

PUBLIC JUSTICE OFFENCES

Hindering investigations; concealing offences and attempting to pervert the course of justice

Reasonable Cause Criminal Law CLE Conference

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Part 7 of the *Crimes Act* 1900 was introduced as a package of Public Justice Offences inserted into the *Crimes Act* in 1990.¹ The purpose of the package was to create a comprehensive statement of the law relating to public justice offences which, until the enactment of the amendments, was described by the then Attorney General Mr John Dowd as “*fragmented and confusing, consisting of various common law and statutory provisions, with many gaps, anomalies and uncertainties*”.²

Part 7 Division 2 deals broadly with offences concerning the interference in the administration of justice. This paper does not aim to cover every aspect of the package of public justice offences but focuses on the principal offences incorporated within Division 2, being Ss. 315, 316 and 319 offences, and their common law equivalents.

Background

Up until 25 November 1990, the various common law offences including misprision of felony, hindering an investigation, compounding a felony and perverting the course of justice, to name a few, operated, until abolished by the *Crimes (Public Justice) Amendment Act* 1990³.

From 25 November 1990, Part 7 of the *Crimes Act* 1900 provided for ‘public justice offences’ broadly described as offences targeting interference with the administration

¹ Inserted by the *Crimes (Public Justice) Amendment Act* 1990 (NSW) s 3, Sch 1.

² New South Wales, *Parliamentary Debates (Hansard)* Legislative Assembly, 17 May 1990, the Hon JRA Dowd, Attorney General, Second Reading Speech at 3692. The court in *R v Rogerson* (1991) 174 CLR 268 (at 47-48) referred to the common law provisions concerning public justice offences as “poorly defined” and “confused” by the court in

³ Section 341 of the *Crimes Act* 1900 NSW expressly abolished the offences at common law of perverting the course of justice, misprision of felony, and of compounding a felony, amongst others. Whilst these provisions were added by the amendments of 1999 (commencing 7 July 1999), they are expressed to apply from the commencement of Part 7, as substituted by the *Crimes (Public Justice) Amendment Act* 1990).

of justice, which included the offences of hindering an investigation (s. 315), concealing an indictable offence (s. 316), and perverting the course of justice (s. 319). Accessorial liability also attached to these offences, in addition to the substantive offences of accessory before the fact (s. 346) and accessory after the fact (s. 347).

THE COMMON LAW PRIOR TO 1990

Despite the abolishment of the common law offences under s 340 and 341 of the *Crimes Act* 1900, the availability of common law offences remain for offences committed before the commencement of Part 7.

Misprision of Felony

Misprision of felony consisted of knowing that a felony had been committed, and failing to disclose that knowledge to those responsible for the preservation of the peace within a reasonable time, and having had a reasonable opportunity to do so.⁴

The offence extends to a person who knows of a treason or felony that is being planned or committed, or has been committed, and without consenting to it conceals or procures the concealment of the crime. *Sykes v DPP*⁵ confirmed the Victorian case of *R v Crimmins*,⁶ that in the early 1960's such an offence was not obsolete, despite the offence being considered 'unusual' and seldom prosecuted at the time (see 543-545, 560).⁷ Such cases will arise "when the public interest will be best served by the citizen, who fails in his duty, being prosecuted..."⁸

⁴ J Smith and S Hogan, *Criminal Law* (7th ed, Butterworths, London, 1992) at 165.

⁵ *Sykes v DPP* [1962] AC 528; [1961] 3 WLR 371; 3 All ER 37; (1961) 45 Cr App R 230.

⁶ *R v Crimmins* [1959] VR 270.

⁷ In *R v Aberg* [1948] 2 KB 173 at p 176, Lord Goddard, CJ described the offence as "generally regarded nowadays as obsolete or fallen into desuetude".

⁸ The full court in *R v Crimmins* (supra) at 272. In *R v Collie* (1991) 56 SASR 302; 55 A Crim R 139 one of the persons tried with the appellants had been charged and convicted of misprision of felony.

The principles of misprision of felony were discussed by Cox J in *R v Lovegrove*⁹ and can be summarised as follows:

- A person was not obliged to tell the police what the police already knew;¹⁰
- The disclosure to the authorities had to be made within a reasonable time and having had a reasonable opportunity for so doing;¹¹
- It did not matter whether the concealment took an active or a passive form (i.e. mere omission to inform the authorities of information that might have assisted the police in ascertaining and apprehending the offender);¹²
- The disclosure must have included all material facts known to the person relative to the offence, including the name of the person if known and the place;¹³
- The Crown did not have to prove that the accused knew the identity of the felon;¹⁴
- The offence was not restricted to those who actually witnessed the commission of the felony but knowledge rather than suspicion was required;¹⁵ and
- The knowledge that had to be proved, was a state of mind constituting actual knowledge and not that of some hypothetical reasonable person.¹⁶

Cox J in *Lovegrove* (at 230) (a case involving a failure by two accused, Lovegrove and Kennedy, to report to the authorities their knowledge of a homicide) stated:

What the Crown has to prove on each of the misprision charges was, first, that a felony (in this case, murder or manslaughter) had been committed by someone; secondly, that the accused knew of its commission; and thirdly, that he unlawfully concealed his knowledge from those responsible for the preservation of the peace, most obviously the police. A person who knows of the existence of a felony must tell the authorities what he knows about both the crime and the criminal. Of course, he must know, and realise that he knows, something worth telling – something that would materially assist the police in identifying a crime and tracking down the person responsible. He is not obliged to tell the police what they already know, or what he

⁹ *R v Lovegrove* (1983) 33 SASR 332; 9 A Crim R 226 (as affirmed in *R v Wozniak* (1989) 16 NSWLR 185; 40 A Crim R 290 and other cases as provided).

¹⁰ See also *R v Stone* [1981] VR 737.

¹¹ Applying *Sykes* (supra).

¹² Applying *R v Crimmins* (supra) ; *Sykes v DPP* (supra) at 545, 562.

¹³ *Sykes v DPP* (supra) at 563, see also *R v Crimmins* (supra).

¹⁴ Applying *Sykes v DPP* (supra) at 545.

¹⁵ *R v Wozniak* (supra).

¹⁶ *R v Lovegrove* (supra) at p 231; *Petty v The Queen* (1991) 173 CLR 95.

believes they already know. However, he is not absolved from his duty to tell merely because his knowledge of the crime may not be complete. He may know that the crime has been committed without knowing all the details and without knowing who committed it. In those circumstances he must disclose what he does know, and it may be that the police will be able to do the rest. The disclosure must be made “within a reasonable time and having a reasonable opportunity for so doing”: *Sykes*, per Lord Goddard at 569. If there is a concealment, it does not matter whether it takes an active or passive form. The Crown’s case against Lovegrove was that he simply did nothing, and against Kennedy that he helped to remove and hide the body. So far as the ingredients of misprision charge are concerned, the difference is unimportant. The offence lies simply in the concealment, in the sense of failing to tell. Generally speaking, it does not matter why a person fails to report a crime. His motive may be to assist the wrongdoer in some way, or he may simply want to keep out of what he regards as no business of his. He may or may not have something to gain by his concealment...None of that matters. The policy of the law is that crimes such as murders are to be brought to light and investigated.

Knowledge

The court in *Sykes v DPP* stated, “it is not necessary that the defendant charged with such an offence should know that a felony has been committed; and it is sufficient if he knows that a criminal offence has been committed. It is a question for the jury to determine whether on the facts of the particular case the defendant had knowledge” (at 545)¹⁷. Cox J in *Lovegrove*¹⁸ stated that knowledge of a criminal offence did not require a person to have eye-witnessed an incident. As stated above, and confirmed in *R v Wozniak*¹⁹ (at 187-188), the knowledge must be that of the “accused and not some hypothetical reasonable person. What is in issue is the subjective knowledge of the accused, not the knowledge which, objectively can be attributed to such a hypothetical reasonable person.” At p. 188 the plurality of the Court stated:

First the Crown must prove that the accused person knew of the felony. Secondly, the jury should be told that mere suspicion of a crime is not enough and a more definite state of mind constituting actual knowledge is required. Thirdly, elaborate discussion of the word “know” is unnecessary.

The distinction between knowledge, as opposed to suspicion can be difficult. Case law in other areas of criminal law can assist in determining what might be considered to be knowledge in the circumstances²⁰. In a case concerning an offence involving

¹⁷ Emphasis added.

¹⁸ *R v Lovegrove* (at 336; 229-230)

¹⁹ *R v Wozniak* (1989) 16 NSWLR 185.

²⁰ *He Kaw Teh v The Queen* (1985) 157 CLR 523; 60 ALR 449; 15 A Crim R 203.

aiding and abetting, *Giorgianni v The Queen* (1985) 156 CLR 473, Wilson, Deane, and Dawson JJ said (at 504):

Intent is an ingredient of the offence of aiding and abetting...and knowledge of the essential facts of the principal offence is necessary before there can be intent. It is actual knowledge which is required and the law does not presume knowledge or impute it to an accused person where possession of knowledge is necessary for the formation of a criminal intent. Secondly, although it may be a proper inference from the fact that a person has deliberately abstained from making an inquiry about some matter that he knew of it and, perhaps, that he refrained from inquiry so that he could deny knowledge, it is nevertheless actual knowledge which must be proved and not knowledge which is imputed or presumed.

The reasoning of the Court in *Pereira v DPP*²¹ indicates how a combination of suspicious factors may however be relied upon in order to sustain an inference of knowledge. The plurality of the court said (at 3):

Even where, as with the present charges, actual knowledge is either a specified element of the offence charged or, a necessary element of the guilty mind required for the offence, it must be established as a matter of inference from the circumstances surrounding the commission of the alleged offence. However, three matters should be noted. First, in such cases the question remains one of actual knowledge...It is never the case that something less than knowledge may be treated as satisfying a requirement of actual knowledge. Secondly the question is that of the knowledge of the accused and not what might be postulated of a hypothetical person in the position of the accused, although of course that may not be an irrelevant consideration. Finally, where knowledge is inferred from the circumstances surrounding the commission of the alleged offence, knowledge must be the only rational inference available. All that having been said, the fact remains that a combination of suspicious circumstances and failure to make inquiry may sustain an inference of knowledge of the actual or likely existence of the relevant matter...a failure to make an inquiry may sometimes, as a lawyer's shorthand, be referred to as wilful blindness.

The type of offences where reporting is required: “felonies”

For the purposes of considering a prosecution of the common law offence of misprision of felony, only those offences defined as ‘felonies’ could be the subject of prosecution. The Butterworths Concise Australian Legal Dictionary (Second Edition) defines ‘felony’ to mean:

In New South Wales, an indictable offence punishable by penal servitude: (NSW) *Interpretation Act* 1987 s 21. The traditional distinction between a misdemeanour and felony is now largely meaningless: *R v McHardie* [1983] 2 NSWLR 7333; (1983) 10 A Crim R 51. It has been abolished in all other jurisdictions. In English legal history,

²¹ *Pereira v DPP* (1988) 63 ALJR 1; 82 ALR 1; 82 ALR 217; 35 A Crim R 382.

a felony unlike a misdemeanour was punishable by the forfeiture of lands and goods to the Crown.

In *Sykes v DPP*,²² Lord Denning referred to the term ‘felony’ as a ‘serious offence’ (at 563):

The accused man must know that a felony has been committed by someone else...he must at least know that a serious offence has been committed...an offence of ‘aggravated complexion’, for, after all, that is still, broadly speaking, the difference between a felony and misdemeanour. Felonies are the serious offences. Misdemeanours are the less serious.

*Criminal Law NSW*²³ commentary defined the historical term of ‘misdemeanour’ ‘in its ordinary sense’ to mean “all those crimes and offences for which the law did not provide a particular name and which were punishable, according to the degree of the offence, by fine or imprisonment; the word was not limited to offences which were punishable only on indictment”. Felony however, was said to apply to those offences punishable by death or penal servitude.²⁴ Lord Goddard in *R v Morris* (at 395) stated “at common law...there were comparatively few felonies: murder, rape, arson, burglary, larceny and the offence of mayhem...though there may have been others.”²⁵

The distinction between these terms was abolished in 1999.²⁶ Section 580F, introduced into the *Crimes Act* 1900 (NSW) from 1 January 2000, abolished all distinctions between felonies and misdemeanours and substituted ‘minor indictable offence’ for the term of ‘misdemeanour’ and ‘serious indictable offence’ for ‘felony’. ‘Minor indictable offence’ is today defined in s 4. of the *Crimes Act* 1900 (NSW) to mean “an indictable offence that is not a serious indictable offence”, and a ‘serious indictable offence’ as “an indictable offence that is punishable by imprisonment for life or for a term of 5 years or more”.

From 1960 up until the abolition of the terms as per s. 580F *Crimes Act*, and the concurrent repeal of ss. 9 and 10 of that Act, these respective sections defined

²² *Sykes v DPP* [1962] A.C. 528.

²³ R. Watson, G.S. Hosking and A.M. Blackmore, *Criminal Law NSW* (Thomson Reuters, 2011) [2.850]-[2.930].

²⁴ *Ibid.*

²⁵ *Morris* (supra) at 395.

²⁶ *Crimes Act* 1900 (NSW), s. 580F.

‘felony’ as “an offence punishable by penal servitude”, and s. 10 a ‘misdemeanour’ as an offence in which no greater penalty than “the imposition of a fine, in addition to or without imprisonment” was imposed.²⁷ Section 453 of the *Crimes Act* 1900 previously defined ‘penal servitude’ to mean, in the case of male offenders, hard labour.²⁸ These distinctions were carried into other legislative provisions by s. 21 of the *Interpretation Act* 1987 which defined ‘felony’ to mean an “indictable offence that is punishable by penal servitude” and a ‘misdemeanour’ to mean “an indictable offence that is not punishable by penal servitude”.²⁹ ‘Indictable offence’ was defined for the relevant period, and is presently defined by that provision to be “an offence for which proceedings may be taken on indictment, whether or not proceedings for the offence may also be taken otherwise than on indictment.” Offences, which are today labelled as purely ‘summary’ offences, are not capable of being dealt with ‘on indictment’, that is, heard before a judge and jury.

Defences

The case law concerning prosecutions of misprision offences indicates that a number of excuses could be pleaded as defences but these were not clearly defined by the common law. They included:

- The privilege against self incrimination³⁰;
- A genuine belief that disclosure would endanger a third party³¹;
- A lawyer acting under legal professional privilege³²; and
- Honest and reasonable mistake of fact.

²⁷ S. 580F of the *Crimes Act* abolished the punishment of penal servitude and s. 580G the distinction between light and hard labour (to commence from 1 January 2000). The definitions of felony and misdemeanor were inserted into the *Crimes Act* from 1901 and s 9 was amended in 1985 to omit the references to the death penalty, and s 10 was amended in 1974 to exclude references to “whipping”.

²⁸ Section. 453 *Crimes Act* commenced on the 1.01.1900 and was repealed on the 2.08.1974.

²⁹ This definition no longer exists within s 21 of the *Interpretation Act* 1987 as it presently is, but existed in these terms between the period 1960 until 1 January 2000. Within those dates, ‘indictable offence’ was defined as “an offence for which proceedings may be taken on indictment, whether or not proceedings for the offence may also be taken otherwise on indictment”.

³⁰ *Lovegrove* (supra) 272; at 236; *R v James* (1983) 36 SASR 215; 11 A Crim R 272; *Petty v The Queen* (1991) 173 CLR 95

³¹ *Lovegrove* (supra)

³² *Sykes v DPP* (supra) Per Lord Denning at 564 (AC).

The High Court decision of *Petty v The Queen*³³ makes it clear that a person who concealed information about a serious offence by failing to answer police questions about his or her own involvement in the offence, or a related offence, did not commit the common law offence of misprision of felony. These authorities held that reliance on the right to silence constituted a reasonable excuse for committing the common law offence. Mason CJ, Deane, Toohey and McHugh JJ said (at 99):

Even if it be assumed that the common law offence still exists in at least some Australian jurisdictions... it is, in our view, clear that silence about an offence on the part of a person liable to be suspected of being criminally involved in its commission cannot constitute misprision of felony.

However, other authority suggests that self-incrimination would not always excuse concealment of an offence at common law, particularly where there is a gross discrepancy between the magnitude of the concealed offence and the apprehended prosecution, or where the offence in respect of which the privilege against self-incrimination claimed is completely unrelated to the concealed offence.³⁴

Other “excuses”

Other excuses were suggested, but family ties were said not to suffice as an excuse in the case of really serious crimes.³⁵ Lord Denning in *Sykes* (at 564) said about the available excuses:

I am not dismayed by the suggestion that the offence of misprision is impossibly wide: for I think it is subject to just limitations. Non-disclosure may sometimes be justified or excused on the ground of privilege. For instance, if a lawyer is told by his client that he has committed a felony, it would be no misprision in the lawyer not to report it to the police, for he might in good faith claim that he was under a duty to keep it confidential. Likewise with doctor and patient, and clergyman and parishioner. There are other relationships which may give rise to a claim in good faith that it is in the public interest not to disclose it. For instance, if an employer discovers that his servant has been stealing from the till, he might well be justified in giving him another chance rather than reporting him to the police. Likewise with the master of a college and a student. But close family or personal ties will not suffice where the offence is of so serious a character that it ought to be reported...

³³ *Petty v The Queen* (1991) 173 CLR 95.

³⁴ *Lovegrove* (supra) at 342.

³⁵ *Sykes* at 564 (AC).

Doctrines of privilege have application in a context of the law of evidence as an exemption conferred by the law upon a party to or witness in, litigation (see s 127 *Evidence Act* 1995 (NSW)³⁶ concerning the refusal to divulge that a “religious confession” was made, or as to its contents).

The application of privilege to the obligation under common law to report a felony, is untested as far as I am able to find. JD Heydon in Cross on Evidence expressed the view that an argument that privilege in respect of self-incrimination might extend to non-disclosure of confidences was “doubtful”, noting that whilst the case of *R v Hay* (1860)³⁷ impliedly recognised the privilege, it did not “displace the bulk of authority which, though inconclusive, is undoubtedly against the existence of the privilege”.³⁸

**Other common law offences: attempt to pervert the course of justice and other
accessorial offences (prior to 1990)**

Prior to its abolition by the commencement of the Part 7 provisions of the *Crimes Act* 1900 in 1990³⁹ the common law offences of perverting the course of justice, hindering⁴⁰ and aiding and abetting the commission of a crime were in existence. Such offences might potentially arise if a person intentionally hampered investigations, or withheld information, concerning a criminal matter with the intention of avoiding prosecution or perverting the course of justice (whether it concerned the person or another).

The gist of the common law offence of attempting to pervert the course of justice is “the doing of some act which has the tendency and is intended to pervert the administration of public justice”: *R v Vreones*⁴¹. For the purposes of the offence it is conduct which may lead, and is intended to lead, to a miscarriage of justice: *R v*

³⁶ Assented to 19 June 1995 in NSW

³⁷ 2 F & F 4; 175 ER 528.

³⁸ at [25315].

³⁹ See FN [1] above.

⁴⁰ I have not included a commentary on the common law offence of hindering an investigation, as it appears that there is little discussion in the case law as to how the Part 7 provision of hindering an investigation under s 315 of the *Crimes Act* 1900 differs from the common law. It is noted however that the s 315 offence concerns only those acts that hinder investigations, or the discovery of evidence concerning a serious indictable offence (carrying over 5 years imprisonment), whereas the common law is not so limited.

⁴¹ [1891] 1 QB 361.

Selvage.⁴² In *R v Edelsten*⁴³ the giving of a false medical certificate in order that an adjournment might be obtained was sufficient to justify the charge.

The High Court considered the extent of the application of the words ‘the course of justice’ in *R v Rogerson*⁴⁴ a case in which Roger Rogerson and two others had been charged with conspiring to pervert the course of justice by agreeing to fabricate or divert a police investigation into the possible commission of a crime. In that case, Mason CJ said (at 276):

[t]he course of justice relevantly includes the proceedings of judicial tribunals, that is tribunals having authority to determine the rights and obligations of parties and having a duty to act judicially. It has been suggested that ‘the course of justice’ and the ‘administration of justice’ include police investigations as such.. But police investigations do not themselves form part of the course of justice. The course of justice begins with the filing or issue of process invoking the jurisdiction of a court or judicial tribunal or the taking of a step that marks the commencement of criminal proceedings....I agree with the rejection.. of the proposition that the course of justice under consideration includes the investigation by the police of facts for the purpose of ascertaining whether or not a crime has been committed.

In this respect, it is important to note that the expression “the course of justice” is synonymous with the expression “the administration of justice”. In no relevant sense do the police administer justice, notwithstanding that they investigate crime, institute prosecutions (where appropriate) and assist in bringing prosecutions.”

At 277-278 his Honour further said:

It is well established at common law..that the offence of attempting or conspiring to pervert the course of justice at a time when no curial proceedings are on foot can be committed. That is because action taken before curial or tribunal proceedings commence may have a tendency and be intended to frustrate or deflect the course of curial or tribunal proceedings which are imminent, probably or even possible. In other words, it is enough that an act has a tendency to frustrate or deflect a prosecution or disciplinary proceeding before a judicial tribunal which the accused contemplates may possibly be instituted, even though the possibility of instituting that prosecution or disciplinary proceeding has not been considered by the police or the relevant law enforcement agency.

Brennan J and Toohey J (who formed part of the majority) in *R v Rogerson* said (at 280):

In the due exercise by a court or competent judicial authority of its jurisdiction to enforce, adjust or declare the rights and liabilities of person subject to the law in accordance with the law and the actual circumstances of the case...The course of

⁴² [1982] QB 372.

⁴³ (1990) 21 NSWLR 542; 51 A Crim R 397.

⁴⁴ *R v Rogerson* [1992] HCA 25.

justice is perverted (or obstructed by impairing ..the capacity of a court or competent judicial authority to do justice...Those ways comprehend..erosion of the integrity of the court ..hindering of access to it,...denying it knowledge of the relevant law or of the true circumstances of the case...

And at 283-84 said:

Although police investigations into possible offences against the criminal law or a disciplinary code do not form part of the course of justice, an act calculated to mislead the police during investigations may amount to an attempt to pervert the course of justice. An act which has a tendency to deflect the police from prosecuting a criminal offence or instituting disciplinary proceedings before a judicial tribunal or from adducing evidence of the true facts is an act which tends to pervert the course of justice and, if done with intent to achieve that result, amounts to an attempt to pervert the course of justice. ...

..The evidence must be capable of supporting at least – (1) an inference that the conspirators believed that the police might invoke the jurisdiction of a court or of some competent judicial authority or might invoke that jurisdiction unless the relevant act deflected them; and (2) a further inference that the conspirators either knew that the relevant act would have a manifest tendency to pervert the course of justice in a relevant respect or intended that the act should have that effect. It is not sufficient for the Crown to prove merely an intention to deceive the police.

The extent to which this term applies to police investigations has also been the subject of discussion: see *R v Einfield*⁴⁵ and *R v OM*⁴⁶. The term was said to apply to where curial proceedings are imminent or where the investigations could or might bring about proceedings: *R v Selvage* (at 380). In *R v Manley*⁴⁷ the offence was committed where a person gave a false account of a crime resulting in the police wasting their time in their investigations.

In contrast, in *R v Selvage* the court found that in order that there be an intention to pervert the course of justice, the accused must either know that judicial proceedings are on foot, or that they are imminent or might occur. In *R v OM* the Court (at 304), citing Mason CJ at 277-288 in *Rogerson* and *R v Murphy*⁴⁸ stated that it was “well established” at common law that the offence of attempting or conspiring to pervert the course of justice at a time when no curial proceedings are afoot, can be committed: “action taken before curial or tribunal proceedings commence may have a tendency

⁴⁵ [2008] 71 NSWLR 31 at 31.

⁴⁶ (2011) 212 A Crim R 293.

⁴⁷ [1933] 1 KB 529; *R v Withers* [1975] AC 842

⁴⁸ (1985) 158 CLR 596 at 609

and be intended to *frustrate* or *deflect* the course of curial....proceedings *which are imminent, probable or even possible.*"⁴⁹

Mason CJ observed that "the course of justice" is synonymous with the words "the administration of justice", and encompasses *attempts* to pervert the course of justice.⁵⁰

Defences available at common law

As to defences available to common law offences, other than disputes as to the establishment or proof of the elements of the offences, defences as to necessity⁵¹, duress⁵², insanity⁵³ and mistake⁵⁴ may arise.

POST 1990: PART 7 Division 2 CRIMES ACT 1900 (NSW) - INTERFERENCE IN THE ADMINISTRATION OF JUSTICE

Section 315: Hindering investigation

Section 315 as it currently applies is as follows:

- (1) A person who does anything intending in any way to hinder**
 - (a) the investigation of a serious indictable offence committed by another person, or**
 - (b) the discovery of evidence concerning a serious indictable offence committed by another person, or**
 - (c) the apprehension of another person who has committed a serious indictable offence, is liable to imprisonment for 7 years.**
- (2) For the purposes of subsection (1), a person is to be considered to have committed a serious indictable offence if a public officer engaged in the detection or investigation of offenders suspects on reasonable grounds that a person has committed the offence.**
- (3) It is not an offence against this section merely to refuse or fail to divulge information or produce evidence.**

⁴⁹ Emphasis added.

⁵⁰ *R v Carroll* [1913] VLR 380; *Archbold Criminal Pleading Evidence and Practice* 43rd ed (1988) London, Sweet & Maxwell at 2463.

⁵¹ *Dudley and Stephens* (1994) 14 QBD 273 (QB)

⁵² *Lawrence* (1980) 1 NSWLR 122

⁵³ *McNaughten* [1843-1860] All ER Reprints 229.

⁵⁴ *Proudman v Dayman* (1941) 67 CLR 536: mistake as to fact, not law.

‘Serious indictable offence’, defined at s. 4 means any offence that is punishable by penal servitude or imprisonment for five years or more.⁵⁵ As referred to above, s. 315 speaks of hindering an investigation of discovery of evidence of a serious indictable offence committed by “another person” and does not apply to a person who hinders an investigation relating to oneself: *R v Sagoa* (supra) at [77].

The term “hinder” is said to include any “obstruction or interference that makes an officer’s duty substantially more difficult in performance” *Plunkett v Kroemer*;⁵⁶ *Leonard v Morris*⁵⁷; and *Jones v Daire*⁵⁸. The term hinder also appears at s 546C of the *Crimes Act* 1900. Examples of the range of criminal conduct encompassed by this provision includes the following:

- encouraging and assisting a person to avoid police investigations by providing them with information: *R v Ibrahim*;⁵⁹
- assisting in the disposal of materials in order to avoid the discovery of evidence: *R v Deborah Grant*⁶⁰; *R v Ibrahim*⁶¹ *R v El-Zeyat*⁶²;
- giving false information on the whereabouts of an accused with intent to hinder their apprehension: *R v Kristine Weston*;⁶³
- hampering the discovery of evidence: *R v Hamze*;⁶⁴ and
- making a false statement to police: *R v Bailey*⁶⁵; and *Mobbs v The Queen*⁶⁶.

This offence, as opposed to the concealment provision in s. 316, requires a positive act, as opposed to an omission, or failure to act.

It is noted further, that the common law provision was wider than the s 315 *Crimes Act* 1900 offence, which restricts hinder to the hindering of the investigation into a

⁵⁵ *Crimes Act 1900* (NSW) s 311(1).

⁵⁶ [1934] SASR 124

⁵⁷ (1975) 10 SASR 528.

⁵⁸ (1983) 32 SASR 369.

⁵⁹ [2005] NSWSC 1028

⁶⁰ [2012] NSWSC 1491

⁶¹ [2005] NSWSC 1028

⁶² [2002] NSWCCA 138

⁶³ [2012] NSWSC 1498.

⁶⁴ [2005] NSWSC 136.

⁶⁵ [2006] NSWSC 49

⁶⁶ [2005] NSWCCA 438

serious indictable offence *committed by another*: see also *R v Imo Sagoa* [2014] NSWDC 44.

Section 315 requires some unlawful action to be proved. For example, the prosecution must prove that the appellant did something to hinder the investigation or discovery of evidence of a serious indictable offence.⁶⁷ The act must have the intention to hinder the discovery of the crime or the perpetrator in some way. It is necessary under s. 315(1)(b) that the accused be aware in a general way, of the nature of the primary offence that s/he was intentionally hindering from discovery. In *R v El-Zeyat*⁶⁸ (at 53 - 56) his Honour stated [emphasis added]:

First, the issue needs to be understood in the light of the traditional rule that criminal statutes, if ambiguous or doubtful, should be construed strictly, that is, in favour of the accused: see for example *Beckwith v The Queen* (1976) 135 CLR at 576 per Gibbs J, and *Murphy v Farmer* [1988] HCA 31; (1988) 165 CLR 19 at 28-29.

This has a relevance for the present case since it was open to the legislature, had it intended to give the wide potential operation to the legislation contended for by the Crown, to achieve that result when enacting s 313, for example by adding the words “*or the precise nature of that offence*”.

Secondly, there is the consideration that absent some general understanding or awareness of the nature of the primary offence, there is something of a logical difficulty in an accused forming an intention to hinder the discovery of evidence concerning *it*. Had the provision been directed to include cases depending on constructive knowledge of the primary offence, or upon wilful blindness or recklessness in relation to it, then it might have been expected that the legislature would have made that clear...

It follows, absent evidence in this case that the appellant was aware in a general way, of the nature of the primary offence, concerning which he was intentionally hindering the discovery of evidence, there should have been a directed verdict.

Section 313 of the Act provides that where it is an element of an offence under Part 7 that an offence is a serious indictable offence “*it is not necessary for the prosecution to establish that the accused knew that the offence was a serious indictable offence.*” Hunt J in *Keenan*⁶⁹ in outlining the mental element of the offence of hindering, pursuant to s. 545B of the *Crimes Act* 1900, stated (at 376-377):

⁶⁷ See *Sagoa* NSWDC 44: the questions to be resolved in this case were: 1) was there a false statement; 2) was it made with the necessary intent? 3) Did it hinder the police investigation of the murder? [65]

⁶⁸ [2002] NSW CCA 138; (2002) 9 Crim LN 37 [1427] (revised – 08/02/2005).

⁶⁹ (1994) 76 A Crim R 374.

As with any person's state of mind, it is the knowledge or belief of the person charged as to what the facts are which is relevant to the existence of the purpose which must be established by the prosecution, not the objectively true facts. The person charged may well have an erroneous belief as to what those facts are, but it is nevertheless that belief which will be relevant as to whether the result sought to be achieved by that person was that which is identified...

Defences available for section 315

Section 315(3) expressly provides that it is not an offence "against this section merely to refuse or fail to divulge information or produce evidence".⁷⁰ Possible defences to such an offence include a challenge to any of the elements of the offence; that the act was not linked to any actual knowledge (as to the commission of a serious crime); that the act of hindering was otherwise lawful; or that the person made an honest and reasonable mistake of fact resulting in the act (of hindering): *Proudman v Dayman*.⁷¹ In *Keenan* (above) Hunt CJ (at 376-377) referred to the honest belief based on reasonable grounds defence. Where this is raised, the prosecution must eliminate the possibility that the defendant had such a belief based on reasonable grounds.⁷² His Honour held that the prosecution may establish that either: (a) the defendant had no such honest belief; or (b) that there were no reasonable grounds for that belief.

Section 316: Concealing a serious indictable offence

Section 316 came into effect on the abolition of the common law offence of misprision of felony and compounding a felony.⁷³ The section stressed the public's duty to assist police in the execution of their duties and that "*not to do so should be a crime*".⁷⁴ In 1999 s. of the 316 *Crimes Act* was again amended following the case of *Petty and Maiden v The Queen*⁷⁵ with the Law Reform Commission issuing its report.

Section 316 is wider than the offence of misprision of felony, in that a 'belief' that an offence has been committed which might materially assist the authorities, is all that is

⁷⁰ The refusal to divulge known information, without reasonable excuse, is of course provided by s 316 of the *Crimes Act* 1900.

⁷¹ *Proudman v Dayman* (1941) 67 CLR 536.

⁷² *Dziduch* (1990) 47 A Crim R 378. See also *Youssef* (1990) 50 A Crim R 1 at 3-4.

⁷³ *Crimes Act 1900* (NSW) s341.

⁷⁴ Attorney General Mr Dowd, Hansard Legislative Assembly 17 May 1990, 3694.

⁷⁵

required. This imposes a duty on a person who has direct or indirect knowledge of evidence to report the crime to the appropriate authorities.

As with the common law provision, the subjective mental element concerning an offence under s. 316 is 'knowledge or belief'. The section clearly applies to a person where the offender has confessed to that person. This mental element would apparently exclude 'bragging' that a person believed to be baseless or exaggerated. However, the section is said also to apply where a person has information (other than an admission or confessions) about other real or circumstantial evidence of an offence.

Section 316 provides as follows:

(1) If a person has committed a serious indictable offence and another person who knows or believes that the offence has been committed and that he or she has information which might be of material assistance in securing the apprehension of the offender or the prosecution or conviction of the offender for it fails without reasonable excuse to bring that information to the attention of a member of the Police Force or other appropriate authority, that other person is liable to imprisonment for 2 years.

(2) A person who solicits, accepts or agrees to accept any benefit for himself or herself or any other person in consideration for doing anything that would be an offence under subsection (1) is liable to imprisonment for 5 years.

(3) It is not an offence against subsection (2) merely to solicit, accept or agree to accept the making good of loss or injury caused by an offence or the making of reasonable compensation for that loss or injury.

(4) A prosecution for an offence against subsection (1) is not to be commenced against a person without the approval of the Attorney General if the knowledge or belief that an offence has been committed was formed or the information referred to in the subsection was obtained by the person in the course of practising or following a profession, calling or vocation prescribed by the regulations for the purposes of this subsection.

(5) The regulations may prescribe a profession, calling or vocation as referred to in subsection (4).

As stated, s. 4 of the Act defines a 'serious indictable offence' as an indictable offence that is punishable by imprisonment for life or for a term of 5 years or more. Section 313 of the Act provides that where it is an element of an offence under Part 7 that an offence is a serious indictable offence "*it is not necessary for the prosecution to establish that the accused knew that the offence was a serious indictable offence.*"

On 30 March 1998 the current sub-sections (3) and (4) were added.⁷⁶ These subsections were introduced following a review of s. 316 by the Criminal Law Review Division of the Attorney General's Department in 1996, which recommended that the Director of Public Prosecutions be required to consent to s. 316 prosecutions of prescribed categories of people, who included members of the clergy, lawyers and medical practitioners.⁷⁷ This indicates, that unlike the apparent position at common law as stated by Lord Denning in *Sykes* (supra) above (at 564), the express intention of the parliament was that legal, or other professional privileges, do not act as a complete shield from prosecution.

It should be noted that this provision is still viewed as contentious and in the majority of prosecutions of this offence, the offenders were in some way either directly or peripherally involved with the offences they were charged with concealing.⁷⁸

Cases in which this provision has been relied upon involve the following range of conduct:

- Concealing the commission of a murder by omitting important facts during a police interview and providing deliberately false facts, including that stating that “she knew nothing about the offence”;⁷⁹
- The offender concealed his own involvement in an offence during a police interview⁸⁰;
- The offender failed to inform police of an offence of murder after the accused confessed to him⁸¹; or after he otherwise became aware of the fact⁸²; or after he had witnessed the offence⁸³; and

⁷⁶ *Crimes Legislation Amendment Act No 85 1997* (NSW).

⁷⁷ Working Party of the Criminal Law Review Division on Section 316 of the Crimes Act, *Minutes of Meeting*, 14 March 1996 at 2.

⁷⁸ *R v Cqd* [2002] NSWSC 732 (23 August 2002); *Podesta v R* [2009] NSWCCA 97 (8 April 2009); *R v Carroll* [1999] NSWSC 825 (12 August 1999).

⁷⁹ *Podesta v R* [2009] NSWCCA 97.

⁸⁰ *R v Cqd* [2002] NSWSC 732; see also *R v Mastronardi* [2000] NSWCCA 12. Note however this approach differed from the acquittal of the s. 316 charge laid in *R v Sagoa* (supra) where Haesler considered the accused's concealment of the offence, (by lying about his presence and the actions of others), was a lawful excuse in that he did not wish to incriminate himself (at [77]).

⁸¹ *R v Clark* [2001] NSWCCA 494; *R v Kerr* [2003] NSWCCA 234.

- The offender made a false statement to police in an attempt to conceal an offence committed by her boyfriend⁸⁴.

Section 316 is wider than the offence of misprision of felony, in that a ‘belief’ that an offence has been committed which might materially assist the authorities, is all that is required. This imposes a duty on a person who has direct or indirect knowledge of evidence to report the crime to the appropriate authorities.

As with the common law provision, the subjective mental element concerning an offence under s. 316 is ‘knowledge or belief’. The section clearly applies to a person where the offender has confessed to that person. This mental element would apparently exclude ‘bragging’ that a person believed to be baseless or exaggerated. However, the section is said also to apply where a person has information (other than an admission or confessions) about other real or circumstantial evidence of an offence. The term ‘information’ has been said to include information in the nature of hearsay, as well as information that would be admissible in court as evidence.⁸⁵

As stated, an obligation to report only arises if the person had the requisite ‘knowledge’ or ‘belief’ that such an offence had taken place. ‘Information’ therefore in the nature of hearsay, may arguably effect whether actual knowledge exists. Much legal discussion exists as to meanings of these terms, as is referred to above. As stated in the case of the common law offence above, ‘wilful blindness’ to the facts, whilst not a form of *mens rea*, is simply an aspect of the subjective proof of knowledge, although it may sometimes be treated as equivalent to knowledge or to constitute recklessness. Whilst existence of suspicion or suspicious circumstances, and the deliberate failure to make inquiries may, depending on the circumstances be of evidentiary significance in relation to that ultimate question, a wilful shutting of the

⁸² *R v Phillip Paul Carroll* [1999] NSWSC 825; *R v Davis* [1999] NSWSC 875; *R v Perry* [2012] NSWSC 1645.

⁸³ *R v Tuan Duc Thai* [2004] NSWSC 1204.

⁸⁴ *R v Lawrence* [2004] NSWCCA 404: The offence in question was a serious assault of their neighbour, which later resulted in death. After the neighbour died, the original charge of ‘concealing a serious indictable offence’ was dropped and the offender was charged with murder. See also *Stock v R* [2011] NSWCCA 49; *R v Om* [2011] NSWCCA 109.

⁸⁵ NSW Law Reform Discussion Paper 39 “Review of Section 316 of the *Crimes Act 1900* (NSW), [2.4].

eyes to avoid suspicion hardening into actual belief is insufficient if that is all there is to it: see Gleeson CJ in *R v Schipanski* (1989) 17 NSWLR 618. His Honour noted therein the comments made by the plurality of the High Court in *Pereira v Director of Public Prosecutions* (as referred to above).

His Honour Woods CJ at CL of *R v El-Zeyat*⁸⁶, (at 49 - 51) said [emphasis added]:

The differences in the ways in which these public justice offences have been formulated does not assist in the resolution of the present issue. All that is common to them is the fact that the Crown need not prove that the accused knew that “the offence” which was committed, that being the expression used in s 313, amounted in law to “a serious indictable offence”.

In these circumstances I find the question at issue particularly difficult of decision. On the one hand it may be that the legislature did not intend to narrow the ambit of the provision to cases where the accused knew of the precise facts going to establish the *specific* primary offence which had been committed, and intended to bring within its sphere of application those who acted with reckless indifference as to what the primary offender had done, although with the intention of assisting him or her to escape detection for whatever that might have been.

On the other hand, it might be thought unreasonable to impose criminal liability, under s 315, upon a person who, having good cause to believe or suspect some act of criminality had occurred, but not knowing what it was, even in a general sense, then acted in the relevant way provided by the section.

The third criteria of this offence concerns whether the information *might* be of material assistance in securing the apprehension, prosecution or conviction of the offender. The word ‘might’ must arguably be read in context with the word ‘securing’. This is again a difficult test to assess without the benefit of hindsight, given an admission to a crime ‘*might*’ be crucial to securing a prosecution (or a conviction) if it exists together with other evidence. It is difficult to say in what circumstances information might become of ‘material assistance’ in the manner stated without particulars. Some information may be useless on its own, or useful for intelligence purposes only, or if used in conjunction with other evidence, obtained as a result of this initial information, crucial. However, the use of the word ‘might’ indicates that the information need only potentially be of ‘material assistance’.⁸⁷

⁸⁶ [2002] NSW CCA 138

⁸⁷ The New South Wales Law Reform Commission Report 93 on the Review of Section 316 of the Crimes Act 1900 (NSW) referred at p 37 to submissions made that these beliefs included “speculative, unjustified or paranoid” beliefs, with no requirement that they be reasonably held.”

Woods QC DCJ in *Leota v R*⁸⁸ confirmed that s. 316 did not require reporting to police a suspicion of serious wrongdoing generally. His Honour emphasised that there must be a requisite mental state, not only that a serious offence has been committed, but that it was committed by a particular person. Only after these factors were proved should the term “might be of material assistance” be considered. Again that possibility must relate to a known crime believed to have been committed by a particular person, and suspicion will not suffice.

Finally, s. 316(1) requires the person to report the information, derived from knowledge of an offence, to a “member of the police force or other appropriate authority”. Other appropriate authority is not defined. Potentially an argument could be made that the requirement to report the knowledge of an offence was met by the passing of the information up the chain of authority within the work place. Alternatively, a reasonable excuse defence, might be argued in that the information was passed on with the honest and reasonable belief that it was the job of the next person to report it.

Defences to 316 offences

The section provides for a ‘defence’ of ‘reasonable excuse’. As in the case of misprision of felony, certain relationships may provide a ‘reasonable excuse’ as to why knowledge of abuse was not reported. The accused bears the onus on the balance of probabilities of establishing the existence of a reasonable excuse, and the prosecution bears the onus of proof establishing the absence of reasonable excuse beyond a reasonable doubt. If there is no evidence of a reasonable excuse the prosecution have no duty or obligation to rebut it. If the defence wish to avail themselves of the ‘defence’ the reasonable excuse must be raised in or by evidence, however it is not essential that an accused give evidence to meet that evidentiary burden.⁸⁹

⁸⁸ [2007] NSWDC 146.

⁸⁹ Per A Haelser SC in *Sagoa* NSWDC 44 at [36]. See also *He Kaw The* [1985] HCA 43; *CTM v The Queen* (2008) 236 CLR 440.

The term 'reasonable excuse' is of wide import. It has been used in many statutes and is the subject of many reported decisions. However, a distinction is to be drawn between the terms 'reasonable grounds' and 'reasonable excuse', and decisions on other statutes may provide no guidance because what is a reasonable excuse depends not only on the circumstances of the individual case but also on the purpose of the provision to which the defence of "reasonable excuse" is an exception."⁹⁰

In *R v Bikic* [2001] NSWCCA 537 at [13] –[15], Giles GA referring to s128 of the *Evidence Act* 1995 examines the term 'reasonable grounds' in a statutory context: "reasonable grounds for an objection must pay regard to whether or not the witness can be placed in jeopardy by giving the particular evidence."

In *R v Crofts*⁹¹, the court held that the section had "many potential difficulties" the chief of which was the term "without reasonable excuse". Gleeson CJ stated:

The evaluation of the degree of culpability involved in a contravention of s. 316 of the *Crimes Act* could, depending upon the circumstances of the individual case, be an extremely difficult exercise. For that matter, as Meagher JA has mentioned, depending upon the circumstances of an individual case, it may be extremely difficult to form a judgment as to whether a failure to provide information to the police was "without reasonable excuse."

With reference to s. 316, the lawyer/client relationship may be argued to be a basis for a reasonable excuse for failure to inform. There is no case law that I have found on the relationship of s. 316 and the doctrine of legal professional privilege although it is arguable that the principles referred to in the case of misprision of felony, expressed by Lord Denning in *Sykes* (supra at 564) apply.

As with the common law offence, silence might also be a basis of a reasonable excuse argument in circumstances that the information might impinge upon the privilege against self-incrimination, where the actions of a third person may involve an element of accessory liability.⁹² As in the discussions of the right of silence in respect of the common law offence of misprision of felony, the magnitude of the concealed offence and the insignificance of the apprehended prosecution, may impact upon the

⁹⁰ *Taikato v The Queen* (1996) 186 CLR 454.

⁹¹ [1995] NSWCCA unreported, 10 March 1995.

⁹² *Petty v The Queen* (1991) 173 CLR 95

effectiveness of the defence.⁹³ As noted by the NSW Law Reform Commission “self incrimination would not always excuse concealment of an offence at common law particularly where there is a gross discrepancy between the magnitude of the offence and the apprehended prosecution.”⁹⁴

The relationship between the right to silence and the defence of “reasonable excuse” is discussed by Judge Haesler in *Sagoa* (supra) at [33] on.

No doubt the nature of the relationship, and the public policy considerations in protecting the privileged nature of relationships, that a person has with the confiding perpetrator (be that as a priest, lawyer or health worker), whilst not providing a defence under the provision, led to the enactment of Regulation 4(g) of the *Crimes Regulations* 2010 NSW:⁹⁵

4(g) Concealment of offences by certain persons

For the purposes of section 316 (5) of the Act, the following professions, callings or vocations are prescribed:

- (a) a legal practitioner
- (b) a medical practitioner
- (c) a psychologist
- (d) a nurse
- (e) a social worker, including:
 - (i) a support worker for victims of crime, and
 - (ii) a counsellor who treats persons for emotional or psychological conditions suffered by them,
- (f) a member of the clergy of any church or religious denomination
- (g) a researcher for professional or academic purposes
- (h) if the serious indictable offence referred to in section 316 (1) of the Act is an offence under section 60E of the Act, a school teacher, including a principal of a school
- (i) an arbitrator
- (j) a mediator.

Read in conjunction with s 316(4) it is clear that the categories provided for by the Regulations do not operate as exemptions from prosecution. The provision simply operates so that if the conduct was not reported and the police became aware of the “concealment” then no prosecution could take place without first obtaining the approval of the Attorney General, (or from 6 August 2012, the Director of Public

⁹³ See *King v R* [1965] 1 WLR 706, 49 Cr App R 140 at 145-146; and *Lovegrove* (supra) at 334.

⁹⁴ NSW Law Reform Commission in Report 93 at 3.14

⁹⁵ *Crimes Legislation Amendment Act 1997* (NSW) proclaimed on 30 March 1998. There are no transitional provisions concerning the operation of these amendments.

Prosecutions).⁹⁶ The DPP would then exercise their discretion, in accordance with DPP Guidelines, as to the public interest in proceeding with a prosecution, in the circumstances of the knowledge, failure and relationship between the perpetrator of the abuse and the person with the knowledge. The scope of the amendment was referred to in the Second Reading Speech of the Crimes Legislation Amendment Bill 1997. With apparent reference to the “reasonable excuses” provided for at common law, Mr Amery, on behalf of Mr Whelan Minister for Police and Emergency Services, stated that “the requirement for the Attorney General’s approval for prosecution is not to be interpreted as limiting in any way existing protections and privileges that may apply to particular professional or other groups”.

s. 319: General offence of perverting the course of justice

Section 319 provides as follows:

A person who does any act, or makes any omission, intending in any way to pervert the course of justice, is liable to imprisonment for 14 years.⁹⁷

Perverting the course of justice is defined at s. 312 as “obstructing, preventing, perverting or defeating the course of justice or the administration of the law”.⁹⁸

In order to be found liable for the statutory provision of perverting the course of justice, two elements must be proven:

- (1) the accused must have committed an act or made an omission and
- (2) the act or omission must have been committed with the intention of perverting the course of justice.

Sully J in *Finnie v R*,⁹⁹ held that the course of justice includes, “*an investigation by police as to whether they should withdraw a charge or continue to prosecute the charge,*” emphasising that the context in which an act occurred is very important in determining a person’s intention. His Honour held that intention must be measured at

⁹⁶ Dan Box, “Victim of priest felt no clergy listened”, *The Australian*, 6/8/2012, p 5.

⁹⁷ This is different to the s. 140 *Criminal Code Act 1899* (Qld) which does not include an omission.

⁹⁸ *Crimes Act 1900* (NSW) s 312.

⁹⁹ *Finnie v R* [2007] NSWCCA 38

the time that the relevant act was done, from the perspective of the accused and not a reasonable person.

Unlike the hinder provisions, an omission to act can act to “pervert the course of justice.” Additionally this provision (despite its higher penalty provision) is not limited to serious indictable offences, but applies to all offences, where the elements are satisfied.

The offence includes any conduct, which is intended to lead to a miscarriage of justice whether or not a miscarriage actually occurs. As stated, it encompasses both a positive act and an omission.¹⁰⁰ In *Meissner v The Queen*¹⁰¹ the court stated (at 144):

[i]t isn't necessary for the accused to have high-minded notions of justice in order to be guilty. It's sufficient to make out the offence if the accused intentionally engaged in the acts which, at law, constitute an attempt to pervert the course of justice.

The passages referred to in the consideration of the phrase “course of justice”, cited above, in consideration of the common law offence *R v Rogerson* (above) were relied upon by the plaintiff in the recent proceedings before Hoeben CJ at CL in *Cunneen and Ors v Independent Commission Against Corruption (ICAC)* [2014] NSWSC 1571 (at [79]). In that case the plaintiff argued that the term “course of justice” included a reference to the due exercise of a court or competent judicial authority of its power to enforce, adjust or declare the rights and liabilities of persons in accordance with the law. This was argued that the allegation that the plaintiff had sought to influence the course of an investigation by police by encouraging a course of behaviour in respect of a motor vehicle accident, was not an attempt to influence any court, tribunal or “competent judicial authority”. In this way it was argued that ICAC did not have jurisdiction to investigate the matter as the power to investigate “corrupt conduct” was not invoked under s 8(2)(g) of the *ICAC Act* 1988.

¹⁰⁰ In *Leanne Tracey Church v R* [2012] NSWCCA 149, the accused was charged with perverting the course of justice by omission for failing to correct the inference that she had cancer. This resulted in the Judge sentencing the accused to a community service order rather than a custodial sentence as a result of her ‘illness’. The scope of the offence was considered in *Einfeld v R* (2008) 252 ALR 375.

¹⁰¹ *Meissner v The Queen* (1995) 184 CLR 132.

The plaintiff in *Cunneen v ICAC* (supra) relied upon the passage in *Einfeld v R* [2008] NSWCCA 215, 71 NSWLR 31 at [89]-[99], which considered the potential for overlap with the provisions under s 315 and 316, if the phrase “the course of justice” was too generously interpreted. The Court (Bell, RS Hulme and Latham JJ) said at [89] [emphasis added]:

“The administration of the law” does not readily describe the role of the police in the investigation of crime. Expressions such as the “enforcement of the law” or the “investigation of crime” would seem more apt if it were Parliament’s intention to include within the offence of perverting the course of justice conduct involving the obstruction or perversion of a police investigation, in circumstances in which the offender did not have curial proceedings in contemplation. In our opinion, the scheme of Pt 7 does not suggest that Parliament intended to include police investigations within the umbrella of “the course of justice: for the purpose of the offence of perverting the course of justice.” This is because of the exactitude with which the offences in ss 315 and 36 were drafted....Section 315 is confined to conduct involving the intentional hindering of the police in the investigation of a serious indictable offence. It would seem anomalous, given the provision for these specific offences involving conduct intended to obstruct the police in the investigation of serious crime, if the Court were to construe s. 310, by reason of the definition in s. 312, as including any conduct intended to obstruct the police in the discharge of any function involving, applying or enforcing any law of the State.

The court in *Einfeld* held that the words “the administration of the law” were not to be construed literally so as to apply to every function of any government body applying and enforcing the law of the State. The words were held to be interpreted in the traditional sense as applying to “the administration of the civil and criminal law by courts and tribunals”. In that case it was held that the offence did not apply to a false statement (by statutory declaration) made in respect of motor traffic infringements.

Hoeben CJ at CL at [84] in *Cunneen v ICAC* did not accept the underlined reference in *Einfeld* as a correct statement of the law if taken in isolation, and considered it contrary to the majority in *R v Rogerson* and to *R v OM* (above) (and *R v Murphy* (above)), which confirmed that the offence could occur at a time when no curial proceedings are afoot. At [87] Hoeben CJ at CL, held in line with *Rogerson*, that interference with a police investigation with the intention of deflecting criminal or disciplinary proceedings can amount to perverting the course of justice or an attempt to do so. As was the case in *R v OM* [2011] NSWCCA 109, (at 301-307) involving

the offender seeking to persuade two persons to make false statements to the police that he was not present in a motor vehicle at a particular time where a false statement made to a police officer will constitute the offence if it had a tendency to pervert the course of judicial proceedings and if it was made with the intention to do so. Similarly, the Court of Criminal Appeal in *Michael v R* [2014] NSWCCA 2 upheld a conviction of an offence contrary to s. 319 where the offender sought to persuade a potential witness to tell the police that he could not remember who was driving his car at a particular point in time, when in fact he did have such a recollection.

The Court of Appeal in *Cunneen v ICAC* [2014] NSWCA 421, agreed with Hoeben CJ at CL that the conduct alleged of the applicant was conduct which could amount to an attempt to pervert the course of justice charge under s. 319 (although Bathurst CJ differed as to whether the conduct would amount to corrupt conduct under the ICAC Act) (see [9]-[12]). Basten and Ward JA agreed at [83]-[91] (but found that the the alleged conduct did not fall within the scope of ICAC's functions).¹⁰²

Further examples of conduct founding a prosecution under this provision are as follows:

- After a car altercation, the offender urged his daughter to lie to the police; and subsequently a friend to provide a false account to the police¹⁰³;
- The offender signed a number of false statutory declarations asserting that he was not driving his vehicle at the time of receiving a number of camera-detected traffic offences¹⁰⁴;
- The accused attempted to bribe a police officer in order to neutralise a prosecution which he was sworn to support as a key witness¹⁰⁵;

¹⁰² This decision is subject to appeal to the High Court of Australia, and was heard on 4 March 2015 but no decision has yet been delivered. The focus of the appeal is that that whilst the allegation being investigated could amount to perverting the course of justice it could not amount to conduct that "adversely affects..the exercise of official function by any public official within the meaning of s 8(2) of the ICAC Act.

¹⁰³ *R v OM* (supra); *R v Thurlow* [2007] NSWSC 1203

¹⁰⁴ *Einfeld* (supra); *R v Subramaniam* [2002] NSWCCA 372

¹⁰⁵ *Marinellis v R* [2006] NSWCCA 306

- Contacting the victim of an offence for which he was charged and offering her money not to attend court for the bail hearing or trial¹⁰⁶;
- Calling false evidence in court¹⁰⁷;
- A police officer pursuing a course of conduct in order to procure a person to plead guilty to a charge knowing the person was not guilty of the charge¹⁰⁸;
- Tampering with the physical evidence¹⁰⁹; and
- Failing to correct a deliberately false impression made by the calling of evidence¹¹⁰.

Sophia Beckett

Forbes Chambers

¹⁰⁶ *White v NSW Commissioner of Police* [2012] NSWSC 1556 ; see also *R v Mrish* [2000] NSWCCA 17; and *R v a R D* [2000] NSWCCA 443

¹⁰⁷ *Finnie v R* [2007] NSWCCA 38

¹⁰⁸ *R v Ngoc Anh* [2004] NSWCCA 332

¹⁰⁹ *R v Patison* [2003] NSWCCA 171

¹¹⁰ *Church v R* [2012] NSWCCA 149