LAW REFORM COMMITTEE

Administration of Justice Offences Subcommittee

Inquiry into administration of justice offences

Brisbane – 13 November 2003

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Witnesses

Mr D. Holliday, Senior Solicitor Crime; and

Mr H. Posner, Senior Solicitor Crime, Legal Aid Queensland.

The CHAIR — Welcome. Thank you very much, Howard and David, for coming along. We do appreciate you giving us your valuable time. We need to finish at 4.15 p.m. purely for travel reasons; I think we will be able to cover everything in that time. Our work is covered by the Parliamentary Committees Act in Victoria, which means that once we get your evidence back into jurisdiction it will be subject to full parliamentary privilege. It is being recorded by Hansard and will then be available as a public record, both on the Internet and in published form. If there is any evidence that you want to give in camera you can nominate that as we go or subsequently you can indicate that to us. We will give you a draft transcript. You will have an opportunity to correct it and if at that point you think there is something you would rather not have on the public record we would be very happy to oblige in that respect.

Mr HOLLIDAY — I do not foresee anything contentious at this point.

The CHAIR — So far no-one from Queensland has felt that need. Perhaps I should introduce the members of our committee, we are a subcommittee of a seven-member Law Reform Committee in Victoria: Richard Dalla-Riva is a member for East Yarra Province in the Legislative Council; Dianne Hadden, a member for Ballarat Province in the Legislative Council; I am the member for Bentleigh in the Legislative Assembly; Kristin Giles is our research and policy officer on this particular reference; and Merrin Mason, whom you have met, is our executive officer.

Perhaps we should start by talking about the fact that this is a code state and your views of the advantages and disadvantages of a code as against the common law, which is the principal way these offences are governed in Victoria. Do you have any particular views on that?

Mr POSNER — Yes, everybody does to some degree. On the whole I think it is positive that we are a code state. I think the codification of the common law in Queensland has proved a success over the last 100 years or so. It has made the law certain and it has made it more accessible to people other than specialist lawyers. Even within specialist lawyers it has enabled it to be found easier than when you are finding common law from judges' decisions. That is a general view and I am speaking generally for Legal Aid.

We like the code. The problem with a code is the moment you write it down it ossifies. That is a permanent problem with any written code — common law is forever altering. I suppose the corollary to that is because that is the nature of a code you tend to get your code reforms in chunks and often driven by all sorts of considerations. With the common law you will get gradual change, incremental change all the time, but with a code you tend to get a logjam of pressure.

Mr HOLLIDAY — There is a burst of activity.

Mr POSNER — And then you will get a series of legislative amendments which change everything and then they will ossify again. If you were going to draw a graph the code looks like that and the common law looks like that. That is a disadvantage because we found recently in Queensland — I am not saying anything that is not fairly common knowledge — that some of our more recent legislative changes, particularly where they have been innovative, have needed amendment and have created a lot of unforeseen consequences. While that happens all the time with the common law, it is being constantly incrementally adjusted. The problem with a code is it is much more difficult to change it because first of all it requires a political admission that something has gone wrong and that it needs changing, which itself requires a series of different dynamics to happen.

The CHAIR — Do not the judges adjust it? If you look at the Griffith code certainly for at least 85 years it was virtually unchanged. Presumably during that period as circumstances changed the judges were interpreting and elaborating on the various provisions within the code. In a sense you have both, don't you? You have the certainty of a code, but you also have the flexibility that judges bring in interpreting the various sections.

Mr POSNER — Of course.

Mr HOLLIDAY — The Court of Appeal does, but it would be more marginal; it would be a bit more circumspect than any developments than common law is having. It is a lot more active I would think.

Mr POSNER — Arguably they should not be. In practical terms they do and in practical terms they should, because clearly a written code ossifies. But I think if you walked back philosophically far enough they probably should not. There should be less judge-made law in a code state than there is in a common-law state. The practical problems of that are that possibly it creates more pressure on judges. It is more difficult for them, I think, when they do feel that the code has moved out of step to make alterations than it is in a common-law state where

they can simply say, 'Look, times have changed. The common law has moved on, the public perception has moved on, and where the law ought to be has moved on' — and that is legitimate. With a code state you really have to go through the somewhat artificial process of saying, 'We have now reinterpreted the same words'. It may create a greater political pressure on judges. It makes it harder for them to alter. They do, of course, because clearly offences that remain on the statute book become less offensive and others become more offensive as times change.

The CHAIR — Do you have any particular examples that come to mind, from legal aid's perspective, where particular aspects of the code were becoming out of step, were ossifying and led to perverse results, in the sense that the judges were not willing to be expansive in their interpretation?

Mr POSNER — Yes, I have one. It is not a case where the code ossified, but it is a case where there was perhaps resistance to what the code wanted to do; and another one where there was, from legal aid's point of view, an over-eager acceptance of what the code wanted it to do. There were some changes to section 552 of the code some time ago. In Parliament it appeared, if one read *Hansard*, that the intent was to move a vast amount of matters from the higher courts to the lower courts. If you read section 552 on one interpretation it was intended to move a huge amount of things down. It was fairly rapidly read down for that not to happen. It did not happen. Now while 552 gives people a choice it did not result in the massive move that arguably was intended. That was done because the legislation was interpreted judicially.

Again I am not saying anything that is not on record. We have been the subject of a number of attorney's appeals in Queensland that have had the effect of fairly radically altering what was the current practice of sentencing on serious matters. There has been a considerable uplifting of sentences. Again you can find legislative justification for it, but 'you have to look for it' is perhaps the best way to put it. Yes, judges do still intervene to match what would have been considered in common-law jurisdictions. They have to deal with public perceptions and public opprobrium as certain offences have become either more prevalent or more publicised so they start to appear over the radar instead of under the radar and other offences move underneath the radar. That is continually happening.

Mr HOLLIDAY — Just before we leave this one, I should indicate — just to be clear — both Howard and I have only ever practised in Queensland, so we live, breathe and will probably die the code.

Ms HADDEN — We have had evidence in New South Wales that whilst a code has its benefits — it has a desirable outcome, it is clearer, accessible — another view is that the law is inflexible under the code, it is absolute and there is little or no room for judicial discretion. Which means that a variety of facts of a particular case are not considered as much as they would be in a common-law system, and as a result the protection and preservation of rights and liberties are trodden on was the phrase used. What is your perception of that? Although you have had no experience of common law, you would see as a legal aid commission the rights and liberties of defendants under a code.

The CHAIR — Specifically with reference to these public justice offences?

Mr HOLLIDAY — The words that New South Wales use are a bit strong.

Ms HADDEN — I have actually lightened them a bit.

The CHAIR — There was one witness in New South Wales.

Ms HADDEN — It was more than one; it was a few witnesses.

Mr POSNER — I think a code moves the discretionary side of the law on the continuum away from the judiciary and towards the Parliament. So you will get lawyers — and I am not disagreeing with them necessarily — saying that if you codify everything what you do is you hand to Parliament a huge amount of the judicial discretions that exist, so what you are doing is really playing with the divisions between the judiciary and the legislative. I think that is probably true. I think if you have a codified state you do have a situation where Parliament responds to issues that would have been left to the common law. To take existing high-profile situations in Queensland, like the judicial corruption-type offences, we have had a situation where a legislative response has created what is in effect a new offence that has then been used.

Whether that is a good or bad thing is a matter for you to decide. If you codify it, you remove from the judiciary some of its fairly untrammelled powers to interpret what was the common law because it is left alone by Parliament, except in specific cases where it chooses to intervene. If you codify it then in effect what you say is that

the common law will be looked at by Parliament, it will then set what it is and then any changes to it are driven by Parliament rather than by the judiciary. Which is the better body to make the call is a political matter.

Mr DALLA-RIVA — This is the issue that came up today, in particular about section 140 of your code: attempt to pervert justice. As we found out today, legislation has been passed to amend that section such that now one of the elements that were necessary to be proved in the prosecution has been taken away, and the sentence has been increased from two to seven years. Are you aware of it? Other witnesses have not been aware of it. That was a concern that I had in the sense that here you had — —

The CHAIR — It takes away more the requirement that you either had to be charged under one of the other specific offences and if it did not fit under the specific offences that come under the umbrella or rubric of perverting the course of justice before you could be charged with the general catch-all perverting the course of justice. So those words not specifically defined in this code, which were in section 140, have just been removed, rather than the elements of the offence. It is really the way in which the courts were potentially interpreting that, which was: you could only be charged with attempting to pervert the course of justice if the offence did not fit within one of the other offences under attempting to pervert the course of justice.

Mr POSNER — Then Parliament intervened and made it right.

The CHAIR — Yes.

Mr DALLA-RIVA — But they used the words 'one of the elements of the offence'. I think you will find that in the transcript. She actually indicated that this was an element that it was necessary to include and that had been removed. It made me think, 'Hang on, we have just had, with the greatest respect, the person, the bureaucrat, directing the changes to the law, not the independence of a judiciary that had taken evidence'. That really concerned me because, as you indicated, it then sort of segregates or merges that separation between the executive and the judiciary. I just draw on that, if you wish to make comment now that we have just had a bit of discussion on that.

Mr POSNER — I suppose at a philosophical level I am agreeing with you. I am not necessarily saying that it is a bad thing. I am saying yes, it is an inevitable consequence of codifying that you are moving — —

The CHAIR — Judge-made law or legislative law.

Mr POSNER — Yes. You are accruing for evermore power to Parliament, in essence.

Mr HOLLIDAY — Whichever way you go there are consequences, so long as everybody understands the consequences.

Mr POSNER — I think what inevitably happens — perhaps we have not thought of it — is that if you codify the common law you are not actually accruing more power to Parliament, because what you are doing then is attempting to codify the existing — judge-made — common law. If you set about to codify Victorian criminal law, Parliament will not be making change; Parliament will be discovering what has already been found. But as time goes on every change that is made is then Parliament-driven, and arguably public opinion and public perception driven, rather than legal opinion driven change. As time goes on we gradually have more changes.

In Queensland — and this is a personal view, not Legal Aid's view — we have increasingly had legislation that has responded to single high-profile events or to particular campaigns in the media. There has been a legislative response, often for political reasons — a legitimate response, but a political response — which has then brought in its wake unexpected consequences. Sometimes it has had the effect of adding charges, adding new things to the code and creating offences that people had not thought of, new offences being able to be extended into areas where nobody thought they were going to go, or sometimes creating double offences.

We had a discussion yesterday about section 416 of the code, which is extortion by threat basically, but you could have used 'conspiracy to bring false application', which is section 131.

If you look at section 416 and section 131 — that being the conspiracy one — you can construct a fairly elegant legal argument as to why they are different and they could be in different circumstances, but you could equally elegantly construct an argument that says you are simply adding more and more detailed ways of producing that same result. The net result is negative not positive. You are better off having broadly based code clauses that can then be legitimately interpreted as to current practice by your judges. The more definite — the more specific —

legislation becomes, the more you constrain the judges and the less ability there is to make any adjustment except via legislative change.

The CHAIR — This issue is not peculiar to code states. Commonwealth states are doing that as well; they are creating more specific offences to deal with specific situations where there is a perceived need to respond to particularly controversial law, a gruesome set of circumstances that have been the subject of judicial decision. That is happening in Victoria as well.

Mr HOLLIDAY — With the specific laws comes the tendency to start writing in specific exemptions — exclusions — so it can get quite convoluted when you go down that track as opposed to a general approach.

Mr DALLA-RIVA — Last question on this issue: do you find that the prosecution, or indeed the police, apply the law easier — they can identify that there is a perjury, it is in black and white and it is easier to understand?

Mr POSNER — We only practise in this jurisdiction, so we do not have a benchmark to judge them against. I do not know whether there are major difficulties with that in non-code states. I do not think I can say whether they find it easier or harder. I suspect we have the same issues with the police as opposed to prosecution — Legal Aid feels the police tend to charge up. At an early stage the police will often concede this: 'It is easier for us to charge where we think it might go and then leave it to the lawyers to work out exactly what the details should be'. Generally speaking until comparatively recently I do not remember many great battles in Legal Aid over code interpretation. It is a comparatively recent problem.

The CHAIR — They are public policy debates rather than judicial debates. Let us get on to some of the specifics. Are you satisfied with the current application of the law in relation to accessory after the fact, in particular to any principal offence? This goes to the question of whether or not its application to serious indictable offences or more general offences is something that needs to be considered from our point of view.

Mr POSNER — Apart from the note about section 10, I have no note saying that it is a major issue or has ever been something that has bothered us. There are some issues about question 4 that you asked us, which leads on to it.

The CHAIR — This is in relation to the disposal of the proceeds?

Mr POSNER — Yes. That has to do with combining two separate widenings of the law, and we speculated yesterday that that had to do with money laundering and with attempting to cash proceeds primarily. It is a legitimate aim, and it may be that we are running against the wind on this one, but we felt if you both extend accessory to obtaining, keeping or disposing of proceeds and extend your definition of 'accessory' to knowledge of not only the actual offence but of related offence or any offence, then you create two separate widenings.

The aim is laudable, but we felt that was almost a perfect example of where you build a new law — when you apply it — it could have the most unexpected consequences because if you both extend knowledge of any offence and of attempting to dispose of or keep the proceeds, you could then legitimately charge any lawyer who charged a fee to a criminal client who, for example, said 'Look, I'm guilty of this part, but not guilty of that part'.

We have had a few cases that people have thought laughable and they have ended up in deep trouble with them, so we had a feeling that when you extend two different laws and put them together in order to get somebody, that is where you hit the unexpected consequences.

We felt very strongly that if you extend an offence to obtaining, keeping or disposing of proceeds then make sure your accessory definition is nice and tight. Or if you are going to extend your accessory definition — to basically anybody who knows of anything that is close to the offence or any offence — then do not widen the net, because if it is having anything to do with the money of anybody who you know who has ever done anything wrong, that is a pretty wide net.

Mr DALLA-RIVA — Fair point.

The CHAIR — It sort of echoes the New South Wales clause that they are about to amend.

Mr DALLA-RIVA — Yes, section 316.

The CHAIR — This was in relationship to concealing a serious indictable offence, where you might not — —

Mr DALLA-RIVA — You just need the 'might'.

Mr POSNER — You know why. When you read the cases that it was intended to cover it makes sense, but when you start applying it to the rest of the world it becomes this huge all-encompassing act. The problem with that is not that people then go out and charge everybody, the problem then is you end up in a situation where you have moved it away from the judges and even away from the Parliament and you have landed it purely and simply in the discretion of prosecutors, and I do not know anybody who thinks that it is a good idea that these things reside solely with the discretion of prosecutors.

The CHAIR — Such a wide discretion.

Mr POSNER — No. 5 was the other one that related to it, 'Without lawful authority or reasonable excuse', we felt that lawful authority is a defence. It is a general defence in Queensland to all code offences, except specifically excluded. We felt you would be creating possibly a statutory interpretation mountain for yourself if you started putting that lawful authority is an excuse for a particular offence — in other words, it is not an offence if done with lawful authority. That applies to all offences. If you start putting it into one or two offences some bright lawyer may stand up and say, 'Look, lawful authority is an excuse in this offence because it says it is. You are silent about it on that one. Therefore there is impliedly a lesser excuse. Otherwise you would put it in — because you put it into this bit'.

Mr HOLLIDAY — Unless there is some good reason why it should specifically be in there.

The CHAIR — Is section 23 the interpretation of your code?

Mr POSNER — I am sure it is s31. There is a general situation of if you do something with lawful excuse — a policeman's extra duties — then it negates all sorts of offences like assault, for example. If you start putting in, 'This is not an offence if done with lawful excuse', then for all the ones that do not say that is it an offence even if it is done with lawful excuse? So we are suggesting that a general clause is better than a particular clause unless you are going to repeat it in every clause that you want it to apply in.

Ms HADDEN — In relation to perverting the course of justice, the Queensland code retains the general offence and the enactment of specific offences. How does that work in practice?

The CHAIR — As against the other options, which are just codification of every specific offence or just having the general clause. You have both, the catch-all and the specific offence?

Mr POSNER — Yes. I am not sure on the history, so I do not know this. I have a feeling — and it is no more than that — that we started off with pretty much the general offence and the others have been added over time to fill in particular problems. I suppose that is an inevitable consequence of people falling through the net who Parliament considers should not fall through the net. We think there should be a general, certainly, to enable judges — and prosecutors, for that matter — to find perverting the course of justice in an infinite — —

The CHAIR — Unforeseen circumstances?

Mr POSNER — Yes, a range of circumstances. Again, the problem with writing specific legislation — and I know it will happen — is that the more specific legislation you write the less implied generality you give to your base provision. If your base provision is supposed to cover all examples of perverting the course of justice, then it can be drawn widely. It is a legitimate expectation that it is intended to find perversions of justice. The moment you start putting in specifics — 'It is a different offence to do this', 'It is a different offence to do that' — you run the danger of impliedly narrowing the base for perverting the course of justice.

Ms GILES — Do you think Queensland would be better off with just a general offence like Victoria has?

Mr POSNER — I do.

Ms GILES — Can you tell us why?

Mr HOLLIDAY — For the points that Howard raised. As long-time practitioners, I certainly have a view

that the general is the way to go in most areas. If you are looking for a specific example or issue — —

Ms GILES — Or reason?

The CHAIR — You have here fabricating evidence, corruption of witnesses, deceiving witnesses, destroying evidence, preventing witnesses from attending, conspiracy to bring false accusation.

Ms GILES — And we have just perverting the course of justice.

Mr POSNER — As long as the elements in the offence of perverting the course of justice are properly thought through when you codify it, it seems to me it would make more sense to have a general one than a whole lot of specifics, because the moment you have the specifics you can then fall through the cracks.

The CHAIR — Could I ask a question about something that people may not think is perverting the course of justice? It is destroying documents that may at some point in the future be used in judicial proceedings, but where there are no judicial proceedings on foot. Is that something that people should be aware of?

Mr POSNER — Certainly some law firms are aware of it now.

Mr HOLLIDAY — Law firms should be aware of it.

The CHAIR — I am talking about the public's or a company's or even a public official's point of view. They may not know that they will be subject to a criminal charge.

Mr POSNER — From a defence lawyer's point of view — I am a defence lawyer — I think it is dangerous legislation. It runs along the same lines as the legislation in Queensland that is keeping people in jail after they have completed all their time for their offences. I have defended some of these people so I understand the legitimate reasons why you do not want them back on the street, but from a judicial point of view it is horribly dangerous when you start creating imprisonable offences for things, where people have either completed their offences and have officially served the full sentence for it or down the other side — what you are talking about — where there is not any judicial proceedings on foot and it might be used in the future.

Mr HOLLIDAY — At best there is an investigation.

Mr POSNER — Again, you can run it to almost any level. It would enable a tax department to in effect investigate anybody's affairs at any time for any distance about anything because maybe you were doing it in order to influence a possible tax investigation in 10 years time when your children grew up.

The CHAIR — What if the acts have to be part of the course of justice? What is the course of justice? Is there an anticipated judicial proceeding?

Mr POSNER — Again, there either is a judicial proceeding or there is not a judicial proceeding.

The CHAIR — There is an investigation. No-one has been charged.

Mr POSNER — To answer your specific question, then find a way in Parliament to formalise the investigation process so you know exactly when your duty starts and finishes. All right, you are halfway through a royal commission and there is an investigation on — a policeman is beginning to poke around in your affairs and somebody says, 'I don't really trust that fire'. There is an investigation on. It is these grey matters where somebody says, 'I've done this crime. What am I going to get?'. You say, 'You're going to get 10 years; you're going to get 10 years but maybe they'll keep you in for the rest of your life' — that is so in Queensland now. If you once said to somebody, 'We can do this and that, but once court proceedings start, we can't do this', we now say, 'Thank you for coming to us. We can't do anything because something may happen in the future'. Be definite. If you want to make the investigation the start line, that is fine, but then define the investigation so that everybody knows when they can be open and when they have to batten down the hatches.

The CHAIR — That is an argument for a specific offence. In a sense you would almost need to define that as being a specific offence at a particular point in time, which is a bit different from having a more generalised attempting to pervert the course of justice offence. It seems to me that in a sense you can hardly argue from where you started from — —

Mr POSNER — That is true; you dont pervert the course of justice before a matter is on foot. My view is that before the matter is on foot, it is not on foot. You asked, 'How do you go about passing a law that enables you to prosecute people for offences?'. I said, 'If you are going to pass a law to do that, this is the best way to do it'. I do not think it is a good idea to do it at all. I am saying that if you are going to do this thing, my suggestion would be to do it this particular way, but my advice would be not to do it at all because I believe that somebody should only be charged when matters are officially judicially on foot. Attempting to pervert the course of justice seems to me to be intended to do that.

The CHAIR — Thank you very much, that was good.

Dealing with question 7 in relation to section 131 of the code which creates a specific offence of false accusation of an offence, which is limited to conspiracies between a couple of individuals as distinct from just one person, do you think section 131 should also apply to individuals who make a false accusation of offences?

Mr POSNER — We decided that we did not think it was necessary because if we were prosecutors we could charge them under section 416, which is the general extortion charge. It is extortion to get a benefit and if you read section 416 widely you could get away with that. The answer to your question is, I think, yes, philosophically, of course a single person doing that should be able to be charged; no, we do not think it is necessary to do it by extending section 131.

Ms GILES — Is there some benefit in having it all in the one place? This is the public justice offences chapter.

Mr POSNER — Yes. We think section 416 would have covered section 131.

Ms GILES — Oh, I see.

Mr POSNER — I know I am being minimalist here and there may be legitimate reasons section 131 is in there to take account of particular circumstances, but again you are back down to narrowing judge-made law and making everything statute based. Section 416 is drawn reasonably widely and can be interpreted reasonably widely. If you cannot fit it into those things, this current practice of seeking offences to right every wrong is perhaps dangerous. You cannot right every possible wrong by statute. Wherever you draw the line there will be a grey area on one side of it and by writing more and more legislation you move where the grey area happens. Wherever you draw the line there will be a grey area just before it so you do not solve the problem, you simply move the goalposts.

The CHAIR — I suspect I know what you are going to say in relation to the next one then, which is the mental element of the offence of destroying evidence with intent to prevent it being used in evidence in section 129 and the mental element of fabricating evidence with intent to mislead any tribunal or in any judicial proceedings in section 126. The Model Criminal Code Officers Committee recommended that that be extended to with intent to prevent the bringing of judicial proceedings or to influence the outcome of current or future proceedings. What do you think of that formulation?

Mr POSNER — I have probably already answered that in other questions. There is nothing wrong with any of these ideas; they are all laudable aims, but simply having laudable aims is not necessarily enough when you end up passing laws that put people in prison. It is a matter of how many applecarts you are prepared to overturn to get to the laudable aim and whether in the end you do more damage — you turn over more applecarts than there are apples at the end of the road.

Ms GILES — That next one is actually obsolete now because we have just found out that the sentencing provisions have been changed.

The CHAIR — They have just synchronised the two sentences for conspiring to pervert justice and attempting to pervert justice.

Ms GILES — The question was: 'Is this distinction justified?'. Apparently not.

The CHAIR — Parliament has just amended that.

Ms HADDEN — I think 9 December is the proclamation date.

The CHAIR — Let us move on to perjury and in particular the prosecution in relation to two irreconcilable statements, which is a part of your code and also exists in New South Wales. How does that provision work in practice and do you think it is a good provision?

Mr POSNER — We could not find any instances where it had ever been used.

Ms GILES — Really?

Mr POSNER — Maybe there have been, but we could not find them. Again it is the right every wrong argument. One of the people we discussed it with yesterday is an former senior prosecutor who had actually been involved in one of the cases which led to the provision. In the end they did successfully prosecute because they got the person to finally admit which one was the lie, but they said, 'Isn't it interesting? What would have happened if they had not admitted it? Oh, there is a gap. Right, off we go, let's get the bricks and mortar, here is a gap, let's fill it', so in comes this piece of legislation which to our knowledge has never, ever been used.

Mr HOLLIDAY — It was that case which drove that particular piece of legislation, but for the life of us we could not pin down the case.

Mr POSNER — I am arguing more common law in a code state. Again it is legislation to fill every gap and it creates as many problems as it solves. At the end of the day perjury should be about proving that somebody is lying and what they are lying about. To pass legislation to enable you to convict somebody of perjury when you do not know where they are telling the lie but you know they are telling a lie somewhere seems to be, again from a defence perspective, going down a dangerous slope.

Perjury is a strange offence because in theory any time anybody ever gives evidence in a case and they are found guilty in many, many cases — apart from the corroboration provision — you should charge them with perjury. Of course you do not because it would mean that nobody would ever plead not guilty and go into the witness box. In Queensland we have done the opposite. In Queensland our most celebrated perjury cases — almost all of which Legal Aid have been involved with directly — have been where people have been acquitted and then they get charged with perjury in that they said they did not commit the murder. That has happened twice. In both cases the new evidence that enabled them to found the charge has been jail-yard verbals. In both cases the juries have loved it and convicted them of perjury and in both cases the Court of Appeal and the High Court have said, 'Go away, you cannot do this', and quashed the convictions. In Queensland we have gone the other way with perjury. We have tried to reconvict what the Crown felt were wrongful acquittals, but in neither case has it stood up because the Court of Appeal has knocked them both down although in both cases juries liked the perjury charge and convicted.

Mr HOLLIDAY — You were involved in the first one.

Mr POSNER — That is right.

Mr DALLA-RIVA — Just on that issue, because it is an issue that I have had an interest in, it seems to me that what we have done is basically now allowed the accused to get up and give sworn evidence knowing full well that they can say whatever they like and they will never be charged with perjury — there is no subsequent threat now to giving false, misleading, wrong evidence under oath?

Mr POSNER — When charged. I agree with you.

Mr DALLA-RIVA — I am not saying it is right or wrong. I am just taking the view that people would then say that means you can perjure yourself knowing full well that there will be no recourse to committing the offence.

Mr POSNER — It is aimed primarily at witnesses and accused.

Mr DALLA-RIVA — That is what I am asking.

Mr POSNER — I am agreeing with what you are saying, but that is a central tenet of the common law. If you move back to a situation where you say to somebody, 'You have been charged with this offence, you must now tell the truth, start talking', you are back to 1487 and the Star Chamber. We have spent 500 years moving away from Star Chamber precisely to give accused an opportunity to defend themselves freely and fearlessly. The perjury rules have been applied primarily in common-law jurisdiction over the past 200 years to stop witnesses, for want of a better word, attempting to pervert the course of justice. They have not been used to stop the prisoner in the dock making a statement that, 'I did not kill the person'. The history of that goes back to the death penalty —

you cannot seriously get someone to stand up and say, Yes, hang me.' We no longer have a death penalty so a lot of the stuff is moot, but I think the principle still remains: you do not want a situation where the police charge somebody and then they are hauled before the equivalent of a Star Chamber, which I suppose in Australian terms is a royal commission, and told, 'Did you do it? You must tell the truth and if you do not say you did it we are going to charge you with perjury because we have lots of evidence'.

Mr DALLA-RIVA — Which is what is happening. My understanding from some of the other evidence is that a lot of perjury charges are coming out of the compulsion on witnesses in royal commissions to give evidence.

Mr POSNER — That is right. I am implacably opposed to it. I think it is a horrible precedent because I think it removes power from both the judiciary and Parliament, and it hands it to the executive.

The CHAIR — That is why royal commissions are used sparingly. We had representatives of the Criminal Bar Association of Queensland. They said their main concern is their defendants giving evidence at all and what they might say because they often hang themselves by their own evidence, whether they are perjured or not.

Mr POSNER — It would be a rare case where you would advise your client to give evidence. You do not want them to give evidence, but when they do I think it would be oppressive to then say to them, 'Simply by going in the witness box and pleading not guilty, if the jury says you're guilty you're going to be charged with perjury as well'.

The CHAIR — There is the whole question of whether perjury should be extended to lawfully sworn interpreters, which now happens in South Australia and Tasmania.

Mr POSNER — We thought it already was because in Queensland they have to take an oath. If you bring an interpreter before a court the interpreter has to take an oath. If they take an oath, they are in.

Ms GILES — We mean a specific provision that underlines it, as it were. It is true the general provision in the White case can apply to interpreters. The Criminal Bar Association felt quite strongly that it should not apply to interpreters.

The CHAIR — They said it is hard enough to get interpreters without creating a specific offence for interpreters.

Mr POSNER — It would be writing an otiose provision for political purposes. They take an oath. They are absolutely liable. If you take an oath you can be charged with perjury.

Ms GILES — That is why it has found its way here, because a couple of jurisdictions have it specifically.

Mr POSNER — It is a legitimate provision, they are — but they are anyway. It is like saying, 'Stealing a Nintendo is an offence of stealing'. We know it is an offence of stealing.

The CHAIR — I think MCCOC has looked at all the jurisdictions and all the provisions they have and has come up with a model code that seeks to reflect every element. We have two questions, obviously. One is the threshold question as to whether we should codify those offences at all. The other is one on which your evidence has been most helpful, which is around the question of the degree of specificity that goes into the offences — whether they should be kept general or whether you need to have all the specific provisions that try to anticipate every single situation that might arise in the administration of justice.

Mr HOLLIDAY — I think we have a general position.

Mr POSNER — Yes. If you codify the common law it is in our submission a good idea, but what you should be doing is codifying the common law, not trying to find every example of a wrong that can be thought of and find a provision that enables it to be charged.

The CHAIR — That has been incredibly helpful. Do you have any further comments you would like to make in relationship to our reference?

Mr HOLLIDAY — None that came to mind. I must confess we turned our minds specifically to the questions that you sent. We acknowledge that there is a whole series of others, and we can certainly turn our minds

to them and send you a response in due course.

Ms GILES — That would be nice but do not feel you have to.

Ms HADDEN — Do you keep statistical information in relation to administration of justice offences — prosecutions and convictions and successes — within legal aid?

Mr HOLLIDAY — Legal aid tracks things by matter types, yes. I can run a report and extract out just how many grants of aid had been applied for and issued over X number of years. That is always with the caveat that data entry is never 100 per cent reliable, so it is a good indication; it is not an absolute. Sometimes if people do not quite understand what they are keying in it will get the wrong coding.

Mr POSNER — It just occurred to me — it is not strictly about perverting the course of justice — that our section 13A provisions are in essence another part of that pattern. They were passed following a series of occasions where deals were struck for people to give evidence against other people and they got lesser sentences and then they claimed they had been leaned on so they did not give the evidence. Section 13A is in essence a weapon held by the court to ensure that people do not attempt to pervert the course of justice. It means if you have somebody who is going to give evidence against somebody else, is going to turn state's evidence, you apply for section 13A. That is a specific provision which means you get a lesser sentence on the basis that you are going to give evidence for the Crown. If your evidence does not come up to proof, you can then be brought back and resentenced for the original offence.

I suppose that is another specific provision aimed at stopping a specific wrong. It has to do with perverting the course of justice. If you go back 100 years, you would probably be running along the lines of trying to find a perverting the course of justice charge for the person — For lying to the court the first time. We now have a specific 13A where somebody is going to turn state's evidence and is going to get a lesser sentence because of it. It is a complex provision. You go into court, you go out of court, certain parts are held in camera and certain parts are not.

The upshot of it all is that the person gets a sentence that reflects the fact that the Crown is going to use them as a prosecution witness, and then if at the trial they either refuse to give evidence or do not come up to proof they are brought back and resentenced for the original offence. It has not created much controversy. It is used regularly by us, and it seems to be something that is accepted as a legitimate part of the game by both us and our clients. For want of a better word, it is actually quite a 'good' system. It does both give the benefit and keep them to their word.

The CHAIR — Thank you very much. That has been incredibly helpful. It has been quite valuable to us to hear your perspectives. We appreciate the time you have taken to come to speak to us.

Mr HOLLIDAY — I will check with our CEO but I do not think he will have any problems with releasing those statistics. I can forward them to you.

Committee adjourned.