal act has been perpetrated and they are an accessory to it. At the end of day it does not matter whether it was murder or some other criminal offence.

Mr GLYNN — Except whether you help someone who has committed an offence might depend on what they had done. You might help someone who, for example, has killed somebody — you might feel really sorry for them — but if you know they have put a gun to their head and pulled the trigger, you might not help them. That is why I think it is important.

Ms HADDEN — What if you help them by your inaction? What if when your husband has told you he has beaten his parents over the back of their heads with a lump of wood and hidden them under the dirt for a couple of days before he has disposed of them up in the bush in the back of beyond you do nothing — by your inaction you do nothing?

Mr GLYNN — Not liable. I do not think you would be liable under the Victorian provision either, because you would not have done anything.

Ms GILES — Maritza Wales pleaded guilty to perverting the course of justice.

The CHAIR — That was the Wales-King case.

Ms GILES — But that was giving false evidence to the police, I suppose.

Mr GLYNN — Yes, if you lie to the police.

Ms HADDEN — She had not told them anything.

The CHAIR — She did.

Ms HADDEN — But then you compare the Wales-King case with Heather Osland and her son. They were both charged with the principal offence of murder.

The CHAIR — This is the battered wife syndrome case, the question of whether a pre-emptory strike against the husband, who had persistently battered and abused Heather Osland and the children, whether or not killing him — in his sleep I think it was — —

Ms HADDEN — The person who did the act of killing was acquitted at a fresh trial. The mother was convicted of murder at the joint trial. She did not do the act of killing. She was actually an accessory after the fact in

reality.

Mr GLYNN — But it requires some positive conduct on your part to be an accessory after the fact.

Ms HADDEN — Yes. She assisted her son to dispose of the body.

Mr GLYNN — Whereas merely becoming aware that your husband has buried his parents in the backyard does not in itself make you liable for the offence, under either the Queensland or Victorian provisions.

Ms HADDEN — It depends on what the police do. If they have a scatter-gun approach and they charge you with murder as a principal offender, what do you do?

Mr DALLA-RIVA — In New South Wales they have section 316, which is concealing a serious indictable offence. Have you heard of that? If a person has committed a serious indictable offence, another person who knows or believes the offence has been committed and that he or she has information which might be of material assistance in securing the apprehension of the offender and does not bring it to the attention of a member of the police force or appropriate authority is liable to imprisonment for two years.

Mr DEVLIN — That is a misdemeanour-type offence.

Mr DALLA-RIVA — There was much debate, certainly. You do not have to work out who was opposed to it or who was supporting it.

Mr DEVLIN — We do not have a offence like that.

The CHAIR — That is going to be amended in New South Wales because it has been very contentious.

Mr DEVLIN — That is the suspect charge.

Ms HADDEN — And every victim or person who hears a victim giving their story.

Mr GLYNN — That is right.

Mr BYRNE — It is very broad.

Mr GLYNN — I must say it is a very dangerous provision.

Ms HADDEN — That is what we have heard.

Mr GLYNN — I am pleased to hear that they are thinking of amending it. The problem with it is it creates enormous problems for people in relationships, for starters. That is just my first and obvious concern, but there are probably a thousand other objections to it.

Mr DEVLIN — It is the first time they have ever made apathy a criminal offence.

Mr DALLA-RIVA — Just before we finish on accessories, there was also discussion in some of the New South Wales evidence about this particular issue where there was an offender who had stabbed police officers, murdered one of them and seriously injured another. I think from memory — if I have the facts right — he came home, but the person who was assisting him — —

The CHAIR — He talked to the girlfriend. He was in an agitated state and she got some impression that something had happened.

Mr DALLA-RIVA — She was of the view that he had committed a crime but was not too sure what.

Mr DEVLIN — I reckon that is the problem.

The CHAIR — She was prosecuted under this section and in fact convicted even though she was not sure what offence he might have committed. She suspected that he might have committed an offence — been up to no good.

Mr DALLA-RIVA — You do not have all the facts, but I just draw it to your attention.

Mr GLYNN — I must say from what you have said it just typifies the problems that it creates. In many senses it is inconsistent with human nature. Human nature is that if your wife, husband, boyfriend girlfriend, daughter or son comes home and says, 'I've just murdered so and so — —

Ms HADDEN — They might not say that. They might say, 'I've just been up to no good, mucking around'.

Mr GLYNN — Even if they do, you are not inclined to rush off to the police.

Ms HADDEN — What are the police going to say anyway — 'Go away; you're annoying us'?

Mr GLYNN — They are not going to say, 'So and so has just come in and confessed to murder'. It is just not human nature — I do not think, anyway.

The CHAIR — Have you got any other particular comments you would like to make whilst you are here? I think we have been through all the questions.

Mr DEVLIN — You raised the question of knowledge or belief in perjury. Without really going into it my response to it was that belief just seemed a wider concept than knowledge. We have knowledge here and cases do turn on it, do they not?

Mr BYRNE — Very much so.

Mr GLYNN — Yes. I have to say again that with perjury it should not be just a belief. It really should be something very solid and specific, such as actual knowledge.

Mr DEVLIN — For something so serious.

Mr GLYNN — For something so serious. While I think perjury is underprosecuted that does not mean we should cut loose on a wider range, I just think we should use the provisions we have. There is just one other thing you have here in paragraph 11 about interpreters. I have to say that I would be horrified at the idea of bringing this in for interpreters, not because I do not say it cannot happen but because getting interpreters in courts is hard enough. The risks to people where a misunderstanding rather than a deliberate changing of the evidence occurs, which I presume is what you have in mind, would seem to me to put at risk most interpreters of being often wrongly accused simply based on misunderstanding.

Mr BYRNE — I agree, because I think in the discussion paper it talks about the recklessness as part of that as well rather than the knowledge. I saw that as doubly dangerous.

Mr GLYNN — I must say that I think it is a very dangerous concept.

Ms GILES — Technically the general perjury provisions could apply to interpreters in the right situations.

Mr BYRNE — There is no doubt they do.

Mr GLYNN — In the right situations. People are very careful. As I say, firstly, it is hard enough to get interpreters and while the need for interpreters is significant in Queensland, I think in New South Wales and Victoria you would need them a lot more often simply because you have a much more multicultural society than we do. For ours it is usually Vietnamese, but for New South Wales and Victoria it would be a much wider spread of people.

Mr DALLA-RIVA — I think if there was any doubt about the interpreter you would find another one and someone who knew the language and could whisper to you.

Mr GLYNN — You often see the problem with interpreters where someone gives a long answer and you get, 'No'. I have actually seen a judge discharge an interpreter in those circumstances and say he obviously was not doing the job properly. There was no suggestion that the interpreter was being other than honest — just simply not doing the job well. I just wanted to raise that because I had put a note on it when I saw it.

The CHAIR — Thank you. Anything else? Thank you very much for your time. We appreciated that and your expertise and contribution to our inquiry.

Witnesses withdrew.