LAW REFORM COMMITTEE

Inquiry into Administration of Justice Offences

Melbourne - 24 November 2003

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Benjamin Lindner, Barrister

The CHAIRMAN - We will start. Can I welcome our one and only public, member of the public, who has been here for all of this afternoon, but is also eminently qualified in his own right, Mr Benjamin Lindner who is a barrister and an author and thank you for taking the time to come and present to us, Mr Lindner.

I think you have probably become familiar with all the members of the committee, but just very quickly, Mr Richard Dalla-Riva, MLC, Ms Dianne Hadden, MLC, Ms Dympna Beard, MLA, Mr Noel Maughan, MLA, Mr Tony Lupton, MLA and myself as a Member of the Legislative Assembly. Can I also introduce Kristin Giles as our policy and research officer for this particular reference, and the author of the Discussion Paper.

Given the hour, I think we will get started. I suppose you might want to talk just very briefly to your submission and then perhaps, particularly I suppose addressing the central question of whether or not codification is desirable and if so in what circumstances, so perhaps we will hand over to you.

Mr LINDNER - All right, thanks very much for inviting me to be a speaker today. I was a little bit surprised at first because I did not quite know how I qualified, and then I remembered that I had written these couple of chapters a few years ago. I thought well, that must be the reason. But I thought if I was going to get a book free from the Victorian Government the least I could do is respond to it. I thought there were no free lunches anymore but it was very nice of you to send it to me.

Yes, I was taught when I went to the Bar two real principles: firstly, know your Tribunal, and that is why I have come so early today, and secondly, go last if you have ever got the opportunity to do a plea. The reason for the latter is that you get to learn a little bit about the parameters of the debate and you get to work out the particular foibles of the Tribunal. I have not worked out all of yours, but it is a privilege to be addressing a jury of eight rather than 12 anyway. That is by way of introduction.

As far as the codification issues is concerned I listened with interest to the comments of Dr David Neal. I think he is wrong. I do not think a general offence such as an attempt to pervert the course of justice is vague and therefore inappropriate. I do not think it does place citizens in a position of not knowing whether they are committing crimes or not. It is the name of an offence, and if one looks at all of the specific offences that are said to be more amenable to public consumption such as interfering with witnesses, interfering with evidence, corrupting witnesses; if one went down to Spring Street and went up to any particular citizen in the street and said "Listen, if you go and interfere with a witness or destroy evidence", or do any of those specific things, they all say "Yes, that's an offence, that should be an offence", and then if you tell them "Well, lawyers call that offence attempting to pervert the course of justice", they will then say "Oh, well, call it what you like. I know that it's wrong and I shouldn't be doing it and I am not going to do it", and you wouldn't expect people to go around committing these offences just because they could not put the right label to them, and in that sense I do not think it is a vague offence at all; attempting to pervert the course of justice is a general concept, easily accessible. The course of justice is anything that happens in the courts or in tribunals or in the organisation of our criminal justice system, and if you try to undermine it or somehow manipulate it, people know that that is what they are doing, and they know that that is wrong, morally wrong, legally wrong and whatever name you put on it it does not really matter, so I do not think that the vagueness of the concept itself is a criticism and that that should in any way be a reason why one should have a specific name for an offence or specific conduct.

I do agree, however, with Dr Neal that the criminal law should ultimately be a rational system, and that if there is a reason for rationalising the system, then that is good in itself, but on the other hand, you cannot assume just because the common law offence of attempting to pervert the course of justice exists, that it is by virtue of that not rational. That is, not part of a rational system of offences. And I think it is. So that is what I have got to say about vagueness.

As for specific offences, such offences as destroying evidence, one of the reasons of sitting in the back here today has been that I have been able to listen sort of critically to other people, and it has thrown up a few ideas. One example might be - I do not know if you have asked Clayton Utz, the legal firm of solicitors, to come and speak to you, but you might remember - no, the reason I say that is you might remember they were the firm that were involved in allegations of destroying evidence in relation to smoking, and their findings of their client, Rothmans, or whoever it was, I cannot remember now the detail, that their client has systematically shredding all their own findings in relation to the ill-effects of smoking over many years and that was called the document preservation system - I mean that is newspeak or whatever you want to call it. That is the way they regarded it.

Now it seemed to me that if destroying the evidence is an offence, well why is not that smoking firm guilty of it?

Why have they not been charged if it was a specific offence? They may come within the orientation of it or the parameters of it. They might in their destruction of expert evidence that they have at their fingertips, they might be involved in destroying evidence even though it is for a civil issue, for being sued. Nevertheless, it is still evidence, it is not even a criminal case, it is in a civil case in that circumstance, but it did occur to me that destroying - the mere destruction of evidence, if that is an offence, might incorporate all sorts of personalities and companies and individuals that might otherwise have not been the subject of the criminal law.

The CHAIRMAN - Could I just ask a question on that because you might be able to assist me about it. I understood that in that case, the reason they were not found guilty of that was because there were no judicial proceedings on foot.

Mr LINDNER - No, no, I am sorry. They were not found guilty of anything because they were not charged with an offence. The proceedings that went to the Supreme Court were not criminal, they were proceedings in relation to whether it was appropriate to - as I recall it to run a case, a civil case, by - perhaps I should defer to my - - -

The CHAIRMAN - What I mean was it was not ultimately whether or not they destroyed documents, it was found that because at the time that that destruction took place there were no proceedings on foot.

Mr LINDNER - Yes.

The CHAIRMAN - Was the reason why that was not seen as being something that ought to be of concern to the courts.

Mr LINDNER - Yes. I think that is probably right, and it is - - -

The CHAIRMAN - And likewise, would not these provisions, as I understand them, relate to judicial proceedings being on foot. The mere anticipation that something might happen at some time in the future which might cause a problem, is not actually something that gets brought within the ambit of the law. In fact it says in - - -

Mr LUPTON - I would have thought - 7.3.2(1)(a) is an interesting example. I think all of us have got appendix 2 of the model code. I do not know whether you have that there, Mr Lindner.

Mr LINDNER - Yes, I do.

Mr LUPTON - But destroying or concealing evidence on p.215, "A person who destroys or conceals evidence with the intention of influencing a decision on the institution of legal proceedings", et cetera, "is guilty of an offence". That would seem to indicate that it is in anticipation of proceedings being commenced.

Mr LINDNER - Yes, I think that is right and I would not be surprised if that sort of conduct would become criminal, so you would be incorporating that type of conduct in anticipation of offences into a new specific - - -

Mr LUPTON - I think on the committee there, apparently I think there are two views of what on the institution - - -

Mr LINDNER - Yes.

Mr LUPTON - On one hand it may mean after the institution.

Mr LINDNER - Or upon the institution.

Mr LUPTON - Or upon the institution once they are instituted.

Ms HADDEN - If he pens a letter of demand to the institution - - -

Mr LUPTON - The other view is influencing the decision on the institution means whether it ought to be instituted or not.

Mr LINDNER - Yes, the usual term that is used in legislation is commencement, commencement of

legal proceedings or commencement, and that has been judicially defined, the different circumstances. What institution means is anyone's guess. It could mean a letter of demand, it could mean a complaint to a police officer, it could mean all sorts of things, short of the actual laying of a charge. The laying of a charge could happen in the terms of indictable offences at any time. In summary offences it must be laid within 12 months of the date of the offence.

Mr LUPTON - Without getting into too much details about the tobacco case, it seems that ultimately that case was rejected by the Court of Appeal on the basis that on the civil standard of proof, it was not shown on the balance of probabilities that the evidence was improperly destroyed.

Mr LINDNER - That is right.

Mr LUPTON - So that would fall a long way short of the criminal standard in any event, so often it is a question of what the evidence actually is.

Mr LINDNER - Yes, well - - -

The CHAIRMAN - I interrupted your submission and we sort of - - -

Mr LINDNER - Yes, well it was a thought from the back of the room when I was listening to the specific offences, and it seems to me that all of the specific offences are as clear as daylight to members of the community, that such conduct is not tolerated, and it has been not tolerated for years and years, and when such conduct is committed, you do not have people ringing up their lawyer and saying "Listen, I've just interfered with a witness. I am not sure if that's an offence or not, please tell me". It just does not happen.

The CHAIRMAN - OK, but say in the Fingleton case would you say it would have been clear as daylight after the case that that was an attempt to pervert the course of justice?

Mr LINDNER - If you want to discuss Fingleton, I think that is a fascinating case. I mean I read it, I downloaded it and read it as soon as it became apparent that it was an issue that you wanted to discuss, and it is probably the best example of my argument that specific offences ought not to be created, and the reason for that is it incorporates factual situations which were probably not conceived by the legislature at the time of the introduction of these offences.

At the time of the introduction of this offence, as your own Discussion Paper indicates, in the second reading speech at p.78, what was said by - p.78 of your discussion paper, about five lines down: "People who take revenge or reprisals against witnesses after a proceeding because of what the witness has said or done as a witness is the category of people that are sought to be caught by this particular provision. There is also no protection for judicial officers against revenge or reprisals. This bill addresses community concerns about the lack of protection".

Now I just circle the word "after a proceeding", because what has happened is that after that principle was enunciated in the second reading speech, what you had is the passage of legislation which in Fingleton's case, if you look at paragraph 2 of the decision, sets out s.119B in terms, and it says "A person who without reasonable cause causes or threatens to cause any injury to detriment to a judicial officer or witness or member of the family of a judicial officer, juror or witness in retaliation because of" - and then it has two sub-sections, not just one, two. "(a) Anything lawfully done by the judicial officer as a judicial officer", or (b) Anything lawfully done by the juror or witness in any judicial proceedings". Now (a) actually is the expression of a law that you would expect to be passed pursuant to the second reading speech. In other words, after a proceeding has been finished. Anything lawfully done by a judicial officer as a judicial officer.

However, anything lawfully done by a juror or witness in any judicial proceedings is in fact how this evidence became relevant to the charge against Mrs Fingleton, because the email was sent to a judicial officer who was a witness in any judicial proceedings. He just happened to be a witness in a judicial proceedings because the nature of Ms Fingleton's authority was that she was a judicial officer subject to an Act of Parliament, the Magistrates' Court Act, and her powers were constrained by that Act, her powers to dismiss, et cetera, were constrained by s.10(2)(d) of the Magistrates' Act. That section gave her the capacity to allocate work in the Magistrates' Court, and it also has the power to remove a person so appointed. So she had these powers under paragraph 5 of Fingleton's case.

Having had those powers, she then sent an email to an officer and the email is all there in the decision, and when one reads the email, what did happen was an affidavit sent by a judicial officer who was a witness in judicial proceedings, because they were judicial proceedings because they had to be because it was about trying to resolve a dispute between parties who are judicial officers, the dispute being whether it was proper to send someone - Ms Thacker, the Magistrate, was trying to prevent herself being sent to a different jurisdiction, to a different court, and used this officer as a witness in that proceeding, so it became a judicial proceedings, but the judicial proceedings was, as far as I am concerned, in the nature of an industrial dispute. That was what that case was about, and it absolutely sticks in the craw of any criminal barrister, especially a defence barrister as I am, that this sort of conduct became criminal. It seems to me to be an - my jaw hit the floor when I read this decision. It is an extraordinary decision. It is an extraordinary law that brought about the decision and I have met actually very few barristers that have actually read the decision, because I have asked them since I read it. I have only met one silk - I will not name him, but he had the same response that I did, a criminal silk who works in the Court of Appeal most of the time in our State.

So both of us had the same reaction, that is, how on earth did this lady spend six months in gaol in relation to an offence which was at its core an issue about industrial relations; an issue about how she got on with her - - -

The CHAIRMAN - Because it had become a judicial proceeding.

Mr LINDNER - Beg your pardon?

The CHAIRMAN - Because it had become a judicial proceeding.

Mr LINDNER - And because it fitted - I agree with the Court of Appeal in Queensland, it fitted within the terms, the elements of the offence.

Mr LUPTON - Yes, there is nothing wrong with the decision in your view, the question is whether it ought to be criminal in the first place.

Mr LINDNER - Exactly, and whether - but the irony of this is that in paragraph 1 it was unnecessary for the jury to consider the alternative charge under s.140 of the Code, attempting to pervert the course of justice. If that was the only offence that was open to them, she would not have been convicted, and if she had have been it should have been overturned on appeal, because - - -

The CHAIRMAN - But if you strip that back and say, you know, forget the circumstances that - you know, we will argue about the facts of the case, let us say it was a judicial proceeding that did not have those other elements that gave it the sense that it was also about an industrial dispute, and you have the Chief Magistrate of the State conducted in what appears to be at least some conduct which could be construed, and certainly was construed by the Court as having elements of reprisal against the witness. Or anyone else, take the Chief Magistrate out of it. Would that necessarily be covered by perverting the course of justice in Victoria?

Mr LINDNER - Probably not - - -

The CHAIRMAN - Given that we do not think reprisals against witnesses are a particularly desirable outcome of the law because we do not want people being afraid to give evidence on the basis that they might suffer some consequence as the result of the reprisal or the fear of reprisals that they might experience.

Mr LINDNER - Could I just say this: as far as that case was concerned, it was not in issue in the court at first instance - two things were not in issue: firstly, that a threat had been made, there was no issue there, and secondly, that there was a reprisal. In other words, email - - -

The CHAIRMAN - What would they be charged with in Victoria in your experience?

Mr LINDNER - Well, she would not have been charged with anything because she did not commit an offence; she has not committed a criminal offence. She might have done something a bit naughty and she might have done something a little bit undesirable if you look at it from the point of view well, she should not have tried to relocate someone, a Magistrate by - sorry, she should not have tried to respond to one Magistrate by telling him he is going to be relocated, and it might not be a very clever thing to do, it might not be an industrially intelligent thing to do, but I am not sure that it was a criminal thing to do, and the sole ground - can I just get back to the issue of what the court had to decide. A threat was not in issue.

The sole ground - this is paragraph 9 - "The sole ground of appeal against conviction is that no reasonable jury could have found beyond reasonable doubt an absence of reasonable cause for the appellant's threat to move Mr Gribbin", and that arose out of the direction by the Judge in that case, that is as follows, it's in paragraph 10: "Remember" - this is what she told the jury, this is the jury's task, and let me remind you Dr Neal said what we need is simplification of the law, that is what specificity does. This is what the jury is told as far as that is concerned: "Remember that such a cause must be reasonable. Please also remember that in the end the Crown must prove absence of reasonable cause. The Crown must prove absence of reasonable cause beyond reasonable doubt".

You are a jury of eight. How many of you can instantly connect with what that means? Double negatives. I mean lawyers get criticised for this sort of stuff, and here you are simplifying the law by creating this discrete offence, and the result of the creation of the discrete offence is that sort of direction. The direction is nonsense because the law is nonsense. Because the issue that was in dispute was whether she had established beyond reasonable doubt reasonable cause, which was an element of the offence or a way out of the offence for her, and the Court of Appeal said look, we are not here to re-litigate and re-decide that issue, a jury has already decided that. All we need to answer is this question, was it open for the jury to answer yes to that or no to that, and if the jury could have - it was open for them to answer that question, well, no there was no reasonable cause, we are not going to interfere with the verdict. And that is what happened. And that is why she spent six months in gaol.

Ms HADDEN - She is still there is she not? She got 12 months.

Mr LINDNER - No, they suspended part of that - - -

Ms HADDEN - Then she has made an appeal to the High Court I think.

Mr LINDNER - And I would not - it would not surprise me if the High Court had something to say about the nature of the conviction and the test that was applied by this court; that is the Court of Criminal Appeal in Queensland. I am not sure that their logic is incorrect, I think it is probably correct, but they should never have been asked to decide such a case in those circumstances. It is a case of bad cases making bad law and the very unfortunate thing is that you have got a very prominent judicial member being the butt of such an Act.

Had the Minister for Justice in his second reading speech been told, let me give you some factual circumstances in an environment like this, there is the Chief Magistrate, she receives an email in these circumstances, et cetera, et cetera, et cetera, and in the light of these circumstances, I am sure I would be very surprised if the Minister for Justice there would say "No, we don't think that ought to be a crime, but that's not what we're intending to criminalise, we're intending to criminalise retaliation against witnesses in these circumstances", and that's the danger, that's the danger I see, and it's writ large. All it needs is a very close reading of the case of Fingleton to really come fairly firmly I think to the view that there is real dangers in specifying offences, and on the other hand there are real advantages to maintaining the general offence, but codifying it.

Mr LUPTON - Yes, so are there other examples of the specific offences that you would say are currently outside the common law understanding of perverting the course of justice, or is the reprisal one a discrete example?

Mr LINDNER - That is pretty much a discrete example, but yells loudly to me because of the status it has within your discussion paper, and that it is a recent example.

Mr LUPTON - The Committee was of the view that we did want to consider ways of protecting witnesses after the conclusion of proceedings from genuine reprisals.

Mr LINDNER - Yes.

Mr LUPTON - Do you have any view about how we do that? For instance, by extending the definition of proceedings or in some other way to have people there in that fashion?

Mr LINDNER - It is very easily done. You codify the offence along the lines of perhaps as I suggested; a person who by his or her conduct intentionally perverts the course of justice is guilty of an offence, that's sub-s.1. Sub-section 2 might read something like - or you have a definition of the course of justice. The course of justice includes conduct that occurs before, during or after the commission of the - - -

Mr LUPTON - Institution of proceedings - - -

Mr LINDNER - Institution of proceedings or after proceedings have occurred. I mean the course of justice is - the beauty of the common law is that it is flexible and it does incorporate new fact situations, things like the Internet, things like that are going to find their way into criminal activity no doubt, and just how they're incorporated into the old offences or the old language can be a matter of redefining, and that is the great privilege of being the legislature, you can redefine terms, you can redefine terms to extend definitions or narrow them if necessary, but in this case you would be extending the definition of the course of justice beyond the common law definition. There is nothing wrong with that and I would not be opposed to that.

Mr LUPTON - Thank you.

Mr LINDNER - There is of course an added aspect to it which I think informs the whole of the discussion, and that is the difference between indictable and summary offences. That actually relates I think to two aspects. First of all the seriousness to which you want to attribute any particular illegal conduct, how serious you consider it to be; and secondly, whether such conduct is properly dealt with by Magistrates who have a limited discretion in terms of maximum penalties.

If you take the view that a particular offence such as reprisals against witnesses, if you take the view that look, that could involve very very serious examples and should not be left simply in the Magistrates' Court, then you might have such an offence that is triable summarily as well as an indictable offence. There are other offences such as those in 52A which are only summary offences, and you might say well, they should just remain summary offences. But that is really a function of deciding really how you would regard the division of labour between the County Court and the Magistrates' Court, because there is a real division of labour, and that is dependent on the seriousness of offences and seriousness of conduct.

I was listening earlier today about theft. Of course there is a range of theft charges and that is an indictable offence that can be heard summarily. Pinch a lolly from the shop you get dealt with in the Magistrates' Court, but steal $1 million you get dealt with in the County Court, so it is a wide range, but with these - - -

The CHAIRMAN - If you are entrepreneur you get away with it.

Mr LINDNER - It depends if you can buy a lot of justice with your resources that you have got available, but in these sorts of matters it really does depend on how serious you regard certain conduct as to whether they should be the subject of indictable or summary offences.

I think one of the problems with perverting the course of justice is that it is only indictable, and there are clear cases where it should be dealt with in the summary jurisdiction.

Mr LUPTON - Do you have any comment about the DPP's view that he would not really object to that kind of notion that he would like a veto over the summary disposition of - - -

Mr LINDNER - Yes, I do not like putting so much power in the hands of one office or officer such as the DPP.

Mr LUPTON - Given that at the moment they are all treated as indictable.

Mr LINDNER - Yes, but I do not think it should be his decision as to whether it is indictable of not. It should be a Magistrates' decision to determine whether he or she, the Magistrate, will accept summary jurisdiction. Sometimes that has to be done. You apply for summary jurisdiction. Sometimes - - -

Mr LUPTON - That is a discretion that the Magistrates have now.

Mr LINDNER - That is right.

Mr LUPTON - In other cases.

Mr LINDNER - In all cases. All cases that are indictable which can be heard summarily. A Magistrate might say "Hold on, time out, I am not going to hear this case, this is too serious". A good example is robbery. Until very recently, probably a few years ago, robbery and armed robbery were only able to be heard by a Judge

and jury, and then one has bag-snatching cases and theft. Robbery of computers and stuff like that which are really glorified thefts with a little bit of violence, but no one is really injured, robbery being assault with intent to steal. That is the difference between robbery and theft.

It was until recently - I suppose the last ten years only indictable, but now Magistrates have the jurisdiction to hear some robberies, and obviously you might come across some that are just at he border, between being indictable and summary, and they will say look, this is too serious for me to deal with it, I reject my jurisdiction and I send it for trial. So it goes from the summary jurisdiction, it goes into what is called the committals stream and it becomes a committal as a preliminary hearing to an indictable matter.

Ms HADDEN - But the Magistrate only has a discretion if Schedule 4 - I think it is Schedule 4 gives him that discretion.

Mr LINDNER - That is right.

Ms HADDEN - He cannot just think off the top of his head, because I mean, that is a minor offence, therefore I will hear it summarily.

Mr LINDNER - No, they can, they can do it by their own motion. They could theoretically have a robbery or some offence before them which is in the indictable stream, in other words a committal, and they say "Listen, I've seen the facts of this and do you people really want this to go to trial, into the County Court? Can't it be dealt with here? Can't there be some intelligent discussions between counsel?" That happens from time to time, and Magistrates, well, it is rare that they will take the initiative and say "Look, I am not going to send this to trial or send it to the County Court". There will be occasions when they will ask the Prosecutor well, "Why is this going to the County Court?"

And there are other offences which it is just a matter of time before there will be summary jurisdiction, such as affray. That is just a fight with a whole lot of people.

Ms HADDEN - Yes, but it usually develops to a big injury too, affray, in my electorate.

Mr LINDNER - It may or may not.

Mr LUPTON - What do they use up there?

Ms HADDEN - No, no, they usually hit back.

Mr LUPTON - What is it in the Upper House?

Ms HADDEN - No, affray is usually pretty bad, poor conduct that has resulted in serious injury to someone. It is probably just short of manslaughter.

Mr LINDNER - Well, if one sees the examples of affray that go to the County Court, it is oftentimes there might be one person that - or one or two or three people that are involved in the heavyweight fighting and any injuries that result from that. It is not necessarily the case that serious injury always results from affrays, because affrays can occur where there is one person seriously injured and the assailant might be just hard to identify, so that instead of charging one person with intentionally causing serious injury, a whole lot of people are charged with affray. And then the poor old Judge has to try to work out what facts they have to sentence on. But that is I suppose moving away from this example.

My point really is that the problem with perverting the course of justice is that it is only indictable and it should have a summary dimension to it.

Attempt, I have already said in my paper and I think you have heard from others, it is almost unanimous that that word is old-fashioned and ought to be gotten rid of, and that is what codification would do. And I have also been thinking just today about whether pervert is a particularly modern word as well. One thinks of it more in terms of child pornography or whatever, but it is not a really appropriate term for this, and I am trying to think of other words and undermine, undermining the course of justice - - -

Mr LUPTON - Interfering with.

Mr LINDNER - Attacking the course of justice. Interfering is probably the best. I was also thinking of compromising the course of justice. But I mean all of those terms are perhaps - interfering, compromising, undermining, are more modern terms and I would have no problem with that replacing the term perverting. The same sense comes out of the offence and I think the person on the street will understand if they do something to undermine the course of justice then they are doing something that is morally and legally wrong.

The CHAIRMAN - Mr Lindner, I wonder if I could just move us on a little bit just on to perjury, because you made a separate supplementary submission this morning on perjury, and I was particularly interested in your comments in that on the Crimes Act as it currently stands, s.314(3), which extends the ambit of the offence to include false sworn and affirmed statements made by affidavit or other declarations, et cetera. What you have said in here is - and I am quoting you here, "The law as stated in s.314(3) is in tortuous, inelegant and unnecessarily complicated language" Can you just elaborate on that and what would you do with all of these sections?

Mr LINDNER - Is the Committee aware that is how it reads, s.314(3)?

Mr LUPTON - It looks like one continuous sentence.

Mr LINDNER - I didn't bring my Crimes Act - yes, I did. It is under 314(3) which says: "Where by or under" - and by the way I will preface this by saying there is no commas in this, which is the tradition under the old way of legislating of - sorry, Parliamentary draftsmanship. This is ancient Parliamentary draftsmanship we are talking about, pre 1960 I think. "Where by or under any Act it is required or authorised that facts matters or things be verified or otherwise assured or ascertained by or upon the oath affirmation declaration or affidavit of some or any person who is any such case takes or makes any oath affirmation or declaration so required or authorised and who knowingly wilfully and corruptly upon such affirmation or declaration deposes swears to or makes any false statement as to any such fact matter or thing and any person who knowingly wilfully and corruptly upon oath deposes to the truth of any statement for so verifying assuring or ascertaining any such fact matter or thing or purporting so to do, or who knowingly wilfully and corruptly takes makes signs or subscribes any such affirmation declaration or affidavit as to any such fact matter or thing, such statement affirmation declaration or affidavit being untrue wholly or in part or who knowingly wilfully and corruptly omits from any such affirmation declaration or affidavit made or sworn under the provisions of any law, any matter which by the provisions of such law is required to be stated in such affirmation declaration or affidavit shall be deemed guilty of lawful and corrupt perjury. Nothing herein contained shall affect any case amounting to perjury at the common law or the case of any offence in respect of which other provisions made by any other Act". There was one comma in it. I apologise, I misled you.

But that is ancient drafting. It is confusing. Tortuous I think was an understatement. I could not think of another word for it, and it is incredibly difficult to understand for lawyers. I have just notched up 20 years at the Bar this year and I have to read that ten times to make any sense of it and I get out my yellow highlighter and sort of try to work out what the heck it means and it is just impossible. I think it means that you are not allowed to sign an untrue affirmation. That is what it means.

Ms HADDEN - All evening out, that is the - - -

Mr LINDNER - Or omit to do that.

Mr LUPTON - An instant controlled breathing exercise for opera singers.

Mr LINDNER - But it only adds to the common law because the common law as you will recall is evidence - common law is principally oral. It is an oral system that we operate on and we like having witnesses in witness boxes so they can be tested and so their oral evidence can be put under the hammer, and that is the tradition we come from. When it comes to documents, well we need to have an Evidence Act even to admit documents as opposed to the common law. And the status of documents and the status of written documents and the status then of affidavits have to be determined under the Evidence Act as we have, and then if there is a lie within one of those or perjury within one of those, that has to be accommodated by this sort of a section because the common law will not necessarily cope with it.

Because it, as I say, relies upon oral evidence. Having said that, I do not know that I will get much debate from anyone that that sort of a section ought to be thrown out and replaced with something simpler.

Ms HADDEN - I am just wondering why your proposed s.314 would not include a person who, without reasonable excuse, commits perjury that we are going to codify.

Mr LINDNER - One can add that very easily. I think the suggestion that I made there, that is that a person who intentionally commits perjury shall be guilty of an indictable offence, reasonable excuse or cause or reasonable cause or lawful authority are general principles which always apply to all offences and do not need to be in place of offences. Just for example we have an offence of murder, you do not have in that offence a person does not commit murder who is acting in self defence or any of the other defence, or accident. Defences are not incorporated, the reasonable excuses or the lawful excuses are not necessarily incorporated. It is a general defence that will continue to be. I do not know that it is necessary but if for the avoidance of ambiguity this Committee decided that it was best to have without lawful excuse in the offence, I do not think that anyone would have a problem with that, from the defence or the prosecution point of view.

Can I just say that as far as both these offences are concerned, that is attempting to pervert the course of justice and perjury, going to first principles is the best way to approach it, in my opinion or my submission to you. And first principles, when it comes to the criminal law, is ironically going back to your two Latin maxims that we all learnt on day one in criminal law at university. And those are mens rea and actus reus. If you go beyond those first principles you are moving into areas of - or you may lose sight of the bigger picture. The bigger picture is that there has got to be a mental element, that is the mens rea. There has got to be an intention, a desire to do something criminal. And there has got to be an act, some conduct which is criminal in itself. Where you have examples of offences like larceny, this was something that I thought of earlier listening to Dr Neal, the offence of larceny was built on a jurisprudence which went for years and years and years up to 1972 of the act taking prominence. And the act that was larceny was picking up and taking away. So you had this enormous law developed on what the meaning of picking up and taking away was. That is what stealing was. That is how it was conceptualised. Throughout the 20th century and the latter part of it there has been a much emphasis generally in jurisprudence on the mental element of crimes, on an intention. So what happened in 1972 was a shift from an emphasis on what one does, on the conduct, on the actus reus, to the mens rea, that is dishonesty. And I agree with Dr Neal, it is not all forms of dishonesty that are criminal. The law does not say thou shalt not be dishonest, it says thou shalt not steal. And theft means the dishonest appropriation of goods belonging to another et cetera, et cetera. And they are all terms which are defined, terms of arts, which are defined and have been defined for the last 30 years reasonably successfully.

So that is an example of codification where I think it follows the general jurisprudence whereby the intent became more important than the act itself. And we were looking at states of mind and that has been the general principle throughout the 20th century, in my opinion, that that is how the law has changed, the criminal law. So it is not just absolute liability or absolute offences but rather there has been an orientation towards - trying to work out what mental states apply to certain conduct. That is why I think I have said on a couple of occasions in relation to both these offences that intention, or intention as the mental element, is the thing that ought to be an element of this offence. The mens rea, the mental element ought to be the intent to do something criminal, conscious and voluntary act rather than other mental states. And those other two mental states are recklessness and negligence. That is what the law recognises, the criminal law recognises those three mental states. In my opinion neither recklessness nor negligence ought to have any role to play in either of these offences. And I think I am on all fours with Paul Coghlan as far as that is concerned in relation to recklessness, because was saying to you earlier today that he thought that the law had got itself into all sorts of problems in terms of the definition of recklessness for serious assaults, where recklessness is defined as intentionally foreseeing the probability of injury but going ahead regardless.

Let me just change that a little bit. What do you say about someone who recklessly foresees the possibility of attempting to pervert the course of justice but goes ahead regardless? You have to do some pretty severe mental gymnastics just to work out what sort of mental state that is to criminalise that sort of conduct. I would much prefer it to be more specific, that is a conscious and voluntary intention to do something like interfere with a witness. It must be done intentionally not recklessly.

I can tell you a war story about that if you want to hear one about attempting to pervert the course of justice. And it comes from my own experience about that matter. If you want to hear it, it goes likes this.

Mr DALLA-RIVA - Can I interrupt. I can have to go at six.

The CHAIRMAN - Maybe given the time we might finish up with this story and rely on the rest of your written evidence which is very comprehensive.

Mr LINDNER - The purpose of the story is really to underline the importance of the mental element, and the mental element being an intention to do a specific illegal act rather than generally do something and do something naughty. This story arises out of two court cases, both of them in Ballarat.

The old court. It started at the old court, it finished at the new court. It's fairly recent. This is a fellow, his name was Mr B. I appeared for him. I appeared at the committal for Mr B, which is a preliminary hearing in the old Magistrates Court where a whole lot of witnesses were called to give evidence against him and to rely on their statements. He was charged with armed robbery and his defence was identification "I wasn't there, it wasn't me". The female witness, Ms W, made a statement that she had seen Mr B in a bed, in a bedroom with the co-accused female, Ms C, about half an hour before the time of the offence, before the time of the armed robbery. This is not an eyewitness who said "I saw him at an armed robbery". This is just an eyewitness who says "I saw him in association with a co-accused about a kilometre from the place of the armed robbery in association with" - - -

The CHAIRMAN - In bed.

Mr LINDNER - In bed. Yes in bed. That's actually the key to it and I will come to that in a moment.

Mr MAUGHAN - With his balaclava on?

Mr LINDNER - No, no. He might have had other prophylactic devices on but it was not a balaclava. At lunch time on day two of this committal, I was wandering around and I got back to court to be told by the informant in this armed robbery that they were going to charge my client with interfering with a witness, or attempting to pervert the course of justice actually with an indictable offence. And I said why was that? And I was told that Mr B, the accused, had told Ms W to say nothing. When she goes and gives her evidence "just say nothing".

On the face of it that appears to be an offence and it might even be interfering with the - perverting the course of justice. As I noted before, her evidence was not an eyewitness evidence and would not convict him by itself. It could not. It is circumstantial evidence.

She gave evidence. She did adopt her statement. She ignored his advice but then she seemed to have no memory of what happened on the day and did not give any evidence about seeing him in bed, oral evidence. Although she adopted a statement and that is tendered to the Magistrate and it becomes part of the depositions, it is part of the case against him.

Mr B was charged immediately after the committal and when the committal finished I said "see you later, I'll mark my back sheet and catch you later". And he said "What am I going to do about this other stuff". I said "I haven't got time to take your instructions about it, but they want to interview you, it's probably best in your interests to maintain your right to silence and don't say anything in the interview". Which he did, or rather he adopted that advice and did not say anything in the interview.

I then later got his instructions as to why it was that he said to this lady "just say nothing about seeing me in bed". After getting those instructions I then was briefed to run the trial of attempting to pervert the course of justice. He was charged and it did go to trial. It did not go to committal. He bypassed that. And at the trial his instructions were that the reason he told her to say nothing was because he did not want his brother, Mr B's brother, who was at that time in Loddon Prison, to know that he was sleeping with his brother's girlfriend. That issue was put to a jury of 12 sensible Ballarat people. The question for them to decide was singular: was there an intention to pervert the course of justice? Or rather put it another way: could they be satisfied beyond reasonable doubt that when he said "just say nothing" - that was not in dispute - was said with an intention to pervert the course of justice. Or was it said with an intention that his brother does not find out that he is sleeping his brother's girlfriend while he is in gaol. And that has got nothing to do with perverting the course of justice. It is about self preservation.

The very sensible jury decided that they did have a doubt in those circumstances and acquitted him. That's the war story and it just underlines the importance of the prosecution having to prove in every case the mens rea and to prove it beyond reasonable doubt. So on the face of it that sort of conduct, everyone would probably say, "you shouldn't be doing that, you shouldn't tell witnesses don't say anything, that's not right and it's not proper". But that

does not make it a criminal offence just because you do something that is not correct. You have to the mental element to accompany it. And that mental element ought to be fairly strictly applied and it ought to be a conscious and voluntary act. Not something that is reckless and not something that is negligent. On that note can I thank you for listening to me, a lot longer than I intended to go.

The CHAIRMAN - We thank you very much appearing. It has been most informative and very helpful for the Committee. And entertaining as well. I note in your submission there is also a lot of other material that are accompanying questions today but which will inform our deliberations, and if we have any follow up supplementary questions no doubt we can come back to you and ask those. But thank you for sharing your experience with us today.

Mr LINDNER - It is a pleasure. You have my email address and I will be more than happy to respond.