LAW REFORM COMMITTEE

Inquiry into Administration of Justice Offences

Melbourne - 24 November 2003

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Witnesses

Dr David Neal, Victorian Bar

The CHAIRMAN - Welcome to this inquiry into the administration of justice offences. David, welcome to the committee. May I introduce to you my colleagues, Mr Richard Dalla-Riva who is a Member of the Legislative Council, Dianne Hadden is also a Member of the Legislative Council, Dympna Beard who is a member of the Assembly, Tony Lupton, member of the Assembly, Noel Maughan, Member of the Assembly and Andrew Brideson, a Member of the Legislative Council.

In addition we have Merrin Mason who is the executive officer to the committee and Kristin Giles who has been the policy and research officer on this particular reference.

As you are probably aware, our hearing today is covered by the Parliamentary Committees Act. That means that any evidence that you give today is subject to Parliamentary privilege. It is also being recorded by Hansard. You will have an opportunity to review the transcript and to make any corrections to the transcript. Following that the evidence will be posted on our web site and will be available in written form to the public.

David, thank you for taking the opportunity to come and talk to us. I understand that you want to make some introductory comments so without further ado, I think we will allow you to do that and then we will get into the details of your submission.

Dr NEAL - Thank you very much, Mr Chairman. Can I say from the outset that I am accompanied today by Mr Ross Nankivill who is the executive officer of the Victorian Bar Council.

The CHAIRMAN - Welcome as well to the inquiry.

Dr NEAL - Mr Chairman, can I make clear from the outset that at present this issue was listed on a very long agenda at the last Bar Council meeting and unfortunately by the end of the meeting we had run out of time. We only began, really, to discuss it and the Bar Council would like a little more time just to consider its position in relation to the submission but I felt it would be helpful to the Committee if I simply continued today in a personal capacity and provided the submission to you and then the Bar Council will advise your executive officer about its position in relation to the submissions that are put ultimately.

The CHAIRMAN - Yes.

Dr NEAL - I think that the principal policy positions that seemed to me important in these areas are outlined in the first part of the paper. The document, that has already been circulated I understand to the Committee, was a memo that I did to the Bar Council and substantially that memorandum is what is contained in the submission.

The point of primary importance, it seems to me, is that Australia needs to move towards national conformity in its criminal laws for a variety of reasons. As a matter of principle it certainly seems to me that people ought to know, generally, especially given the sanctions attached to criminal behaviour, where they stand no matter whether that is on the north or the south side of any of the particular rivers that divide the jurisdictions.

There is, as the Committee will be aware, a process that has been in place now since 1990 I think it was, the Model Criminal Code Process, and I have to concede that in a prior life I was involved in that process as the inaugural chair of the Model Criminal Code Committee. The ambition there – and that ambition was coming out as the same time as the Corporations Law was being developed - was that the Standing Committee of Attorneys General then thought that that Australia ought to move towards as much uniformity in its criminal laws as could be achieved.

That process then was carried into effect through this Model Criminal Code Officers Committee whereby each of the jurisdictions appointed an expert criminal lawyer to the Committee to develop model provisions with the aim that these model provisions would be adopted in each of the jurisdictions. There has, in particular at the Commonwealth level, been a substantial delivery on that promise. The initial situation had been that the Commonwealth had had a major review of its criminal law under The chairmanship of Mr Harry Gibbs. It came to the states at about 1990 saying that it wanted to move on the Gibbs Review and implement that from the point of view of the Commonwealth criminal law and the states, including particularly Queensland and Victoria said, "Look, why don't you defer that so that we can explore the possibility that we can have uniform laws across the country rather than continuing this nine jurisdiction approach and enshrining yet further divisions among the states in a revamp of the Commonwealth law pursuant to the Gibbs Committee"?

The Commonwealth agreed to that but said essentially only so long as the states are genuinely going to commit to this process.

There has been a series of reports put out by the Model Code Committee, and the first and the most important of them was the one on general principles of criminal responsibility. That report has found its way into the Commonwealth Criminal Code Act of 1995 and it sets out the basis rules of criminal liability which are, essentially, the codified common law rules of criminal responsibility. It has conducted a major review of Commonwealth offences to bring all of its substantive offences into line with the principles set out in the Criminal Code Act.

Since 1995 the Commonwealth also moved on the major area of theft and fraud type offences and it will adopt theft and fraud type offences which are closely similar to the Victorian legislation which is itself borrowed from English legislation on that area. I understand that South Australia is close to movement on that area as well. It has draft legislation in place.

The other states have not yet followed along those particular offences but there have been a number of more particular legislative reforms across all of the states in areas such as forensic procedures, female genital mutilation and some other areas. So that there is some reality to that process and it seems to me important that from the point of view of the national good that Victoria ought to make good its commitments to that national process. This area of the law is one of those areas where those commitments could be made good.

The first principal policy point to make is that I certainly do not believe that common law offences which are very vaguely defined should continue to be the norm in the modern era. If the government of the day or if the Parliament wishes to prohibit certain conduct and in particular to attach heavy penalties to it as is the case in relation to attempt to pervert the course of justice which carries a 25 year penalty, then Parliament should deliberate quite carefully on what the boundaries of that behaviour are and specify that in legislative form.

That is, I think, a very deep principle in the criminal law that you should only be punished for things which are well known in advance to be criminal and easily known. It is not good enough in my view that expert criminal lawyers can tell you at the end of the day if you are charged whether you are guilty or not and give you a prediction about what a jury should do.

The Parliament should be saying, "Here is the conduct which you may not engage in and if you do this will be the penalty". If one accepts the principle that especially serious criminal offences should be codified, I then move to the second policy point which is that they should be codified if at all possible in a uniform way across the country and hence a recommendation in the submission that I have prepared for this Committee to entertain seriously the Model Code provisions contained in their report entitled Administration of Justice Offences.

That report has been through a very serious and detailed process, not one which I was actually directly involved in as I had been with the theft one and the criminal responsibilities one but the person who was in charge of that particular work was a man, the late Andrew Menzies, who was a very senior public servant in the Commonwealth Attorney General's department for many years and he is assisted by a very expert committee, that committee is chaired currently by Justice Howie of the New South Wales Supreme Court. One of its members is Matthew Goode who is a very senior academic criminal lawyer in Australia, he is certainly one of the leading ones, if not the leading academic criminal lawyer and he is also presently the principal adviser in these matters to the South Australian Attorney General.

So that the credentials for the report and the process that it has been through at a national level ought to be things which would weigh heavily with this Committee in thinking about the workability of the proposals that have been put forward. You will notice, and indeed I notice from your own Discussion Paper, that each of the other jurisdictions really bar Victoria and ACT has moved down the lines of specifically defined offences. What they have not done, I think, is to move in a sufficiently uniform way.

It seems to me that if Victoria is then going to move to the codified approach that it does make good sense to go with the Model Code approach. Both as one that has been well researched and is clearly stated in the provisions that are outlined and one which I think the Committee could be confident would lead to other jurisdictions following suit. I have been in touch with the Commonwealth Attorney General's department. Their advice to me is that the Commonwealth will legislate these offences within approximately the next 18 months so that they have a legislative program or schedule about the adoption of the various provisions of the Model Criminal Code and in

their schedule it is about the 18 months mark. Parliamentary schedules as you all will be aware, are notoriously moveable but that is the best and latest advice certainly that I have.

The ACT, the other common law jurisdiction, has been a pretty strong supporter of the Model Code approach. It has or it is just about to adopt the general principles of criminal responsibility and it seems that the ACT is pretty strongly supportive of this process and one could expect that if the Commonwealth moved along these lines with the administration of justice offences that the ACT would as well. And that then would bring us to Victoria. I would like to see Victoria taking a lead on some of these processes.

I, in another former life, edited a case book on criminal laws at the University of New South Wales along with a number of colleagues. I was rather proud in compiling that book as a native born Victorian, though then living in that accursed state of New South Wales, to include in that book a number of Victorian cases because of the quality of the decision making coming out of Victoria in criminal law. Victoria was recognised at that time as a leader in criminal law and I think that that is a leadership that has been lacking somewhat.

I am very much a rationalist in the law reform process and I regret very much that a lot of our law reform proceeds in a fairly knee-jerk way to specific issues that are matters of great public controversy at the time. It seems to me that that clouds the process where it would be most preferable that these issues be deliberated in a calm and rational way without the heat and emotion that attends some particular matter of public controversy.

It does seem to me that the MCCOC provisions, though there are certain reservations that I state in the last part of my paper about some of them, represent a good and clear statement of the principal offences that one would want to see in this area. They are offences which almost without exception already exist in the other jurisdictions although in differing forms and that is to be regretted. So that their practical operation has been tested to a large extent in the other jurisdictions and we and the Model Code Committee can profit from that and I think the Model Code Committee has profited from it in the way it has drafted its provisions and that the Committee's primary disposition ought to be to follow that Model Code scheme unless there were very good reasons to the contrary.

It seems to me in these national uniformity type processes and I can certainly assure you that there were at the Model Criminal Code a series of debates on some of the major issues around the law of theft and around the fundamental issues to do with proof of intent and negligence and recklessness and complicity and the like, heated and extended debates about whether the law should be this way or that way, whether the Queensland / Western Australian Griffith Code approach should prevail or whether the Victoria / New South Wales common law type approach to these things should prevail. I am happy to say that on those important issues of criminal responsibilities the Victorian and the common law approach prevailed and that is a reason why a lot of what else will follow now from the Model Code process will be very sympathetic with the fundamentals of the Victorian criminal law.

So that you will see in the paper for example, I have reservations about the codification of the very general offence attempting to pervert the course of justice. Though I must say I think there is a need in these things for principled compromises to be made as have already been made in the Model Code process. That is to say there are some things that colloquially one should die in a ditch over but in other cases, while it might not be one's first preference, it does seem to me that a principal compromise in favour of national conformity should be the approach to be adopted.

Apart from the reasons in principle why the criminal law throughout the country should be as uniform as it can be, there are a number of practical advantages to it. One of them is that when appellate courts deliberate, they are deliberating on essentially the same sorts of provisions and we can evolve with greater clarity in relation to those provisions on a national level.

Secondly, the production of texts and commentaries explaining the law can be done on a national basis. It makes it a great deal more practically and economically feasible to produce practitioner texts guiding people about interpretations of these areas of law and then finally when people are asking for advice from lawyers about whether or not the conduct they are proposing to engage in is within or without the legal prohibitions, one can say as a lawyer sitting here in Melbourne, "Well, look I can say with a great deal of confidence that the law in the Northern Territory and Victoria and Western Australia where you're going to be operating is the same and here is what you need to take account of. On looking at what you're proposing I can quite confidently advise you that it is or it is not something which you could do within the ambit of the law as it presently stands.

That is that the, to take the economic line about it, that the cost of providing legal information should go down because it is uniform, it is easy and you can get it pretty much from anyone without having to go through nine different variants as one currently does have to do across almost all of the criminal law.

So that for those reasons I do urge the Committee to (a) to codify and (b) to codify in a way that maximises uniformity and to me the obvious and practical expedient for uniformity are the set of offences outlined in the Model Code and I would urge the Committee to adopt that approach.

The CHAIRMAN - Thanks, Dr Neal, for a very comprehensive overview of your submission. I suppose starting with that threshold question, you point to the need for these offences to be knowable and accessible and easily understood. The Criminal Bar Association in its submission indicates that the current offence, for example perverting the course of justice is one that is easily explained and is always generally given rise to sensible directions to a jury. It further goes on to say the current offence is not currently controversial, the generality of the offence has a positive benefit, it is broadly familiar to the community. It is easily explained to accused persons and to persons seeking advice on the legality of the proposed course of conduct and it is easily understood at a lay level.

Clearly they have come down on the side of saying, "If it ain't broke, don't fix it" and that is their approach. They are saying these kinds of offences, if you said to someone, "What's attempting to pervert the course of justice?" probably people could, with a bit of conversation, tell you what it is.

And therefore that the onus on those proposing reform is to say why you need to do it. And you have all ready expressed some reservations around the specificity of the offences that would apply to that particular offence in any model code. So just what is your answer, I suppose, to the proponents of the Criminal Bar position?

Dr NEAL - It will not surprise you to know that we have had considerable discussions between ourselves about some of these matters. You will note, I think, that the draft that you have before you proceeds on the assumption that there is no realistic prospect of national uniformity. That is the CBA draft - proceeds on that assumption. I believe, though you can ask them directly this afternoon - I believe there is an introductory note there on the first page of their submissions which says "We do not believe that it is a realistic possibility. If we thought it were a realistic possibility that would be grounds to reconsider the position that we take". I believe that they are now better informed about the progress of the Model Criminal Code and in particular the legislative timetable of the Commonwealth for implementing the administration of justice offences, is the first point.

The second point is that as you will see from my submission I do not believe that it is in proper conformity with criminal law principles that offences be vaguely specified. We would not tolerate in the law of theft an offence which simply said you must not do dishonest things.

And finally, certainly as presently described, although if you are a expert criminal lawyer and practising in this jurisdiction you will have a fair idea of where the boundaries are. They are gloriously unclear and the offences unclearly described. It is not an “attempt” to pervert the course of justice at all as your own discussion paper says. So that at the very least there ought to be a codification of the general offence along the lines that is contained in the Model Code approach. But in my view if what the Parliament is really intending to prohibit is tampering with witnesses, tampering with evidence and the like, then it should say so, just as a matter of quite clear political principle. If these are the forms of conduct that you think are wrong and should be prohibited, then describe them with specificity. Vagueness is anathema to the idea that anyone should be punished without being able to know with some precision what it is that the law prohibits.

The CHAIRMAN - The Criminal Bar Association also says even if we introduce a Code we are still going to have criminal lawyers explaining the law by reference to the common law position in Victoria. In other words they will see it through a common law filter and in explaining the nature of the offence, they will nevertheless be resorting to the common law language to explain it. So you have not really achieved what you set out to achieve.

Dr NEAL - Mr Chairman, that is true of any area of law. I do not think - the common law of larceny which was the most gloriously obscure and difficult area of the law was removed from the statute book in Victoria in 1972 and replaced by the Theft Act. The Theft Act is not without its difficulties and it is also true to say that one does not, by writing a piece of legislation, reinvent the world. Of course a lot of the concepts that are present in the old criminal law of larceny which, God rest its soul, I do not think there is anyone campaigning for its return. The

Theft Act has been interpreted in light of that and it is proper that it should be because you need a degree of consistency and there will always be difficult cases. Similarly I do not believe that you will see in most of these areas of the criminal law that have been codified - the sexual assault area is another example - people crying to go back to the good old days when you could find the law if you knew your way through the English and Australian law reports. It is just not tolerable at this stage of the 20th century to think that you cannot, if you wanted to, look anything of these up on the 'net and find out precisely what it is that Parliament says you must not do. That is simply - I suppose in a sense a point of a small p political difference of approach.

Mr LUPTON - Dr Neal, I think you have touched on this point but I perhaps just ask you if you could elaborate a little on it. If we were to move down the codification path there seem to be differing opinions about how many, if any, specific offences ought to be created following a general offence. Could you just give some elaboration about your views about that matter.

Dr NEAL - I think the Model Code offences are correct. They are based on essentially the offences that exist in all of the other jurisdictions now. So I think that the issues as to the practicability and so on are being reasonably worked out in the other jurisdictions. Victoria and the ACT really are alone in all of the jurisdictions in not having specified offences. My real ideal position would be just to have the specific offences and not to have the general catch all type of provision, but I do not believe that is acceptable generally, that is a view that I am going to have to make the principled compromise on, I think. But I would much rather have a series of offences that were directly saying to someone "If you tamper with a witness or if you conceal, fabricate evidence that is what you must not do". Rather than tell people "You must not attempt to pervert the course of justice", whatever that might mean.

There are a couple of offences which are additional offences, if you like. The one of them is recrimination against a witness which raises the Fingleton issue. I think that the Fingleton issue is actually a reasonable example of the point that I want to make generally. There is reasonable debate about whether or not the conduct that Ms Fingleton engaged in ought to be criminal. And why is that? It is of the certain vagueness about the notion of the law of attempt to pervert the course of justice. If she is going to be punished for criminal conduct then the nature of that conduct ought to be clearly specified.

The CHAIRMAN - In that case it was. Under the Queensland code the reprisals against witnesses was very specific to the provision of the Queensland code.

Dr NEAL - Exactly. But that is my precise point. Whether or not it is criminal should not be left to whether or not this vague offence, attempt to pervert the course of justice, covers it. It should be the subject of a specific offence which says "If you want to do this" - and I think reasonable minds could differ - "but if you think it should be a criminal offence then say so. Do what Queensland has done and provide a specific offence". As I say in my paper, I in fact believe that recrimination against a witness after the event, that is after the case is over, in fact ought to be a criminal offence. But I can see how reasonable minds might differ over it. What I would not want to see is that left vague in Victoria and your not knowing whether it is or it is not. So if you think it should be criminal then include it among those offences which are specifically defined as things which the criminal law will punish if someone does not.

Mr LUPTON - Do you see any difficulties if we were to recommend a general offence and a number of those specific offences of those two different concepts not perhaps working well together?

Dr NEAL - Well it was the case in Queensland. She was charged with both the general offence and the specific one and then the Court of Appeal found that - I am indebted to Ben Lindner sitting behind me here today for this potted summary. They found that she was guilty of the specific offence and therefore there was no need to go and deal with the general offence. The reason that people want to keep the general offence is because of conduct which we may not yet imagine occurring but which we would want to criminalise. I have a general - as I have said to you earlier - a general disfavour for those sorts of offences and the example that I usually would give in this context is the old offences of conspiracy to corrupt public morals and those sorts of offences. It seems to me that attempt to pervert the course of justice smacks a bit of punishing the conduct after the event rather than before it. But I think that the two could coexist and what I would envisage seeing is that prosecutors would charge the one and they would be alternative counts. If you did not fall within the specific conduct they would fall back on the general, but if you are not guilty of either you get acquitted of both. That does not seem to me to raise very significant practical difficulties.

The CHAIRMAN - The Queensland Code to date has gone further than that in that it actually said that any person who attempts in any way not specifically defined in this code to obstruct et cetera.

Dr NEAL - Please do not do that.

The CHAIRMAN - They have now moved to amend it but they were quite explicitly saying that you had to find a specific, well it seemed to be saying, at least the court seemed to be interpreting it this way, you had to find a specific offence and it was only if you could not bring it under a specific offence that you could charge under the general offence. They have moved to amend the code.

Ms HADDEN - And increase the penalty.

Dr NEAL - Simply to repeat the general point that I was making earlier. I believe, as a matter of political principle, if you are going to prohibit certain conduct then prohibit it clearly and do not have these sort of catch all provisions. I do not think that that is consistent with the fundamental principle that you should not be punished for something unless it is clearly prohibited in advance.

Ms HADDEN - On that point, Queensland's s.140 is the catch all, attempt to pervert the course of justice. And the explanation given to us in our meetings in Queensland was that you can never define an offence to last for all time because criminal activity is a moving feast and activities are improved, better as time goes on. So while you might think you can specify an offence for today that might not be satisfactory in the future. So therefore they said you do need the general offence.

Dr NEAL - I see that and it is the same rationale that MCCOC adopted in relation to the codification as a general offence but for the reasons I have outlined, I have reservations about it but I think I have to be realistic about it. I do not believe that the chances of my view of that one prevailing are good at all. So I simply cop that.

The CHAIRMAN - Perhaps we might move onto some other aspects of public justice offences, taking the law of perjury in Victoria. Perjury in Victoria applies - the exception to the law of perjury applies to acts done with lawful authority or reasonable excuse. In other words you can perjure yourself if there is some reasonable excuse or lawful authority for doing so. That is unique to Victorian law. MCCOC clearly does not favour that approach. Looking at MCCOC it argues that reliance should be placed on the general offence of lawful authority recommended in an early discussion paper rather than a specific provision. And this recommendation formed part of the final report. That would presumably, in order to achieve uniformity, would require some change to an area of Victorian law which is fairly well settled and accepted. What is your view on that?

Dr NEAL - Mr Chairman, I have not given a great deal of thought to it. The defence of lawful authority is the general - I still struggle a bit with the notion that you can commit perjury if you have a lawful entitlement to do it. And I cannot think off the top of my head of the examples of where it would be - I am sure that there are some because otherwise people would not discuss it. But I do not have a particular thought about that to give you at the moment. I think on areas of extreme detail such as that, that if at the end of the day you wanted to codify it on the Victorian line rather than the Commonwealth line you could, although I suspect there is a general defence of lawful authority in the general common law of Victoria in any event.

The CHAIRMAN - Kristin has just pointed out to me the defence of lawful authority or reasonable excuse in our discussion paper on p.103 refers, for example, to a case where the Act extended to destroying the evidence of an offence, for example a worthless cheque in pursuance of a legitimate agreement to refrain from prosecuting. That was seen as - - -

Dr NEAL - Obviously something like that should be provided for in one way or another. And I would not see that as a central issue. It should be dealt with, whether you deal with it through lawful authority or if because the MCCOC proposal is relying on a provision which is not yet enacted in Victoria then it is a simple matter of drafting to put in the equivalent.

The CHAIRMAN - Just then dealing with the issue of the whole offence of perjury and the situation in which it covers including taking evidence on oath or affirmations for the purposes of legal proceedings or otherwise, in Victoria of course the law is applicable to any document made on oath or affirmation. You say that seems right in principle. Could I ask you to elaborate on that. I mean there has been a view put to the Committee that in fact giving evidence on oath as part of legal proceedings as a particular gravitas attached to it the fact that

someone has sworn on oath, the fact that they may well receive warnings that they can be liable for perjury if they fact lie on oath is of slightly different order to the taking of a statutory declaration where in fact no such warnings may be given, at least by the person who is taking the declaration.

Dr NEAL - It might be that the answer to that is as you suggest that if you go with the MCCOC recommendation it is linked to proceedings and is a more serious offence and that you have some other less serious offence for simply swearing false oaths in documents where commonly there are warnings in fact that you are - - -

The CHAIRMAN - (indistinct) on the document.

Dr NEAL - That the lesser gravitas of that is dealt with in the way - - - . My study on paragraph 16 is simply this, and it is from first principles really, that if you swear on oath that something is true and you know it is not, there seems to me to be a problem about doing that. And that is significantly wrong enough - that is significantly enough of a wrong thing to do to warrant a criminal offence and it may be as suggest, Mr Chairman, that that could be at a lower level with a lower maximum penalty than swearing false oaths for example in the course of judicial proceedings.

The CHAIRMAN - Again, just following on from that in relation to your submission on the offence of perjury, you indicate that it has to have some objective reality, that the statement should actually be false as well as being believed to be false, which is different from the current Victoria position.

Dr NEAL - Yes.

The CHAIRMAN - Can you elaborate on what you attribute that to.

Dr NEAL - It again stems from the general criminal law principles that if I do something believing it is wrong in the sense of criminal offence, but it is not in fact a criminal offence, I am not guilty of an offence.

The CHAIRMAN - Except that even if you make a statement which is true but you believe it to be false or you recklessly make the statement, you do not believe that should attract any criminal penalty.

Dr NEAL - I am troubled because the parallel - if I do something believing it to be wrong when it is not in fact wrong, that is exactly, in a sense, what you are saying. Traditionally the criminal law has not punished that, there has been a big debate in the law of attempts. I shoot at a tree believing it is a human being, am I guilty of a criminal offence because it actually turns out to be a tree? That is the issue. Currently under the law of attempt in Victoria it would be an illegal attempt, but do you see we are now at a point where there is a danger of lapsing into Humpty Dumpty type prohibitions and that is the problem that I am trying to highlight in that area. Mere believe that you are doing the wrong thing is never enough. It may be, as you say, Mr Chairman in reply, that if you not only believe it but actually give some evidence that that is enough. I do have a reservation about it for the reasons that I have just outlined.

The CHAIRMAN - Alright, just finally in relationship to your experience of the criminal law, are there any particular areas where you - and you have already enunciated on perverting the course of justice, the particular cases or areas where you believe that the common law offence was of such vagueness and breadth that it has caused particular problems in that the accused could not possibly have understood the nature of meaning of the offence?

Dr NEAL - Not directly from cases I have done, no I do not. Can I say by way of addition on this issue in relation to procedural matters, it does seem to me that the device of indictable offences hearable summarily should be applied to this offence. What I can say is that there are too many trivial cases that are going for trial in this which in other areas of the law which - typically theft - which is an offence which carries a ten year maximum penalty. That is an offence where the minor cases of theft can be dealt with in the Magistrates' Court because it is an indictable offence which can be heard summarily.

The same ought to apply to attempt to pervert the course of justice. There are far too many of the trivial sorts of cases that are taking up time in the upper courts which should and could easily be dealt with in the Magistrates' Court. So that when you are dealing with the topic of a code of indictable offence you should go the extra mile and make sure the less serious instances could be dealt with summarily.

The CHAIRMAN - Are there any other questions?

Mr DALLA-RIVA - Just one question, Chair. The police investigations – should they be part of perverting the course of justice, your view?

Dr NEAL - Stick with the existing law so not.

The CHAIRMAN - Any other final comments you want to make? Sorry, Dianne, yes?

Ms HADDEN - Some of the submissions we received in New South Wales made the point that when codification takes place it does so in a way to reduce rights and liberties of people and it makes the law inflexible under a code. The code is absolute and little or no room for judicial discretion and that whilst generally codification is a desirable outcome of clearer and accessible law, it removes the basis rights and liberties of persons. Do you have a comment on that?

Dr NEAL - Yes, I do not agree with any of those propositions. For the reasons that I have put most strongly, and probably I am just repeating myself but how are people's rights to liberties advanced if the criminal prohibitions that bind them are vaguely expressed and they cannot find them? That seems to me to just be as a matter of practical commonsense, wrong.

In relation to the rigidity of codes, also I believe quite wrong. The experience for example I gave you earlier of the codification of the law of theft in Victoria made it a great deal more clear but like all words, whether they are written in a law report or whether they are written in a statute book, they fall to be interpreted and they are very - interpreted within a contextual framework and there is a series of adjustments made in the interpretations over time. The idea that we could fix, we could even if we wanted to, fix these things for all time is wrong I think and as for the codification of the common law of larceny I think generations of law students, to say nothing of their teachers and anyone else thank the authors of the Theft Act for simplifying and clearly stating to the extent that it can be that very difficult area of the law which actually defines the boundary between legitimate commercial transactions and illegitimate ones.

If there is one thing that people in business will ask you for on all of these things, "Tell us something that's sort of, you know, tangible and clear so that we know whether or not the transactions we now propose to engage in is a lawful transactions or not". One of the great vices in the area of conspiracy to defraud which is one of these vaguely defined offences is that people doing very extensive banking transactions in Hong Kong had to go all the way to the Privy Council at the end of the day to find out whether or not their conduct was lawful or not and it turned out bad luck for them, it was not.

So that is why I think that the arguments put by the people who make those submissions in New South Wales really are quite wrong and in fact the opposite is true. It is much more to a citizen's advantage that those who govern the citizen are forced to specify what it is that must not be done, rather than to leave it vague so that we can get you in the end if we think it is naughty after all.

Ms HADDEN - But that is the case (indistinct) from the code because you have the - it is going to catch you if we have not specified an offence - - -

Dr NEAL - You know I have confessed my reservation about the general offence and I think best that I doubt that I - I had a similar argument at MCCOC on another issue and I lost it there too. I still expect I will lose that issue. But I agree with the point. I agree with you- for reasons that I have outlined.

Ms HADDEN - In relation to the two code states that have been code for a century, WA and Queensland, they have the highest incidence - - -

Dr NEAL - Tasmania is too.

Ms HADDEN - Yes, but they - all right. Have the highest incidence of Aboriginal incarceration in Australia.

Dr NEAL - Yes.

Ms HADDEN - How does that fit with when they are a code state? How do you say we would be following that path if we did recommend codification?

Dr NEAL - The Griffiths Codes in Queensland and Western Australia have been accused of a lot of things but that is the first time I have heard them accused of that. I do not really think that the existence of a Code or not has any effect on that, on arrest rates. So if you asked me, "Well, what about" as in this state for instance a law which made public drunkenness an offence, if you had a large Aboriginal population in Victoria and that offence you would find a much higher arrest rate in Victoria than you would in Queensland which has now abolished that offence.

So I do not believe that there is a cause and effect relationship there. I think that the Queensland and Western Australia codes are now dated and they reflect it in a way that their author, Sir Samuel Griffith, and one of the very good things about the Model Codes principles of general responsibility is that their codified principles are the common law principles, the ones that have evolved. They do require the proof of intent and they do require that those people who intentionally chose to do the wrong thing, that that is the touchstone of criminal responsibility and that is a principle that I think we are very comfortable with in Victoria and ultimately in Queensland and Western Australia they will be too when they get it.

Ms HADDEN - Yes, but there is no suggestion they are going to follow a Model Code though, is it?

Dr NEAL - Look, as I understand it, all of the jurisdictions have undertaken in their participation in this process that they will, as these things fall to be reviewed, move to the common law model, that is really to the MCCOC model.

Victoria passed the Sentencing Act in 1991 and a couple of years later Queensland effectively passed a very similar thing. It is very hard to predict how these things go but you will see in the Queensland legislation already parts of the Theft Act that we have, you will see in the New South Wales law of theft for example, now a strong mix of theft and common law provisions and if you look around the other jurisdictions it infiltrates.

It seems to me that the process will not work if everyone sits back and says, "Look, we'll wait for someone else to do it". What we need to do I think in these things is to take a leading role in them if we believe that that is the correct principle to adopt. I think that, if Victoria, the Commonwealth and the ACT went down this path on administration of justice offences, you would pretty soon find that the rest would as well. That is putting to one side - look, those states have adopted numbers of the other provisions and I gather that they are all pretty keen on this administration of justice issue because of some other things that are happening around, double jeopardy which is a topic that you have heard of and spoken of in the last few days I think.

Ms HADDEN - Thank you.

The CHAIRMAN - **Dr NEAL**, thank you very much. I am sure we could actually go on. It has been a most interesting session.

Dr NEAL - Thank you.

The CHAIRMAN - And everyone has got a lot out of it I am sure. But we do, for want of time, need to move on.

Dr NEAL - Sure.

The CHAIRMAN - But presumably if there are any additional areas we need to follow up with you, we can do that by way of written question?

Dr NEAL - Yes, I would be very happy to help if I can and thank you for the reception and for hearing me.

The CHAIRMAN - Thanks very much for coming and thank you, Mr Nankivill for coming along as well.