LAW REFORM COMMITTEE

Administration of Justice Offences Subcommittee

Inquiry into administration of justice offences

Brisbane – 13 November 2003

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Ms L. Clare, Director of Public Prosecutions, Queensland.

The CHAIR — Thank you for coming along and meeting with us. We appreciate it because we know you are very busy. The work of the Law Reform Committee is covered by the Parliamentary Committees Act in Victoria. We have two Hansard reporters who are recording the proceedings which are subject to parliamentary privilege, at least when we get back to Victoria. If at any point you either do not want something to be on record or would like that evidence to be given in camera, you can indicate that and we will very happily accommodate that. In any event you will get a copy of the transcript and if there is anything that you either do not want to be made public or you want to correct, you are more than able to do that. Are you happy with those arrangements?

Ms CLARE — What happens? Does this all get published in the normal course?

The CHAIR — It is available on our web site and it is available in publishable form if people ask for it. If you do not want it formally recorded or you want it in camera then it will not be published. So it is entirely up to you.

Ms CLARE — I will see how we go, I think, if that is all right.

The CHAIR — We have started by asking people a general question which is: what do they see as the relative advantages or disadvantages of the arrangements that exist in their state — in other words, codification as against the common law. Obviously this is a code state, so perhaps you might like to talk about that.

Ms CLARE — I think having grown up with the code we cannot help but pay for it because I think it gives a greater certainty. I am not qualified to speak about common-law states, but from our perspective here in Queensland I think it is fair to say that having everything in a volume gives one greater confidence that with all the parties involved — between the defence, the Crown prosecutor and the judge — people are going to raise the relevant issues in relation to the criminal law, so there is that aspect.

The CHAIR — Does it make it easier for prosecutors and, in your experience, even for sworn officers in terms of understanding what the criminal law is?

Ms CLARE — I think so, absolutely, because everything is there — or should be there. There is still a certain amount of development in the law itself, but ultimately we all go back to the code to see what the true state of affairs should be. We were speaking earlier about the longevity of those original provisions like sections 7 and 8, the defences of self-defence, provocation and so forth. They have stood the test of time. They have adjusted to modern conditions and circumstances and they still seem to accord with what is fair. It is much easier for judges, I think, to sum up to the jury when they have the law codified.

The CHAIR — One of the criticisms that is made of code states — we have just been in a predominantly common-law state, New South Wales — is that codes, they believe, can be more inflexible or there is not the capacity for the judges to take into account every aspect of the particulars of a case or any developments in terms of the law. What is your experience of that?

Ms CLARE — I think the other side of that is the certainty you get from the code. We know what the law is and was at the time of a particular offence, because it is here. We still continue to get the law clarified by the Court of Appeal, of course, but the answers still come back to this piece of legislation and I think that is very useful. It is useful for counsel who are instructing their clients, giving them legal advice as to how they should plead — the way in which they should conduct their defence. It is useful for Crown prosecutors to work out what evidence is relevant, who should be called, what sorts of charges should be laid and if any charges should be laid.

As I said, it is, I would have thought, better from the judges' perspective because they do not need to be inventing the law as they go along. If issues pop up that need redressing, that is a matter for legislative review. That has happened, of course. In your paper I see you refer to section 119B, so we do have amendments from time to time.

The CHAIR — There was an attempt, I think in the mid-1990s, to significantly rewrite the code. That was stymied when there was a change of government. One of the suggestions that we have had put to us is that codes are more susceptible to changes in the political complexion of governments and therefore there is the potential to perhaps fiddle with the criminal law in this area in a way that is not necessarily consistent with good administration of justice.

Ms CLARE — Those sorts of criticisms, I think, are made from time to time — for example, in relation to amendments of maximum penalties. When maximum penalties are raised, or not raised, there is a complaint about the penalties being too low — for example, we had the introduction of indefinite sentences. The whole penalties

and sentences legislation that we have in Queensland was introduced in 1993. Sentencing has become very much a law and order political issue in Queensland. However, I see that as separate from the nature of the offences themselves and the nature of the defences. I do not know that we really have had a great deal of debate about the political flavour to those sorts of things. Perhaps as a aftermath of the Fingleton case in relation to section 119B there was a flavour of that in some quarters, but other than that — —

The CHAIR — Are you suggesting then that most of the political pressures have been around the level of the maximum offence rather than the actual elements of the code? Is that what you are suggesting?

Ms CLARE — That is right. From time to time there are calls for mandatory sentencing, for minimum jail terms, those sorts of issues which we have not yet got to in Queensland, but we do have an indefinite sentencing regime and we also have a serious violent offender regime which requires a minimum parole period of 80 per cent to be served.

Mr DALLA-RIVA — That is not particularly relating to what we are reviewing.

Ms CLARE — No.

Mr DALLA-RIVA — You said earlier that there is still some development to go with the introduction in relation to the code law. What did you mean by that?

Ms CLARE — Sorry, I cannot recall saying that. I think perhaps I might have been referring to the way in which society itself evolves — for example, battered woman syndrome is something that came to prominence.

Mr DALLA-RIVA — That is what I was getting at.

Ms CLARE — Again that is not really on the administration of justice offences, but there is a case that went to the High Court called Osland. It was a case of murder charges being brought against a mother and her son. That really focused on this idea of battered woman syndrome and whether or not the law of self-defence could actually cover that or whether there was in fact scope for another defence. In Queensland when you consider what our provisions are in relation to self-defence, I think there is a very good argument that they are perfectly adequate to cover such a situation where somebody believes themselves to be in imminent danger, as opposed to the pre-emptory strike where you get somebody before they get you even though there is no immediate danger. On a lot of levels that can offend one's sensibilities about what is right and what is not and the law of the jungle as opposed to civilised society. There are parameters set within our code in a general sense that apply to all offences that have shown remarkable — —

The CHAIR — Durability.

Ms CLARE — Durability, yes. That is a good thing, but I do not mean to say that that means the code is a bible that can never be altered because it does not stop parliaments from amending and adjusting. There have been reviews of it from time to time. There was just the model criminal code that was being mooted, but there were also major amendments in about 2000 in response to a review — I am not going to get the name right, but there was a committee and I was a member of the committee so I should remember it. It was basically a review of the code from the perspective of women. There was a concern that it did not actually consider the modern concept of equality for women and the importance of protecting women and children in relation to sexual offences and so forth, and so there was a review undertaken in that respect. That resulted in some changes.

Mr DALLA-RIVA — Can I then extend that discussion to the issue of perjury? As we are probably all aware, with people swearing an oath and providing sworn evidence there is some argument, some discussion we have been going through, that over the years the importance of somebody holding a bible or swearing that what they are about to say is the truth has diminished. In the context of the code law when it comes to perjury, how do you think the code has adapted to that diminishing of a person's own responsibility to tell the truth in the court,, if at all?

Ms CLARE — It still remains an offence to give false evidence whether it is on oath or affirmation. I am not sure I fully understand your question.

Mr DALLA-RIVA — Just in relation to a person, let us say 40 years ago, who would have jumped in the witness box and sworn that what they were about to say was the truth, and they would go through and know that they should not say anything that deviates from what they believe to be the truth. We know that now there are occasions, more so than probably we would like to know, when people jump in the witness box, grab the bible,

swear to tell the truth and then lie their teeth off. I was wondering about the code law here or any examples you have or any anecdotes you might want to discuss about how you or the Director of Public Prosecutions has dealt with that perjury.

The CHAIR — I think Richard's question goes to two questions. One is to what extent there are prosecutions for perjury, given that we know people often perjure themselves in the witness box and many of them go unprosecuted; and secondly, in Victoria the law in relation to perjury seems to extend to a wider range of documents, including statutory declarations and the like, whereas I think in Queensland it is more restricted to affidavits and obviously evidence given on oath and in judicial proceedings.

Ms CLARE — There are other offences that attach to those. The first part of the question — —

The CHAIR — About the prosecution of perjury, whether it is an underprosecuted crime.

Ms CLARE — It is not a particularly common crime. I am sorry we do not actually keep separate data on the number of perjury trials that we have had; I can endeavour to get somebody to count those for the last year for you, but it is a manual thing and it will take a bit of time. I do not imagine there would be very many because it is not a common offence that is proceeded with. Largely that is because of the need to have corroboration, and secondly, because it needs to be material — it has to be material to the proceeding. However, when we do have corroboration and it is an important aspect of the matters at issue then we do prosecute.

I see in here reference to our ability to prosecute even though you do not know which one is the truth and which one is the lie. That brings to mind a particular case that I did some years ago where a mother gave evidence that she had seen her de facto indecently dealing with her daughter in the bathtub. She provided a sworn statement to that effect, but by the time she came to the committal hearing she had reconciled with him and she then gave evidence that it was all a dream. She gave evidence on oath to say, 'It was all a dream, it did not happen, I am sorry, big mistake'. So the prosecution in relation to him could not go ahead, but she was then prosecuted for perjury on the basis of the two conflicting versions and she was sentenced to two years imprisonment as a result of that. So where we do have clear corroboration we do prosecute.

Ms HADDEN — In relation to chapter 16 of your code under the definitions section 199A, headed 'Meaning of "family"', does 'a spouse of a person' include domestic and de facto partners or is it only a legal spouse?

Ms CLARE — I have to say I have not looked at that. We might have to see whether it is in the Acts Interpretation Act because it is not in the code itself. Section One is the definitions section generally and it does not appear there. There are other aspects of the code where there is conflict as to where family relationships start and end — for example, in incest, section 222, we have a very broad definition of family so it includes step relationships and de facto relationships. But for indecent dealing where we have circumstances of aggravation in relation to family relationships as well, it is limited to blood relationships. There is no extended definition. So there is that inconsistency. That, I suppose, sometimes happens when you are relying upon statute and you have amendments coming in at different points in the history.

Ms HADDEN — I come from a common-law system; that is all I know. So you have to convince me that a code is good for Victoria — really convince me — because you have had 100 years of a code. New South Wales is part code, part common law, but it also has a catch-all general offence, section 319, perverting the course of justice, which picks it up. If it is not specified in its Crimes Act they can go to the general offence. I notice that your chapter 16, on administration of justice offences, also has a general catch-all provision in section 140, attempting to pervert the course of justice. What is the policy reason behind that? If you have a code, why have a foot in each?

Ms CLARE — Why have something to cover all the remainder?

Ms HADDEN — Yes.

Ms CLARE — I suppose it is because experience tells us that it is almost impossible to cover every circumstance under the sun. In part that explains why other offences since the code was introduced — for example, in relation to fraud and accounting offences that have developed along the way — could not have been foreseen when Sir Samuel Griffiths drafted this. Attempt to pervert in our code is an interesting one because as part of the element of that offence there must not be another offence applicable in the code, which has never really been considered judicially in the state but would suggest that if we just charged attempt to pervert when in fact it amounted also to fabricating evidence or some other offence, then there would be a complete defence to that

section 140 charge to say, 'What I did actually amounted to this other offence', and that would be the end of it. So I have recommended that that be amended to have that taken out. You also see that section 140 has a maximum of only two years and again I have recommended that that be increased to be more consistent with that division, where we have maximums of 7 years and 14 years.

The CHAIR — Ours is 25 years. What you have just said is interesting, because section 140 says:

> Any person who attempts, in any way not specifically defined in this Code ...

So you are saying the judicial interpretation — —

Ms CLARE — There has not been one. But a normal interpretation of that would be that it can only apply if there is no other offence that does apply in law. If the conduct constitutes any other offence, then it is not, in Queensland, an attempt to pervert. That is why at the moment, when we charge that offence, we will normally put some other offence first on the indictment and attempt to pervert will usually be the alternative. Sometimes there is not another, but in the Fingleton case, for example, it was the alternative to reprisal, the section 119B offence.

The CHAIR — We have jumped around a little bit, but you are coping very well with that.

Ms CLARE — So long as you can understand me.

The CHAIR — Absolutely. Going back to the issue of perjury and irreconcilable statements, which is part of your code — and you talked about that specific case where the woman was charged — do you think that particular aspect of perjury could have the effect of discouraging someone from correcting mistakes or statements they have made which were initially wrong?

Ms CLARE — That is one way of looking at it. But another way of looking at it is the need to deter people from committing perjury in the very first place. From the angle that you raise — that is, allowing people to come back and correct matters themselves — from one perspective that could really be about shutting the gate after the horse has bolted. Do you know what I mean? So it could be six of one but half a dozen of the other, talking in clichés here. Where somebody lies the first time and comes back at the next proceeding and lies again and is ultimately prosecuted, that would be an aggravating feature because they are compounding the perjury. Normally I think people tend to make admissions only after they have been caught out, so only after there is some other evidence. Occasionally people have a pang of conscience.

But prosecutors also have an obligation in relation to the reliability of witnesses. If there is a reasonable basis for thinking that a witness is unreliable then a prosecutor should not call that witness. So where somebody has lied the first time around and it becomes clear that they have lied, before they get in the box again, then there are a number of options open. One is to consider whether there should be a prosecution for the perjury. At that stage it is probably unlikely, unless you have other clear evidence of the perjury. There may be consideration of whether there might be an indemnity or some sort of immunity from prosecution given to them if they are a critical witness. But again their credibility is going to be very much diminished if they have given one version and then come back to another — unless there are some other compelling circumstances which lend weight to their new testimony. The third option is simply not to call them at all, in which case nothing happens to them but their evidence is just not used. That does happen from time to time where we know the truth — between the committal hearing and the trial we learn what probably is the truth — but there is not much that can be done about it because your key witness has turned around, and then you are really left with no evidence that is valuable. Does that answer your question?

The CHAIR — Yes, it does, thank you.

Ms HADDEN — Can I ask you a question about judicial discretion and precedent? How is precedent relied upon in sentencing under your code?

Ms CLARE — We do not have guideline judgments as such.

We refer to the sentencing range, which can sometimes be seen as being subjective as to what a person places particularly more emphasis on as serious or mitigating in nature and the weight to be given to these factors. But we also recognise that the sentencing judge has discretion in relation to any offence, unless there is some mandatory sentencing requirement. So it is not the case that if a certain set of circumstances relate to a particular crime then that will result in a sentence of six months — there is more likely to be a range from an intensive correction order, which is a non-custodial order, through to six months in custody or a range of two to three years as a head sentence.

When we say 'judicial discretion', it is a recognition that there is no hard and fast sentence that must be imposed in a particular case but a range of sentences, consistent with all previous sentences, that should be recognised.

Ms HADDEN — Then you do look at the previous cases?

Ms CLARE — Always.

Ms HADDEN — For that particular — —

Ms CLARE — Always. And very seldom are two cases exactly identical, but there are common features and it is a matter of weighing up which is more serious, how bad the aggregating features are in one case as opposed to the other and how they are offset by those features which are favourable to the offender.

The CHAIR — I think what we might do is go back to accessory after the fact and talk about that, because there are significant differences here between Victoria and Queensland. In Victoria the offence of accessory after the fact applies only to principal offences, where there is a serious, indictable offence, whereas in Queensland any offence can constitute a principal offence for the purposes of a charge of accessory after the fact.

Ms CLARE — We have accessory before the fact, which can amount to a principal offence under section 7, but not accessory after the fact.

Mr DALLA-RIVA — I have here section extended — —

Ms CLARE — Section 10?

Mr DALLA-RIVA — Section 10. It is on our briefing paper, page 74, under 'accessories'.

Ms CLARE — And that is the offence — —

Mr DALLA-RIVA — No, it is on our briefing:

> To what principal offence must the offence of accessory apply (for example, 'serious indictable offence' or any offence)?

It has here, under the heading 'Queensland: Any offence: s 10'. Under 'New South Wales' it says 'Serious indictable offence: s 347', and under 'Victoria' it says 'Serious indictable offence: s 325(1)'.

Ms CLARE — But there is a distinction between accessory after the fact and accessory before the fact. In Queensland an accessory before the fact can be charged as a principal offender. But an accessory after the fact is charged under section 10 as accessory after the fact to the offence.

Mr DALLA-RIVA — Any offence?

Ms CLARE — Yes.

Ms MASON — Talking about what offence it relates to though, in Victoria it has to relate to a serious indictable offence.

Ms GILES — It has to carry a term of imprisonment of at least five years — —

Ms CLARE — Whereas in Queensland it is any offence and in Queensland any offence.

The CHAIR — So that is the distinction?

Ms CLARE — That is right. You confused talking about principal offenders, because in Queensland if you are an accessory before the fact — for example if you encourage somebody to commit an offence or assist them to commit an offence, then you can be charged with that offence — that is, with the break and enter or the murder. That is opposed to if you help them cover it up afterwards, when you can only be charged with being an accessory after the fact to the murder or the break and enter.

Ms GILES — But effectively you could be an accessory after the fact to a theft or to a murder or to any offence — —

Ms CLARE — To anything, to shoplifting, in theory, but I do not know if I have ever seen anything like that.

Ms GILES — Really?

Ms CLARE — No. Certainly those sort of things are generally dealt with by police prosecutors anyway, but accessory after the fact is not a common prosecution in Queensland for anything.

The CHAIR — So in effect you are saying that for non-indictable offences there is not a lot of prosecution?

Ms CLARE — Well, there is not a lot of prosecution at all, and where we do see them — and we see them very rarely — is in relation to murders — homicides basically.

Mr DALLA-RIVA — So would that offence be tried in a Magistrates Court — in a lower court? It is any offence?

MS HADDEN — It depends on the penalty.

Mr DALLA-RIVA — I am trying to think of a summary offence where you could be accessory after the fact.

Ms HADDEN — Like shoplifting.

Mr DALLA-RIVA — No, that is a serious indictable offence.

Ms MASON — Summary offence.

Mr DALLA-RIVA — Summary offence. I suppose if somebody spray-paints on a wall and gets rid of the spray can — I am trying to think of something that is very minor.

Ms CLARE — Our penalty regime is two years for most offences, so accessory after the fact to a crime is two years imprisonment unless the code specifically provides for some other punishment. If there is a specific punishment set out, as you would expect for accessory after the fact to murder, for example — it is likely to be the maximum there. We have had, I think, sentences up to 14 years. There is a case of Lister that I recall where I think a sentence of 14 years was imposed on a woman who assisted her de-facto husband to bury the bodies of her children, who he had murdered.

The CHAIR — Just while we are still dealing with accessory after the fact, in Queensland an accessory must have knowledge of the actual offence?

Ms CLARE — Yes.

The CHAIR — If an offence has been committed in Victoria, a knowledge or belief that an offence has been committed is sufficient.

Ms GILES — Also you have to have the knowledge or belief that the principal offence or some other serious indictable offence has been committed. So you do not have to know —

Ms CLARE — Precisely.

Ms GILES — Whether it was murder, or — —

Ms CLARE — I think that the same can be argued here. In fact there is a case of *Carter and Savage* where the distinction in homicide between murder and manslaughter was made. I think there the court, or at least one of the judges, in obiter accepted that an accessory could be an accessory after the fact to manslaughter notwithstanding that someone had committed murder, because the accessory may not have known that it was a deliberate killing, for example, but knew that he had in fact killed somebody, and that would be enough.

That suggests that that would flow on to other offences where you have subsets of offences within offences — for example, grievous bodily harm with intent to do grievous bodily harm, where the accessory may not know that it was an intentional act, so it would just be grievous bodily harm. Or where there has been an attempted murder, the accessory might only know that there has been a wounding, for example, and not know that it was a deliberate attempt to kill somebody.

Although, to my knowledge, we do not have any authority on that, the use of the definition of the word 'offence' in section 10 suggests to me that it opens up the way for people to be guilty as an accessory to a subset of conduct that amounts to a crime within what has been committed by a principal offender. And that really flows on from the decision of the High Court in Barlow, which looked at the meaning of the term "offence" in the code in Queensland.

Ms HADDEN — That is interesting, because MCCOC — the Model Criminal Code Officers Committee — took the view that that wording in section 10 means that knowledge of the actual offence is required, so that is where we are getting that viewpoint from. But I am interested to hear your interpretation.

Ms CLARE — I might well be wrong. I have not really thought it through, but just sitting here — —

Ms GILES — I think it is open to debate.

Ms CLARE — It seems to me that that would be a sensible resolution of that.

Mr DALLA-RIVA — How would you see the suggestion where we could constrain any offence to a serious indictable offence and then have the knowledge of the principal offence relating only to knowledge of a serious indictable offence? Would that restrict the capacity of the courts to interpret somebody who may have thought that an offence had been committed — thought somebody had come home and committed murder where they had actually committed an aggravated robbery or something, do you think that would constrain the capacity of the courts to interpret the accessory after the fact because they thought it was murder but it was a theft-based offence?

Ms CLARE — What you are saying is that that did not happen, so the accessory is actually mistaken as to what he assisting in, not just to the extent of it but to the actual fact of what is — —

Mr DALLA-RIVA — Yes. You have not had that issue?

Ms CLARE — No. That sounds more like an attempt to be an accessory after the fact, which is getting a bit further down the line. It is an interesting point, though.

Mr DALLA-RIVA — Just in the discussion, because your discussion contradicts what is in the discussion paper, I just wanted to get clarification.

The CHAIR — I think what Leanne is saying is it is still probably a contestable area of law in Queensland, based on the Savage case.

Ms CLARE — Yes. I do not remember when that was, but it would be a number of years ago now. I do not recall it being raised again. Part of the reason for that would be simply because this is a very rare offence. We do not use it very much at all.

The CHAIR — Moving on to interference with evidence and witnesses, it is interesting that in your code section 131 is a provision to deal with conspiracies to bring false accusations. One of the questions we had as a committee was: under what provisions of the code do you deal with individuals who bring false accusations?

Ms CLARE — We would look at them in terms of perhaps perjury or fabricating evidence or corruption of a witness — they are all provisions within that same chapter.

The CHAIR — Would it be desirable for section 131 to also apply to individuals who bring false accusations of an offence?

Ms GILES — In New South Wales it does.

Ms CLARE — I think that is a good point, and it is something that could be considered, but so far I do not think that we have really hit a situation where we are not covered. Part of that might be because if somebody makes a false accusation, I suppose if it does not go any further — I am just trying to think aloud as to where there might be a shortfall. Those offences I have just mentioned would not cover a situation where you simply go to police, make a false complaint, you do not sign a statement and you take it no further. Then there would be questions whether that amounted to an attempt to pervert the course of justice. There are probably some summary offences that relate to making a false complaint.

Ms GILES — As there are in Victoria.

Ms CLARE — Yes.

The CHAIR — Following on from that, in section 126 you have a reference to fabricating evidence and in section 129 to destroying evidence. In other states the code or the law extends to the actual alteration of evidence. What is your view about that in relation to the Queensland code?

Ms CLARE — I would have thought that fabricating evidence really incorporates altering evidence, because you are changing the evidence and you are making it into something else.

The CHAIR — Yes, even if you are making it up from the beginning.

Ms CLARE — That is right. There are other offences I suppose you could also consider, like deceiving a witness — so if you interfered with a document and left it there so that someone else could find it and then think that it was the true document — as well as other documentary offences that would be in the code. That might be open as well. Personally, I would be quite comfortable with charging fabricating evidence in relation to someone who altered a document.

The CHAIR — We are getting to an area which has been the subject of considerable controversy here in Queensland, which is in relation to reprisals against witnesses. In New South Wales there is no requirement that threat to the witness with detriment be without reasonable cause, whereas in Queensland it is — and that was obviously at the heart of the Fingleton case.

Ms CLARE — Caused us a lot of trouble, yes.

The CHAIR — Do you want to just expand on that in relation to the operation of that section and how you think it works?

Ms CLARE — As to what that means?

The CHAIR — Yes.

Ms CLARE — I do not really know. I think that phrase must have been copied from other areas of the code, like the extortion provisions in sections 415 and 416, where it is used as well. We have had previous judgments of the Court of Appeal which have said, 'We don't really know what this means exactly' and have been unable to define it. But thinking in terms of the context of this particular reprisal offence, I can only think of circumstances where perhaps there might be a legitimate counterclaim in law. For example, where a witness is giving evidence against you but it raises other issues in relation to your civil relationship, for instance — we are talking about a civil case — and therefore you have a legitimate counterclaim against the witness, as opposed to the other party. We have settlements in civil cases all the time, and nobody sees anything improper in that. Perhaps it is along those sorts of lines that that might really come into play, but it is very difficult to think how otherwise you might be justified in bringing some detriment to bear on somebody who is simply doing what it is lawful to do in giving critical evidence.

The CHAIR — Particularly in a criminal case where they are required to give evidence.

Ms CLARE — Yes. Because this section refers to 'anything lawfully done' by the witness, and therefore it has to be truthful evidence that the witness is giving. So it is not even as though there is a possibility that you are reacting to perjury. It is only in relation to truthful evidence, therefore the ambit of what might be reasonable has to be very, very limited.

Ms HADDEN — In relation to the sections where the Attorney-General's consent is required before institution of prosecution — for example, section 131, conspiracy to bring false accusation, and 132, conspiring to defeat justice — how do they work in practice? Is the advice to the Attorney-General independent of your DPP and Crown counsel?

Ms CLARE — No. Matters only go up to the Attorney-General, in practice, if I think that there is merit in the application, and I will then advise the attorney as to the nature of the case and all the issues relevant to whether it is a proper matter for prosecution for that offence.

Ms HADDEN — Do you keep statistics on the number of successful prosecutions under your administration of justice section, chapter 16?

Ms CLARE — No, not specifically, although we record the major offence of every prosecution. So it probably is possible to go back and count particular queries for you, if you want to forward them to me. However, I can tell you that those two offences that you just referred to are very, very rare.

Ms MASON — Did you say you only record the principal of those so if it was a series of offences you would only pick up the one?

Ms CLARE — We have just done our annual report. Those who are doing the paperwork — filling in the computer files after any trial — have to identify what is the principal offence. Because we only count the number of cases as opposed to the number of charges in total we then have to marry that up with the principal offence for each matter. It is left to the discretion of whoever is filling in the paperwork to define what is the principal offence in that particular prosecution.

The CHAIR — Just returning to perjury for a moment, in Queensland materiality is an important element of the offence — it has to be material to the proceedings. In Victoria that is not the case. Do you have any views about that and the advantages and disadvantages of the two approaches?

Ms CLARE — I do not know but I am assuming that in Victoria there are probably other mechanisms which control the number of prosecutions; for example, the discretion as to whether it is a trivial matter or not. That would probably amount to the very same thing in the end in a case like this. When you think about it, if we were to look at charging people for everything that they said in court that was not true, it would include things such as someone lying about their age if it is a woman who wants to be 21 again when she is really 45.

The CHAIR — An obvious lie.

Ms CLARE — Very rarely is that going to be pertinent to the particular issue in the trial. Someone else might lie about perhaps the precise weight they are. Those are issues of vanity that really do not have great bearing on the outcome of the case itself so there is not really much point in pursuing those things.

Mr DALLA-RIVA — I know it is probably not relevant to our reference and I have been advised of that on the odd occasion but the issue where an accused perjures themselves to avoid the crime they have been charged with and they give sworn evidence — —

The CHAIR — Are we talking about the Carroll case?

Ms CLARE — I was just going to say that you might be talking to the wrong person here.

Mr DALLA-RIVA — I am not referring to any case.

Ms CLARE — You know how I feel about that one.

Mr DALLA-RIVA — I do not mention double jeopardy but I am glad you did. I just want to get it very clear where the Director of Public Prosecutions in Queensland sits in relation to that.

Ms CLARE — In relation to double jeopardy?

Mr DALLA-RIVA — In relation to a person who perjures himself.

Ms CLARE — We now have a decision of the High Court and we know it is an abuse of process to go back after someone has been acquitted of an offence and charge them with lying when they denied the offence in the course of their evidence. If you have somebody who comes in to testify on his own behalf at his own trial who says, 'No, I did not do this crime', and afterwards is acquitted but there is a videotape found which shows him doing the crime, even though that is corroborative of the commission of the offence we cannot go back and charge him with lying about not committing the offence.

Mr DALLA-RIVA — So in the context of our review, do you see that as diminishing again the capacity for courts to say to people that if they perjure themselves they will be charged. This sort of indicates to me that it gives open capacity for offenders to jump in the witness box and perjure themselves with no recourse at all.

Ms CLARE — There is an argument that it reduces the accountability of an accused person and therefore could be seen to devalue the weight of the evidence of an accused person because there are aspects of that evidence which may not be subject to perjury, for which that person may not be liable to perjury. It is a different situation where it is a denial about something peripheral to the offence. For example, in the Carroll case he had denied being in Ipswich where the murder was committed and said he was in South Australia so it may have been open to charge him with perjury in relation to where he was as opposed to his denial of killing the child.

Mr DALLA-RIVA — I do not want to go down the double jeopardy issue.

Ms CLARE — That is the issue really.

Mr DALLA-RIVA — But in relation to the perjury it would seem to me that if we are looking at codifying or bringing in statute law, would you as the Director of Public Prosecutions like to see Queensland bring in a law that would stop people ad hoc perjuring themselves? My view would be that if I was a defence lawyer now I would have every accused jump into the witness box and lie his head off because there is no recourse.

Ms CLARE — That is not quite right because most trials are not single-issue trials — they are not just about did you do it/did you not do it but rather there is a whole multilayered dimension to the evidence of any witness including the accused. The issue of perjury will attach to other issues in the trial which may still be very relevant — they have to be to be perjury — to the issue of guilt and the elements that need to be proved by the Crown but not the key issue that would prove the offence. You can understand the reasoning for that because it really amounts to a retrial of the first trial and under our system of justice — you understand all of that. If you did not have that law then theoretically it would be open to the Crown just to have a second go and even use the same evidence. There are some jurisdictions that have preconditions such as there needs to be fresh, substantial evidence that is different and was not available at the first trial which establishes the perjury.

The CHAIR — Richard would very much like to be at the Standing Committee of Attorneys-General.

Ms CLARE — It is an interesting area. I must say that idea of accountability for an accused's evidence is an important one.

Ms HADDEN — Can I ask you a question about section 136 in your administration of justice offences where any person who being a justice without reasonable cause requires excessive and unreasonable bail is liable to three years imprisonment — it is more than attempting to pervert the course of justice. I am only reading out subsection (a) because I can understand (b) in which the justice has a personal interest but leaving that aside — it is under the heading 'Justices acting oppressively or when interested' — has a justice been prosecuted under that section in the code for requiring excessive bail?

Ms CLARE — To my knowledge, no — what could be more sensational than our most recent trial?

Ms HADDEN — I was wondering what the policy is behind it. I would think the community with law and order would require appropriate bail but how do you determine excessive and unreasonable bail and then have the justice liable to three years imprisonment? It seems very over the top.

The CHAIR — Not very often by the sounds of it.

Ms HADDEN — I am just wondering what the purpose of having it in there is.

Ms CLARE — Well, we still have treason, I think, in there and we have not prosecuted anyone for treason for a very long time.

The CHAIR — We need to finish up but do you have any general comments or things you would like to say or feel we have not covered?

Ms CLARE — No. This might be getting off the track a bit but going back to Richard's issues on perjury and the value of an accused's evidence, there is another case and a decision of the High Court called Soma which relates to the ability to cross-examine an accused person. When someone is giving evidence and the Crown prosecutor in the course of cross-examination puts to the accused, for example, previous statements the accused has made. Generally it is open to put previous inconsistent statements and say, 'That diminishes your credibility and shows that perhaps you are lying now.' Where the Crown has, for example, some statements by an accused and chooses not to put those statements into evidence in the Crown's case, the Crown cannot raise those statements with the accused in his evidence — you are stopped from doing that. If the accused gives a different version in

his evidence and we have not already put the first version which could have been led in the Crown case, then he cannot be cross-examined about that. If he has got to the point where the Crown case has closed, he could know that he can give another version without challenge.

I just raise that for you, not in any way complaining about the decision in Soma, which was a decision from Queensland, but simply because I think it is for legislators to consider whether there needs to be any kind of informed modification in relation to that rule. It comes back to the rule against splitting the Crown case. The Crown has to lead all of its proof in its evidence-in-chief, and then it is bound by that and it can only test the evidence of the defence when that is led.

Part of the theory behind all of that is that it can be more prejudicial to an accused person — it is the last bit of evidence that the jury hears or there can be ambush or so forth. But where the evidence is, for example, on a pre-recorded tape of a police interview, the jury normally have that in the jury room anyway, so they could play it at any time. We have full disclosure of the Crown case so the defence knows what the Crown actually has, so it is not a matter of ambushing anybody. When we talk about modernising the law to meet modern conditions, it may be that that is a legitimate area for legislators to consider — whether or not there needs to be some modification.

The CHAIR — Leanne, thank you very much for giving up your valuable time to come and speak with us. This has been most interesting and very helpful to our inquiry and we appreciate your time.

Witness withdrew.