LAW REFORM COMMITTEE

Inquiry into Administration of Justice Offences

Melbourne - 24 November 2003

Members

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

Chairman: Mr R. Hudson
Deputy Chair: Mr Noel Maughan

Staff

Executive Officer: Ms M. Mason

Policy & Research Officer: Ms K. Giles

Witnesses

Peter Morrissey, Criminal Bar Association

The CHAIRMAN - I think we might start. Perhaps I could start by formally introducing Peter Morrissey from the Criminal Bar Association and welcome you to the inquiry. Thank you for taking the time to appear before us.

Mr MORRISSEY - Thanks for having me.

The CHAIRMAN - Can I introduce my colleagues? Richard Dalla-Riva is still absent, he was here before but I will introduce you to him when he comes back. Dianne Hadden who is a Member of the Legislative Council for the Ballarat province, Dympna Beard who is a Member of the Legislative Assembly for Kilsyth, Tony Lupton who is the Member for Prahran in the Legislative Assembly, Noel Maughan who is the Member for Rodney in the Legislative Assembly and unfortunately Andrew Brideson who is a Member of the Legislative Council for Waverley province has had to go due to Shadow Cabinet business. Rob Hudson is the chair of the Committee, member for Bentleigh, Merrin Mason is the executive officer for the Committee and Kristin Giles who has done all the policy and research work which is evidenced in the summary of administration of justice offences paper there that you have.

Thank you for coming to appear before us. As you are probably aware, our proceedings are covered by the Parliamentary Committees Act which means that any evidence you give before us is covered by Parliamentary privilege. You will have the opportunity, in due course, to review your evidence which is taken down by Hansard and if there are any corrections you want to make you are able to do that.

Following that your evidence will be posted on our web site. It will be available for public perusal, it will be available in written form. I am sorry, Mr Richard Dalla-Riva, the Member for Yarra Province in the Legislative Council.

Mr MORRISSEY - Thanks for having me to speak.

The CHAIRMAN - You will obviously want to make some introductory remarks in relationship to your submission. So perhaps we might deal with those first and then we might go into some general questions.

Mr MORRISSEY - Sure. Thanks very much for giving the opportunity to the Criminal Bar Association to come. Our organisation is a bit unusual in that we have two roles to play, partly if you like as a trade union type of role in looking after the interests of members but also a quite different role in terms of offering assistance when asked to comment on reform proposals.

In responding to this particular one, I was asked to prepare the paper and I took the view that it would be of the best assistance to the Committee to put something that was a relatively coherent position.

You would have noticed that this is rather stridently a no vote and - - -

Ms HADDEN - I can cope with that.

Mr MORRISSEY - I should make the comment that that was done for a number of reasons and one of the reasons was that in law reform matters it seems to us, the Committee, that it very seldom is that a no case is put coherently because nobody actually likes to say that law reform is bad or wants to stand in the way of law reform as a general category - that therefore it is assumed that law reform is a good thing. It may be that it is in most cases but I therefore took the view that unless there was a very good reason to say yes to any suggested reform or proposal, I would put so much as I was able to, a case for no.

That does not mean that my own view was always no in each case, nor does it mean that the Committee would be non negotiable or would take a hard view on each category but that is the argument that we thought would be best to put.

Secondly, there is something I would want to clarify about the report here. David Neal might have, I guess, made a reference to this earlier this afternoon. There are some, and the Bar Council I think is in this position, who take the view that national uniformity is a very desirable thing. I personally share that view.

In the introductory notes that I have got to our response to the discussion paper, I noted that uniform laws across Australia may be desirable but we were not aware of any real possibility of that happening. I based that mainly

upon the diversity of different laws that there are in relation to the attempt to pervert the course of justice regimes that pertain in different states.

David Neal has gone some way to persuading me that there is a real prospect of national uniformity. It is not the case at the moment that there is a number of different signed up persons but David has probably indicated to you, I imagine and he has certainly indicated to us at the Crim Bar Association that there were real prospects for a uniform approach to be taken in this field.

The Crim Bar Association has not yet got a fixed position upon that. I have to say to you that we are all practitioners and we tend to come from, if you like, a court room perspective rather than a general law reform perspective and therefore we have not yet surfaced with a view of the Code. Generally speaking there is a diversity of views. I am probably on the flank of those who favour uniformity and consider that to be an independent reason for law reform.

But if there be doubt or if a matter be finely balanced, that would be a matter that clearly weighs in favour of reform. That is my opinion. I do not have authority to speak on behalf of the Criminal Bar Association in that regard at this stage and we are working our way through it. One day though, it is to be hoped that we would have a coherent position.

However, in the mean time I would say that that introductory note that I have got when we make the comment it is not currently a realistic prospect, I would not seek to persist with that one. I think it may well be that it is realistic. You would have to form your own opinion and would be better informed than I would about it.

The final thing I might say by way of introduction before I am grilled or questioned is that it seemed to us at the Crim Bar Association that since there is no community group that would normally coherently put an anti reform position per se it is desirable that there be some principles that law reformers ought to have to meet if you like, some hurdles that they ought to have to jump over to justify change. Because we see there being a value in the status quo as status quo. Bad though it may be in any given case.

The status quo has been tilled over by lawyers and courts and explanations for what an offence may consist of and how a judge might direct a jury and what the elements of the offence are, what the consequences of conviction for a particular offence are, are now part of folklore. So that even a flawed offence or one which is uncertain has got at least some level of practice behind it which is an important consideration we think, partly from an abstract constitutional one, a rule of law principle, it is very important that people be able to know what they are facing and what their obligations are.

From a pragmatic point of view as a barrister I can say that it is of benefit to work with what you know. Not just because of self protecting reasons or laziness reasons, although you might form an independent judgment about that, but because you have got to explain to the crooks, real or potential, you have got to explain to persons who are innocent who have been accused of crimes, you have got to explain to their families, instructing solicitors, what they are facing. Sometimes you have got to explain what the consequences of a particular action may be. People who are contemplating a course of conduct might say in varying degrees of sophistication, "This is what I'm proposing" and it may well be that that is unlawful.

It is useful to be on familiar ground when those things arise and my experience is they arise quickly so you have got to give quick advice. Therefore, any law reform disturbs that basic ability to respond quickly to a question and therefore has to be justified against that ground.

Something I am putting to the Criminal Bar Association but has yet to be adopted by them is a suggestion that a three step process can be taken that you analyse any proposed law reform, first of all for substantive justice, is there a need to prevent injustice or promote justice?

Secondly, is there a need to reform based on clarity? In other words, is there a current lack of clarity and furthermore if the new law comes in, what is the situation as to clarity after that? How easy is it to explain and comprehend?

Finally any other policy matters in Australia, this is not a matter that follows logically but in Australia it follows clearly just by reality. That we have got a federal system and the lack of uniformity does create lack of clarity in its

own. So it may be that that is a positive separate good governance principle which the Crim Bar Association would associate with, I do associate myself with it.

Those are the three hurdles, I think, in a way that law reform in general ought to jump. Applying it to these matters here, and if you like those are the three matters that I have sought to apply here in the negative responses that by and large have been produced but I have not relied on the uniformity because I did not see it as possible or achievable, though I am persuaded to some degree to the contrary now. Those are the introductory notes.

The CHAIRMAN - I suppose just picking up on that last point, it does become a little chicken and egg because uniformity only becomes more possible once more states commit themselves to the overall proposed uniform criminal code. I suppose just sort of picking up on that in terms of Victoria, we have played a leadership before in codifying the law of theft which has subsequently been picked up in other jurisdictions. Do you see any benefits at all based on the MCCOC report of Victoria showing some leadership and helping the impetus towards the adoption of a national uniform criminal code in this particular area of public justice offences?

Mr MORRISSEY - Yes, I do. Victoria retains a good name in criminal law circles. It was probably the pre-eminent one at one time and may be again. In taking the lead in that way, I think the Code, the promotion of uniformity through the code would be promoted and yes, the answer is yes.

The CHAIRMAN - You were talking about the need for criminal lawyers to be able to quickly and succinctly explain the law to their clients. If we are aiming for actual codification, in other words except for perhaps a couple of areas around the edges which we will come to, if we are actually codifying the common law as it exists in Victoria, do you think it beyond the dexterity of criminal lawyers to be able to say, "Well, this provision, this is what it means"?

Mr MORRISSEY - No. No.

The CHAIRMAN - Do you think that the differences would be so pronounced between the common law and what is proposed in the MCCOC code that it would be difficult for lawyers to explain that to their clients?

Mr MORRISSEY - No, it would not be. There might be a time period in which uncertainty prevailed. I should say these offences are not so commonly prosecuted that there would be a massive number of disadvantaged accused in that gap. It should also be said that a lot of Victorian practitioners now service other states, have been going to the Northern Territory for a long time and Western Australia in particular now and uniformity from that point of view is very desirable and that would - yes, so that is another argument in favour of it.

I suppose the difficulty in explaining that I make reference to in the paper really related more to the fragmenting offences. A general offence could well be drafted, and I think I have made the point here so I cannot resile from it anyway, that a general offence codifying what the common law now is, is possible to draft. In any event, we would explain it by, as I think I said, by reference to what the common law was in the past and our experience in that regard we think would be helpful. So the answer is I do not see it as a major dislocation but there is the possibility of some uncertainty.

I think there is also a possibility of some level of uncertainty in the community. I do not think the community thinks in terms of elements of offence and yet members of the community do have a sense that there is an offence of attempting to pervert the course of justice. Most people in my experience I have had to deal with have understood, in a broad sense, that trying to fix up a court case is wrong, proceedings is wrong. They do not break it into the elements.

But the general offence serves well to persuade the community that you should not do that. If it is broken up into fractured offences and if the general offence is simply a residual one to catch all of those actions which do not fit, then I think what the community understands by the offence might be lost. Although I cannot give any evidence as to what they actually understand.

The CHAIRMAN - Yes, you have presented us with a forth option out of the three that we raised on p.48 of our discussion paper in relationship to perverting the course of justice which is on p.52.

Mr MORRISSEY - I do not have the report but which question is it, sorry?

The CHAIRMAN - Sorry, it is question 4. In relationship to question 4 where there are three options presented around reform. You seem to have come up with a fourth one which is the general offence be codified but in general the specific offences not be enacted. So you would support that?

Mr MORRISSEY - Yes, well that is a suggestion. Yes, that is a proposal that we advance. Preserving the general sense seems to be important just in terms of the rule of law. But you would know better than lawyers would in a sense whether or not the community or what the community sense of a particular offence is. We only know when they are already in trouble.

The CHAIRMAN - Yes, if I can just push the argument a little bit further. In relationship to the specific offences in the Queensland code, it was under one of those, the reprisals against witnesses, that Diane Fingleton was charged and that raised some controversy - and convicted.

But I mean just thinking about that situation arising in Victoria, do you think that perhaps the generalised common law position might have created even more controversy? But reprisals against witnesses made it quite clear that you could be charged with an offence after the case had concluded?

Mr MORRISSEY - Yes, I think - - -

The CHAIRMAN - Perverting the course of justice, do you think that it would be generally understood that that would include that?

Mr MORRISSEY - No, I do not think it would and I think I made reference elsewhere other than in that section. I just cannot recall precisely where I did but I think it is clear that reprisals against witnesses after the event may be a different matter. One can envisage punishment against witnesses many years after a proceeding has finished and indeed the witness protection programs that are set up for witnesses that I have seen give evidence under very difficult situations, are set up for that very purpose, to allow them to avoid being mistreated at a much later time.

I just cannot recall whether - I have a memory of it, I hope it has not simply been edited out or appeared incoherently elsewhere. But I do accept that there is a possibility that the general offence would not cover situations where the proceedings had terminated. And that clarification may be needed.

The CHAIRMAN - There is question 19 to 21 in your answer, I think you are indicating you opposed the new offence in that area?

Mr MORRISSEY - Yes. Well that may be an example of what I referred to earlier, putting the no case but acknowledging the - - -

The CHAIRMAN - Yes, but you see this question raises more difficult issues. There are potential, if indirect, strike at the hearts, wherever a witness is threatened, or even where the threatener has no intention to pervert the course of justice and so on.

Mr MORRISSEY - The proposal was in the third substantial paragraph there.

The CHAIRMAN - Yes.

Mr MORRISSEY - I do acknowledge that and it is a problem and we encounter it sometimes. I should say that I have not seen prosecutions arising out of it, I have just seen the reality that people who I have represented who have perhaps been involved in a crime to a lesser degree then been involved in witness protection, have then suffered hardship later on, sometimes detriments but those, in my experience, have never been prosecuted. Naturally it is many years later, people just want to get on with life.

There is no reason in principle why there should not be an offence that covers that. I acknowledge that that may well be a shortfall of the current offence.

The CHAIRMAN - Perhaps if we could move on to a more particular area. You represented the defendant as counsel in the Schroen case in relation to the defendant's perjury plea and in that case there were alternative charges of perjury and attempting to pervert the course of justice. Did that case reveal anything about the workings of the law in this area that you would like to share with us?

Mr MORRISSEY - I suppose balancing on - I have got obligations about the instructions I had and so on in that. I can generalise from it in a way that is relevant I think. There are cases of which Schroen may well be an example where a person has committed acts that fall easily under perjury and also easily under attempting to pervert the course of justice.

Jennifer Schroen, who was a person who was caught in a difficult situation in the court case and again law reform, the realities often are more, always are more complex of the law and it is one of the beauties of the common law which those who practise in it sometimes feel as being abused by law reform but the practice is developed out of numerous disastrous situations one after another which has produced a rule of law which is subtle.

Sometimes it is hard to justify intellectually when looked at in isolation from the cases. The case of Schroen was one where it really blew up out of nowhere. She was before Judge Anderson, it was looking to her counsel at the time that she was going to be imprisoned and she was very keen not to be imprisoned.

It would appear that she then invented a job offer in Sydney which would have allowed her to pay back all this money that she had stolen or had obtained by deception I think it was. She then got in the witness box and testified. It is a major - I believe you may have - when the person from Legal Aid was here, it may have been an issue raised, I anticipated there was going to be but I will leave that for a moment.

The difficulty for barristers in that situation when the client insists upon giving evidence and one smells a rat, spells danger for them. That, no doubt, must have happened in this case but nevertheless Ms Schroen gave evidence and it was false evidence and easily provable to be false.

In terms of what happened afterwards, whilst I would not really be entitled or comfortable with saying exactly what I did and so on, there was the possibility of two charges. One with a 25 year maximum, one with a 15 year maximum. The courts have got to take notice in sentencing of what the maximum sentence is, hence the dilemma.

What is the answer? That is an unacceptable situation from an intellectual point of view but it is acceptable if there be good faith and goodwill from the prosecutor's side of things and where you can trust the prosecutor not to use that as a bargaining chip in any way but simply to lay what they see as an appropriate change in the circumstances, then only justice will be done.

I am not aware of an injustice being done arising out of this problem but there is potential there which you ought to know about, it exists.

The CHAIRMAN - Should it not have been clear what the appropriate charge was for Ms Schroen? I mean if we think about sentences for a start but also just in your own mind perjury as against attempting to pervert the course of justice they do carry with them a certain different level of seriousness.

Mr MORRISSEY - They do, you are right.

The CHAIRMAN - And therefore the alternate charge seems to indicate there was lack of clarity about what she should be charged with?

Mr MORRISSEY - There was double lack of clarity because in this case what it really was was perjury. To a criminal practitioner that is what it smelled like and felt like. That is the feeling in my little toe was, as a practitioner was, that it was perjury. Because it was lying in court, it was clearly on oath, she had sworn inside a court.

The CHAIRMAN - Yes.

Mr MORRISSEY - Attempts to pervert the course of justice seem to be more general, they cover a wide spectrum of possible things. The trouble is that the penalty is higher for attempting to pervert.

Usually the focus defence and certainly on the proposals where specific offences have a heavier penalty than the residual one, that is what you would expect. Yet here we have the other situation.

Mr LUPTON - Do you think that perjury is in fact a specific example of attempting to pervert the course of justice?

Mr MORRISSEY - From my point of view if we were dealing it in a principled way, yes. But it is imaginable that somebody would commit perjury without intending to pervert the course of justice and therefore one can see a separate role for it. Perjury is so widely understood and people can be told, "You're perjuring yourself" without having to explain it. Very often, for example a Magistrates' Court might find someone that is becoming a bit frisky with the truth in terms of evidence that they are giving and they can be very quickly told, and it is a useful court room tool for a magistrate to say, "Look, you're aware that there's an offence of perjury, I expect you to understand, that's the situation" and perhaps on some occasions seek legal advice and so on. The offence has plenty of work to do but the answer to your original question is yes, in most cases.

Ms HADDEN - Could I just clarify what that case of Schroen. She pleaded guilty?

Mr MORRISSEY - In the end of perjury.

Ms HADDEN - Of 15 - - -

Mr MORRISSEY - It has got the maximum penalty of 15 years.

Ms HADDEN - Yes, but she had already entered a plea of guilty for 15 counts of theft and then subsequently charged with perjury?

Mr MORRISSEY - Yes, what happened was she pleaded to the theft and was dealt with for the theft. Whilst being dealt with for the theft, she told lies. She was then dealt with for the theft and imprisoned.

Ms HADDEN - So what has she got? What is her maximum? What did she get for - - -

Mr MORRISSEY - Nine months I think with three actually to serve I think she received from Judge Campbell on the perjury charge. I cannot recall what she had for the thefts but she certainly had to go back in. I just cannot recall now how much time she had done on remand or how that all worked. But the answer was that yes, she, having finished with the theft matters, came back and was dealt with again.

Normally a sentence for perjury or attempting to pervert the course of justice where you were the accused would result in a cumulative sentence. So if you got six months on one you would be given more and that is what happened to her. And she was at liberty in the meantime. So it was quite - - -

Ms HADDEN - 15 years?

Mr MORRISSEY - 15 months.

Ms HADDEN - 15 months?

Mr MORRISSEY - Sorry?

Ms HADDEN - Did you say 15 years or 15 months?

Mr MORRISSEY - No, no, the penalty was nine months I think with a minimum of three. Maximum penalty was 15 years. We were trying to think of how you could get to 15 years.

There is an issue about - I do not know whether you want to get to that at some point but there is an issue about the maximum sentence because it is very disproportionately high and we tried to rack our brains on the basis of how you could ever get up to that level.

Mr LUPTON - You are likely to be actually committing some other form of very serious offence, are you not?

Ms HADDEN - It is easier to get you on the perjury than on anything else.

Mr MORRISSEY - That is true. That is true. Although it may be that problems of proof could arise and yes, I agree with that. But the theory that I put into this paper was somebody who systematically rigged juries and that is an imaginable situation. It is sometimes said that juries have been got at or individual jurors have been got at. It is sometimes said by accused people that they have been got at too and you could imagine a situation where - I mean one example may be a corrupt member of the police force in a position of trust was found to have

persistently interfered with jurors. One could imagine a country town jurisdiction or something of that nature. I am not suggesting that I have got an example of that, it is just a theory. But it is not impossible that it would happen.

Such a person then abusing an office of trust, persistently interfering with trials, causing people to be in prison and so on, one could imagine a very heavy sentence there. On the other hand, 25 years is the second highest that there is going and no one is aware of any sentence that has got near that. I am not aware of one that has got to double figures and frankly it just seems to be disproportionate.

The CHAIRMAN - Perhaps if we could just move on a little bit to take you into the area of the accessories provisions. In your answer to question 27 which asked whether the current formulation of escaping punishment in s.325 of the Crimes Act with the accessories provision there is appropriate, you said there was no need for reform.

However, you did also note that the acts done to impede the prosecution, conviction or punishment and in many cases the apprehension of principal offenders would be chargeable as attempts to pervert the course of justice. Your submission then goes on to state, "Against a stable offence of attempting to pervert, some rationalisation of s.325 is meaningful".

Just taking those two statements for a moment, can I just ask you a couple of questions? First of all (1) presuming the general offence of attempting to pervert the course of justice is retained, what sort of rationalisation of s.325 do you think is needed?

Mr MORRISSEY - I just want to remind myself.

The CHAIRMAN - It is a complex area but there just seem to be so - s.325 of the Crimes Act, accessories.

Mr MORRISSEY - Yes, and it was my response to question 27.

The CHAIRMAN - You said there was no need for reform in this area. Question 27 being - - -

Mr MORRISSEY - The difference between the UK formula and our formula is that the UK formula left out conviction and punishment. That seemed to be the difference.

The CHAIRMAN - What did you mean by a rationalisation of s.325?

Mr MORRISSEY - I think the breadth of the different - like the things that can be impeded is currently phrased very broadly. There is a number of them there, there is four. I have built into my answer if you like a sense that there is a doubt about attempting to pervert the course of justice at the moment. If there was a decision not to reform it, if it was made clear that it was not to be or if the general offence were to be retained, then that seems to cover the latter two situations covered currently by 325, namely conviction or punishment.

In other words any act done to interfere, with the purpose of impeding the conviction of a person as distinct from the other two would look like something that had emerged at a later stage in proceedings.

I cannot say that as a matter of certainty but any act done to impede the conviction or punishment of a person as distinct from the apprehension or prosecution would look to be something that had occurred once proceedings were underway. Yes, I now recall having thought through that. That is why it may be that the people who interfere or attempt to impede the conviction or punishment are better charged as acting to pervert the course of justice because the course of justice is underway in a meaningful way at that point.

The CHAIRMAN - Right.

Mr MORRISSEY - Whereas this would seem to, the current breadth of the section does seem to allow for further overlap between two offences, a person who does actions to interfere with punishment for example or the nature of punishment such as Ms Schroen might be seen to have done. May then find herself liable to be dealt with for another type of offence.

The CHAIRMAN - Do you think there is too much overlap between s.325 and attempting to pervert?

Mr MORRISSEY - In practice there I am not aware of a problem ever arising but I see an intellectual overlap which is difficult to sustain on a principled basis.

The CHAIRMAN - If we took the Maritza Wales case where she was initially charged with accessory but eventually pleaded guilty only to the charge of attempting to pervert the course of justice. Are you able to shed any light on that?

Mr MORRISSEY - I am not able to shed any light on the internal machinations of the defence and how they negotiated with the Crown on that basis. I can say my opinion is or my guess is that choosing to plead guilty to the charge that she did choose to will put a greater distance between herself and the actual offending. An accessory has a

The CHAIRMAN - The connotation.

Mr MORRISSEY - It has a connotation of involvement in the crime even though that has - because of the use of the term accessory, that is a term in itself which may be misleading in the same way as the word attempt has been said to be misleading in relation to this.

Because although the old language of accomplice liability included accessory, nowadays it is not used. Really an accessory after is just somebody who hinders an investigation or aids in the concealment of an offence. But it can be very proximate. You can assist an offender straight away. It may be that that was the atmosphere which hung over, the plea - that was my perception anyway as someone who was in court - that was the atmosphere that hung over Maritza Wales' situation. That how close to it was she? There were certain people involved in the case, not accused but other witnesses, family members and so on, who were desperate to illustrate that she was involved in the crime.

On sentence, her counsel was clearly concerned to set her aside from that to the extent that she performed culpable acts. The plea was put on her behalf that what she did was in no way connected to the crime itself but it was connected with protecting her husband and her family and at all times urging him to give himself up but not prepared to shop him effectively.

It was really advocacy that dictated the way in which the defence sought to go in that case. Those areas of doubt in the law are not always productive of an evil result. Sometimes they allow the right result in a human sense to come along but only viewed from within the criminal law. People outside the criminal law might say that is illogical and it is wrong and there is no justification for it.

Members of the public, when a result is otherwise unsatisfying, will focus not just on the unsatisfying result but also on what seems to be the defence lawyers side-stepping. Plea bargains annoy the public, unless they are properly explained. This was not a case like that I do not think because I think those who were calling for Maritza's head clearly had an agenda that was real of their own for good or ill.

But there are other cases, manslaughters for example, where people, the public and we as defence lawyers, we understand it, that they are unsatisfied with it. Why should this murderer get off with manslaughter? It is very hard. Areas of doubt like that and overlaps in the area that we are studying now are productive of that sort of dissatisfaction. But it does not always produce substantive injustice. In fact the reverse, it is often used appropriately because of the flexibility that these overlaps allow.

The CHAIRMAN - Noel?

Mr MAUGHAN - Taking you to your answer to question 39 which was about irreconcilable statements and whether or not that should be the basis for charges of perjury which her statements has given where one conflicts with another, and then you said that you would be happy to comment further on this one. Your answer was, no, the existence of her reconciling her statements was - may be led, but that it was a perjury in some cases and you said there is no demonstrable need for a further offence. Can you elaborate a little but on that? Why you believe that someone that is very clearly misleading the court by giving those two contradictory statements should not be charged with an offence?

Mr MORRISSEY - Although the law has got a very unsatisfactory of what a lie is, it is safe to say that just because there are contradictory statements that does not necessarily mean that one of them was a lie. It may be

that one of them was believed at the time but subsequently has been forgotten. It may be that one of them was said in error or in hope or perhaps making a certainty out of something that was not, you can put that into a lie as well. In other words, asserting as positively true what you are not quite sure is positively true.

But it may well be that you can have two flatly contradictory statements which do not indicate a lie. I should say that as a defence lawyer one of the things that we do all the time is to read committal proceedings and compare what a witness then says at a trial to what they said at the committal. It is a dirty barrister's trick in a sense. Sometimes a legitimate one, sometimes an abused one to say that, "You now say that you saw a red car, at the committal you said you saw a white car".

That is a basic example. The more specific and different the detail are perhaps the more irreconcilable they are. In some cases it may be that two statements which clearly indicate thinking about something are irreconcilable, one of the must be a lie.

But in those circumstances our position is to favour the retention of another offence or the use of another offence evidence of which is these irreconcilable statements and the use of detail. It did not seem that there was any need to have that situation.

I only have a limited knowledge of what has happened interstate but my understanding is that some of these provisions have become useful in the context of if you like police corruption sort of inquiries where people testified in completely different ways in situations where they are serving a different master on different occasions.

In that context it may be useful. I am commenting on Victorian context now.

The CHAIRMAN - Sure.

Mr MORRISSEY - In that other context, without knowing a huge amount about it other than having a look at legislation, I see the point, in a particular context it could be valuable.

The CHAIRMAN - I take the point, it is not black and white.

Mr MORRISSEY - No, no, it is not. It is not. But if they are plainly lies there will be a charge of perjury. It would be hard to avoid, the evidence would be hard to avoid. If they are not plainly lies, if perjury were hard to prove, would you want an offence that was a lesser charge than perjury with a lesser standard of proof? That depends on a political context I suppose but as a criminal lawyer I would be uncomfortable with it.

The CHAIRMAN - Sure, thank you. Tony?

Mr LUPTON - Peter, yes would you just like to comment on the answers to questions 42 and 43 about the materiality of the lie told on oath?

Mr MORRISSEY - As a defence lawyer, the more elements the better. In the abstract, I think as I said here, in the abstract one could see petty oppressive prosecutions brought. It is theoretically possible that a person who had told a lie about something that absolutely did not matter for reasons of great personal shame or embarrassment or for whatever reason, perhaps for understandable reasons, perhaps for not wanting to incriminate somebody else or a family member had told a meaningless falsehood, a lie, then it would be oppressive to deal with them as perjury.

I think the examples that come to mind from my practice would be witnesses who are perhaps in sexual cases who do not want to confess particular aspects of something that happened, even though they know it did, even the chief witness in a case may tell a falsehood about something where otherwise the evidence of that witness is perfectly acceptable and truthful.

Family members may be aware of not putting their son in on further drug charges, for example somebody who is called to testify even in a trial against one of their children and is giving evidence relevant to the Crown case might minimise or lie for a reason that is not going to affect the outcome in any way but simply protecting the interests of someone dear to them. I do not see those people being charged. So it is only really a theoretical problem.

There is no reason in logic - as much as I say as a defence lawyer I want more elements to be there and it is more for us to work with and it sets the bar higher for the prosecutor but it is hard to justify intellectually that it must be

there. It is a matter that Parliament can make its mind up on rationally and clearly and they have. You know, there is a clear justification for making any falsehood, whether material or not, strictly enforceable offence. It does serve some public purpose to have - - -

The CHAIRMAN - In practice it seems that unless it is material, prosecutions are not brought.

Mr MORRISSEY - I think that is true. One of the - - -

The CHAIRMAN - Certainly is in talking to New South Wales and Queensland I got the strong impression - - -

Mr MORRISSEY – Bit spoilt for business, you do not have to go looking!

The CHAIRMAN - They tell little fibs there, do they?

Mr MORRISSEY - They just do not have the Victorian suaveness of - - -

The CHAIRMAN - Just get caught out more often.

Mr MORRISSEY - It really depends, there is a policy that might come into play a little bit more. I do not know that it has. Victoria, none of us quite know, this is not a police corruption committee of course, to the extent that you - the more you trust your law enforcement agencies the less that matter will be a concern and here there has never been said from the defence side as far as I am aware anything to the effect that prosecutions are suspect.

Sometimes it is thought that prosecutions are initiated by police over enthusiastically. That is a pure defendant's thought, it is not one that I think I would be prepared to go much further than that and in short it is a theory.

But we have had revelations of significant corruption in Victoria in recent times. It is not that it cannot happen so the theory must be at least noted and perhaps even for future reference if things get worse then you might think, "Well, petty prosecutions could be abused by people who need to abuse it" but at the moment we don't see any signs of that.

The CHAIRMAN - I think we have come to the end of our questions. Do you have any other comments you would like to make?

Mr MORRISSEY - Well, yes, perhaps just in terms of the urgency of this reference and why it has occurred, we do not know and it is not our business in one sense to know that. But where law reform proposals emerge in the absence of any actual legal controversy then the response of our organisation, the Crim Bar Association, is going to be necessarily more theoretical.

We have a view about our role which we hope is consistent with Victorian democracy to give a view on substantive matters even though we're not elected to do that. We see that we should be commenting on the substance of what is being done as well as the procedural aspects and as well as the clarity.

We think we should do that because nobody puts the accused's point of view. At the moment accused are, in terms of the eyes of the law, they are given a great deal of significance but it is also true to say that at the moment they become a form of blood sport. At the moment no doubt there is pressure brought to bear on Members of Parliament and on Parliament generally to deal more harshly with accused. There is also no doubt that media outlets have a profit motive in a particular approach to crime and I can say as a barrister who practises in a number of recent gruesome murder cases I do not get in the paper if I win. If you have an acquittal you will be on p.17. If you are found guilty it will be in the paper, you will be on the TV that night, justice is done and the theatre is played out.

For that reason law reform proposals are sometimes looked at by defence barristers with suspicion and with concern because it is sometimes said that they are a (reaction to) a statement by John Laws or some other person of that ilk. Therefore we do feel ourselves to be obliged to respond in substance, even though we are not democratically elected and perhaps it might be said it is not our concern to determine what the function of it really is. Therefore we have put the no case for the reasons that we have. But we should say that we are not an anti reform body as such and that subject to the principles that I tried to put forward earlier on - I should say they are in

an early stage of drafting - that we would hope to be of help rather than simply to be a curmudgeonly force. We do not take the view that law reform is bad and nor do we say that Parliament has a wrong approach. We have to recognise constitutional realities, that it is your job and not ours but that is what we say about our role.

The CHAIRMAN - yes, and I think to be fair, far from being curmudgeonly, you have actually indicated that if there was a compelling case, if there was the possibility of uniformity amongst the states, if there was the possibility of clarity in some aspects of the law then you would not necessarily be opposed. So may be it is an unfolding story.

Mr MORRISSEY - That is correct. That is correct. We think that it would be better for the Committee rather than as we cannot comment too much on prospects for uniformity, those who have access to the Standing Committee of Attorneys General would be better placed to say it.

What we can say is from the trade union point of view we would support it because it is clearly more work for the Victorian Bar and a greater profile for the Victorian Bar and for solicitors here. We have got in fact a very good criminal bar here and a good private solicitor's practice as well as a very healthy and participatory Legal Aid Commission.

It is in our interests to be a more national presence. There is not a Criminal Bar Association like ours in any other state. We are asked sometimes to make a contribution interstate and we seek to do that. We are very grateful for the chance to assist you.

The CHAIRMAN - That is alright and we will not pursue any analogies around common law and restrictive work practices.

Mr MORRISSEY - No, well in fact we should say that reform benefits us because uncertainty is a wonderful thing for those who practice in appellant jurisdictions. Two years of financial benefits ensue on most major law reforms and there are those who would be happy for it to happen on that basis.

The CHAIRMAN - Thank you very much Peter, for appearing before us. We appreciate your time and the effort you have made to come and we will look forward to continuing the discussion.

Mr MORRISSEY - Thank you very much.