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ional Crimes Commission?

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**INSTITUTE OF CRIMINOLOGY  
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**INSTITUTE OF CRIMINOLOGY  
SYDNEY UNIVERSITY LAW SCHOOL**

**Proceedings of a Seminar on**

**A NATIONAL CRIMES COMMISSION?**

**CHAIRMAN:**

*The Honourable Sir Laurence Street,  
Chief Justice, Supreme Court, New South Wales*

21 September 1983  
State Office Block, Sydney

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## FOREWORD

*The Hon. Justice M.D. Kirby, CMG\**

### A Timely Meeting

The sober, scholarly gathering of the Australian and New Zealand Association for the Advancement of Science (ANZAAS) was an unlikely venue at which to launch a major national controversy about organised crime in Australia. Yet in May 1983 in the beautiful setting of the University of Western Australia, on the banks of the Swan River, Mr Douglas Meagher, QC, Counsel Assisting the Royal Commission into the Federated Ship Painters' and Dockers' Union (the Costigan Commission), delivered a three hour *resumé* of his perception of organised crime, from the viewpoint of that major national inquiry. The picture he painted — of prostitution, pornography, race fixing, tax rackets and so on spread like wildfire around the nation — indeed around the world. Suddenly, the 'lucky country' was portrayed as a land increasingly overtaken by drug pedlars, vice racketeers and corrupted officials.

All of this happened, as Mr Bob Bottom points out in the papers of this seminar, on the tenth anniversary of the first of the recent series of Australian Royal Commissions of Inquiry into aspects of organised crime. That was the Moffitt Royal Commission. Justice Moffitt's work was soon followed by the labours of Justices Philip Woodward, Williams, Edward Woodward, Stewart, the Costigan Inquiry that brought Mr Meagher into the arena, and numerous other past and current investigations, great and small. Words like 'cancer in our midst', 'Mr Big', 'wild beasts of crime' and 'corruption out of control' became commonplace. Banner headlines screamed anxiety at commuters as they proceeded home. Even the magistracy and Ministers of the Crown were said to be involved. In these circumstances, it seemed, the ordinary forces of law and order were breaking down. Long established ways of controlling crime in Australia appeared to be failing. Something more, it was claimed, was necessary.

In the wake of the revelations of the early reports of the Costigan Commission, the Fraser Administration had introduced and secured the passage through Federal Parliament of the National Crimes Commission Act 1982. It was an important piece of legislation, hastily put together. It provoked much opposition during the debate in Federal Parliament. Moreover, it attracted the opposition of State Governments of differing political persuasions, both because of its terms and because of the haste with which it had been enacted. A Queensland judge (Sir Edward Williams) was named to head the new body. But when the writs were issued for the Australian General Election held in March 1983, the Act had not been proclaimed to commence. It remains in this legislative limbo to this day.

The Hawke Administration adopted a more cautious stance. The indefatigable new Federal Attorney-General, Senator Gareth Evans, was sensitive to the unusual combination of opposition ranged against the 1982 statute. In the hope of attracting a consensus around the need for action and the design of a more appropriate response, Senator Evans issued a consultative

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document. This document canvassed the problem of organised crime in Australia and the models, compatible with the Federal Constitution, that could be adopted to address that problem. One model was a kind of permanent Royal Commission: an inquisitor and prosecutor. The other was more like an intelligence-gathering unit designed to assist the established agencies of the police and prosecutors to perform their tasks more effectively.

To debate these models, other possibilities or just simple opposition to any form of Crimes Commission, the Attorney-General summoned a number of participants to a meeting in the Australian Senate Chamber at Parliament House, Canberra, on 28-29 July 1983. On the plush red leather benches, where the Senators normally sit, gathered an unusual collection of commentators: State Government delegations, Judges, Royal Commissioners, past and present, Police Commissioners and police unionists, representatives of the organised legal profession and of Councils for Civil Liberties.

The meeting was opened by the Prime Minister, Mr Hawke. There were, he said, three distinct levels to the questions which had to be asked and answered:

First, is the problem of organised and sophisticated crime such that some further and better investigatory machinery than we have at present is needed to cope with it? Secondly, if the answer to that first question is yes, is the concept of a standing Crimes Commission preferable to alternative approaches, including in particular upgrading the powers and capacity of the police and continuing ad hoc Royal Commissions and Inquiries? Thirdly, if a National Crimes Commission is a preferred alternative, what should the precise functions, powers and composition of that Commission be?

Driven remorselessly by Senator Evans and Mr Kim Beazley, MP, Special Minister of State and therefore minister responsible for Federal police affairs, the participants addressed themselves to these issues over the two-day meeting. They are the issues which are also addressed in these proceedings of the Institute of Criminology. Indeed, some of the participants in the Institute's seminar also attended the meeting in Canberra. Others, such as Dr Boothwaite and Mr Bottom, were not invited to participate in Canberra. From different perspectives, they offer a vigorous critique of and an alternative viewpoint upon the conclusions which Senator Evans offered at the end of the national conference. Summing up the meeting in the Senate Chamber, Senator Evans indicated:

Clearly the notion of a National Crimes Commission with a full range of Royal Commission-type powers on a standing permanent basis and with very wide jurisdiction . . . is not likely to command much acceptance on the evidence of these last two days . . . The strongest measure I discerned in discussion was support for the graduated response approach of the kind . . . where police, assisted by special investigators, exercised traditional powers and further down the track contemplate a Royal Commission inquiry.

### **The Proponents**

As at the Canberra conference, the Institute's seminar divided quite sharply between the vigorous supporters of a National Crimes Commission, the sceptics and those, frankly unconvinced, who at this stage were opposed.

The paper by Mr Bottom, now a journalist and formerly Special Adviser on Organised Crime to the New South Wales Government, is emphatic. If only there had been a Crimes Commission 10 years ago, if only the Moffitt Royal Commission had enjoyed wider powers and a wider reference, the current Australian problems of vice, illegal gambling and tax frauds would not have reached their epidemic proportions. According to Mr Bottom, the Royal Commissions since Justice Moffitt's inquiry have clearly established the need not only for a National Crimes Commission but for State Commissions as well to supplement them. The underworld has mushroomed. It is corrupting the police, the media, the legal and accounting professions. It stretches to organised shoplifting, arson and even bird smuggling, illegal immigration, social security fraud and so on. Most frightening of all, it has now infiltrated the formerly virtually impregnable fortresses of high Crown service — even the Federal Attorney-General's Department.

Reaching similar conclusions is the contribution of Mr John Hatton, MP, an independent Member of the Legislative Assembly of New South Wales. Mr Hatton has for many years been campaigning for action to tackle the insidious effect of corrupting crime. Amongst his chief concerns is the need to provide the ordinary citizen with a neutral trusted venue for legitimate complaints, to which he can resort without fear of retaliation, intimidation or whitewash. Mr Hatton concedes the need for law reform in some of the areas of the law that give rise to corruption — laws on gambling, vice and drugs — where there are few complaining victims and where modern Australian society exhibits ambivalent values. But he is unconvinced that law reform alone can adequately tackle the problems of modern crime. The law lags behind. The parliamentary process is extremely slow — an observation proved by the failure of the NSW Parliament in 1982 to reform the laws on homosexual offences. And there is a vital need for immediate solutions to urgent problems.

Mr Hatton is not singleminded. He concedes the need for additional, supplementary reforms. These include a role for multipartisan parliamentary committees. They also include reform of the police, so that improved recruitment and personnel procedures will ensure higher standards. But he feels that the centralisation of our society and the impersonal nature of the modern Australian urban community provide a splendid breeding ground for crime. Our present instruments of social retaliation are inadequate and need reinforcement.

### **The Critics**

The critics of the proposal to establish a National Crimes Commission found an articulate voice in Professor Richard Harding, Dean of Law in the University of Western Australia and more recently appointed Director of the Australian Institute of Criminology in Canberra. Professor Harding is frankly sceptical about the assertions by Mr Douglas Meagher and others concerning organised crime. To dismantle fundamental principles of criminal justice and basic rules in the relationship between authority and the individual, something more is needed than the assertion of a few commentators, however distinguished. It must be proved, says Richard Harding. When questioned, he asserted that it must be proved to him — to ordinary citizens, not simply to Royal Commissioners and governments. At stake is nothing less than our traditional civil liberties.

Professor Harding's scepticism about the so-called 'Meagher report' to ANZAAS was heightened by the absence of substantial factual material, the inaccuracy of at least one factual matter that could be checked and the tendency as in overseas cases to chase folk devils rather than, boringly enough, paying attention to systematic improvement of the law and of its enforcement bureaucracy. Furthermore, Professor Harding's caution was enlivened by what he called the 'organised moral panic' engendered by supporters of the National Crimes Commission. All too often they adopted a simplistic diagnosis of the problem and then ventured simplistic solutions to match. Whilst prepared to contemplate the comprise proposal suggested by Senator Evans at the close of the national conference in the Senate Chamber, Professor Harding emerges from these pages as distinctly unconvinced. He appears dubious that a Crimes Commission could be designed with adequate protections. Instead, Professor Harding repeats the call for the attention to the difficult business of law reform and the seemingly intractable problems of raising the quality and integrity of police by adopting new and more imaginative personnel and recruitment policies for police and other law enforcement agencies.

To the same point is the contribution of Mr John Marsden, a Sydney solicitor and now President of the NSW Council for Civil Liberties. Mr Marsden was a participant at the Canberra conference. He reviews the unusual combination of voices that expressed doubts at that conference. In particular, he calls attention to the telling reservations voiced in the Senate Chamber by Justice Alastair Nicholson of the Supreme Court of Victoria. That judge, who had himself conducted a relevant inquiry into criminal activities, had said:

If one is to look for historical comparisons with the National Crimes Commission I would equate this proposal in terms of potential danger with the Communist Party Dissolution Bill of the 1950s ... I doubt if there is a real community awareness of the extent of the affront to privacy and liberty involved in the conferring on a Royal Commission or similar body of compulsory powers to examine witnesses or produce documents. I must confess that I now appreciate the enormity of such power. I must confess that I had not appreciated the enormity of such powers myself until I was firstly in a position of being able to procure their exercise as Counsel assisting an inquiry and secondly when I exercised such powers myself, when conducting an inquiry.

### The Uncommitted

Between these polar responses to the National Crimes Commission came the cautious and the uncommitted. Dr John Braithwaite was irritated by the assumption of participants that the problem of organised crime could be tackled by locking up more criminals, especially big criminals. He pointed to the experience in the United States and the 'displacement factor'. Destroying the large organised criminals of one city simply left a vacuum that was soon filled by enthusiastic replacements from other cities — perhaps worse than those locked up. The *National Crimes Commission Act 1982* established, *de facto*, a Grand Jury system akin to that operating in the United States. But it did so without the backdrop of constitutional guarantees in favour of due process and against self-incrimination. Dr Braithwaite makes the important point that a Crimes Commission can succeed even without successful

prosecutions. He cites the alert provided by the early Costigan report concerning the national problem of bottom-of-the-harbour tax evasion schemes. But he cautions about the need to introduce any such new institution under the discipline of a legislative 'sunset clause' and constantly to evaluate and monitor its performance for its impact on traditional civil rights.

Professor Duncan Chappell, now of Simon Fraser University in Canada, also produced a paper for the ANZAAS Congress in Perth. It did not attract the coverage given to Mr Meagher's effort. It is reproduced here, with Professor Chappell's permission. It provides a useful commentary on likely future directions in the investigation of crime. Its special value is its reference to North American experience with Crimes Commissions. It points out that in British Columbia, Canada, where Professor Chappell is now resident, the establishment of a Crimes Commission was rejected by the government in favour of reliance upon expanding the resources of existing law enforcement agencies. Professor Chappell returns to his oft-repeated themes: the need for better recruitment and personnel policies in the established police forces, the need for a more scientific approach to criminal law enforcement and the need for better co-ordination of law enforcement agencies within Australia.

It is this last point that Professor Richard Harding asserts to have been the chief value of the Australian national debate on a Crimes Commission. Now, at last, it is realised that the constitutional division of responsibility for the criminal law may not necessarily be appropriate for the problems of crime in today's generation. Crime, nowadays, ignores State and even national boundaries. With the development of computers and means of rapid transport, this reality will become increasingly obvious in the years ahead. The substantial confinement of law enforcement effort to State jurisdictions weakens the response of organised Australian society. Efforts of the past to secure co-operation between State law enforcement agencies have generally foundered on the rock of jurisdictional and institutional jealousies, so rife in Australia. Now, it is increasingly realised that better co-ordination and co-operation of law enforcement bodies is necessary. But as Professor Harding points out, such co-operation must be developed within a framework of rules sensitive to our legal traditions, our established respect for civil liberties, our obligations under the International Covenant on Civil and Political Rights and the developing national jurisprudence of human rights.

### **Law Reform Needs**

As we continue to refine our thinking about crime, organised crime and the appropriate Australian response, it is to be hoped that we do not lose sight of the needs of law reform. If major targets of a proposed National Crimes Commission are crimes of which there are few complaining victims (gambling, pornography, prostitution, homosexual offences, marijuana etc.) it is vitally important that we should tackle the urgent needs of law reform that exist on these topics. All too often, these are subjects upon which the law, reflecting an earlier morality, says one thing. Large numbers of otherwise perfectly decent and law-abiding citizens are doing another. If organised crime is big in Australia, as Mr Meagher asserts, it is big with the participation of very many ordinary Australian citizens. The message of these Proceedings would appear to be much the same as the message of the national conference organised in Canberra. It is that there is no simplistic solution to the complicated problems

of crime in a modern society such as Australia. Certainly a National Crimes Commission provides no panacea for the nation's ills and evils. Some form of institutional response may be necessary. But, without reform of the law, we must be cautious in disturbing things long settled especially where attributes of freedom are involved. Without reform, we must be specially cautious before establishing institutions, manned by enthusiasts — particularly where the unreformed laws which they will vigorously enforce may catch in their net of computers, inquisitorial powers and intelligence systems, a surprising number of fellow citizens — neighbours of yours and mine.

## A NATIONAL CRIMES COMMISSION?

*Bob Bottom\**

Journalist, formerly Special  
Adviser on Organised Crime,  
N.S.W. Government

### The Background

As a matter of record, this seminar happens to mark the tenth anniversary of the beginning of the sort of official scrutiny of organised crime that has subsequently promoted the concept of a National Crimes Commission. It was ten years ago, just several blocks away in the old Supreme Court in King Street, that the Moffitt Royal Commission began its hearings — that being the first commission of inquiry into modern-day organised crime. The lessons arising from that original inquiry demonstrated more than any other factor since that Australia needs an ongoing commission to deal with organised crime generally.

Indeed, if the Moffitt Royal Commission had been extended at that crucial time into a fully-fledged crimes commission Australia might since have been spared much of the all-pervasive growth of organised crime. Unfortunately, the Moffitt inquiry was an *ad hoc* Royal Commission, restricted by its terms of reference to inquiring only into allegations of organised crime infiltration of the New South Wales licensed club field. Mr Justice Moffitt did his job admirably, his work being respected even by American authorities as a landmark. But the premise upon which calls were initially made for a crimes commission was that, as good as the Moffitt Royal Commission was, once it had gone out of existence, there was no positive follow-up.

Moreover, during the life of the Moffitt Commission itself, whilst it did look at the wider area of organised crime as it related to clubs and associated police corruption, its limited terms of reference forced it to ignore information pointing to murder, drug trafficking, illegal gambling, vice and other rackets. If, in fact, the Moffitt Commission had been given a general brief, it could have wiped out major drug trafficking syndicates in their embryo stage, for many of the identities being investigated in relation to clubs have since been proved to have been major masterminds of the drug trade.

If Mr Justice Moffitt had been able to look at illegal bookmaking, he could have thwarted syndication of SP bookmaking, for at that time major figures who had come under his notice were still in the throes of networking betting outlets. Similarly, he could have disrupted illegal casino operations at the time people associated with them were entering the international drug trade. Likewise, he could have crippled Sydney vice kings at the time they were extending into pornography rackets that now ensnare young children.

In a similar vein, the next major inquiry — the Woodward Royal Commission into drug trafficking — was restricted by its terms of reference to drugs. And, it too, in effect, had to ignore material pointing to other rackets, again involving major organised crime figures controlling illegal gambling, vice and other rackets. The Federal Williams Royal Commission, also restricted to drug trafficking, likewise came across considerable material

\*Author of *The Godfather in Australia* (A.H. & A.W. Reed, 1979).

on the extent of organised crime generally and the reality of the so-called Mr Bigs and Mr Big Enoughs.

The Costigan and Stewart Royal Commissions, as well as the Connor inquiry, all have had the same experience — an investigation of certain crime figures inevitably leading to a group or syndicate, or a combination of them, and the probing of one racket invariably pointing to another. Because of the extension of their terms, and extensions to the life of these two commissions, they have been able to initiate follow-up actions while still in operation. In that respect, they have been fulfilling the role envisaged for a Crimes Commission. But for this follow-through procedure there might not have been a smashing of billion dollar tax frauds, or a breakthrough in the investigation into the disappearance of anti-drug campaigner Donald Mackay.

In a nutshell, Australia needs an all-embracing Crimes Commission, preferably a National Commission plus supplementary State Crimes Commissions, to combat organised crime on all its fronts. As successful as *ad hoc* Royal Commissions may be in their own right, in accordance with their own terms of reference, they may serve to cut off some of the tentacles but leave the real octopus of organised crime untouched.

### The Problem

In stark terms, organised crime in Australia has mushroomed into a two-headed monster — an underworld and an upper world. No longer is it old-time back-street racketeering. Instead, it now reaches out into all facets of society, with hardline criminals of the old underworld working hand in glove with politicians, lawyers, accountants, bankers and businessmen in the upperworld of high society. It is a universal fact of life, wherever organised crime is a problem, that organised crime as such, as distinct from sundry crime, cannot exist or flourish without protection. Certainly, the development of syndicated crime has been aided largely by corruption within law enforcement agencies, notably the New South Wales police force. But it is no longer valid to simply point a finger at the police. For the disturbing truth is that organised crime has become sophisticated more through the assistance and patronage of people in the political, legal, accountancy, banking, and indeed, the media fields.

It's something of a cliché for some people to say that there has always been an underworld and that there always will be one and that you are knocking your head against a brick wall trying to do something about it. That mentality is tantamount to criminal pacificism. To quote Mr Douglas Meagher, QC, counsel assisting the Costigan Commission, organised crime is out of control in this country, and to quote a recent warning from Mr Justice Moffitt, unless effective measures are taken to counter it, organised crime will take over in Australia within five years.

Of course, there has always been an underworld, going back to the Pushes at the turn of the century, the Razor Gangs of the 1920s and 1930s, the black marketeers of World War II, and the sly grog merchants and backstreet baccarat of the 1950s and early 1960s. But dramatic changes unfolded from the mid-1960s. Out went old-style baccarat and in came shopfront casinos; syndicated networks took over from the Friendly Freds conducting SP outlets, and, instead of just bawdy houses and laneway prostitutes, modern massage parlours emerged that could advertise in the daily press. And, coupled with it,

came the drug trade. Except for cocaine dealing during the Razor Gang days, organised drug trafficking did not develop until major crime figures entered the trade in the late 1960s.

In the illegal gambling field, the traditional moneypot for organised crime that often funds its spread to other areas, the turnover Australia-wide for illegal bookmaking has been estimated at \$4 billion. According to the Connor inquiry, the figure for New South Wales would be \$1.8 billion, with Victoria accounting for one billion and the other States making up the rest. Illegal casinos, and they are opening up again in Sydney, turned over hundreds of millions of dollars in their heyday. Coupled with that are race-fixing rackets, involving national betting coups raking in half a million dollars on a fixed race. All paid for by mug punters who expect horses and jockeys to run on their merits.

In the vice area, the turnover nationally runs to hundreds of millions of dollars. However ambivalent one might be towards prostitution, the fact is that more than 80% of working girls are heroin addicts. On a Sunday, girls 12 and 13 may be seen walking the streets of Kings Cross. Girls and boys, even younger, have been used for pornography.

No reliable figures are available on the full extent of the drug trade, but, for all types of drugs at street level prices, the turnover would be approaching a billion dollars. Discrepancies in Australia's national accounts of up to \$1,200 million have been attributed to the laundering of drug money and illicit proceeds from gambling and vice. The man in the street is familiar with major drug busts that have grabbed the headlines — the Anoa yacht shipment of \$44 million in buddha sticks, Bela Csidei's marihuana plantation in the Northern Territory, the Thailand heroin case, the little old ladies with a camper van full of drugs, the Griffith grass castles and Nugan Hand. What has not been spelt out is that behind such cases are interconnecting links that point to the real masterminds of organised crime in this country. They, not just those arrested in possession of drugs, should be the priority targets of a National Crimes Commission.

Operating alongside the three main arms of organised crime — drugs, gambling and vice — are a multitude of subsidiary rackets dominated largely by the same networks. For example:

- *Shoplifting*, costing well over \$100 million a year and attributed usually only to errant schoolkids, light-fingered housewives and thieving employees. In fact, probably 20 percent goes to syndicates through professional shoplifting gangs trained in Sydney and even sent overseas to plunder stores in London, Paris, Rome and Madrid. Four of the top eight organised crime figures of this nation were shoplifters a few years ago.
- *Arson*, again costing well over \$100 million a year, with much of it carried out on a fire-for-hire basis by professional 'torches' provided by syndicates to burn down premises for profit. The public and business consequently pay higher insurance premiums.
- *Bird smuggling*, an international racket grossing up to \$40 million a year, with involvement of American Mafia identities such as Vincent 'Big Vinnie' Teresa.
- *Poker machine cheating*, with an annual rake-off variously estimated at from \$25 million to \$110 million.

- *Illegal immigration*, with many of the 100,000 illegal immigrants having been brought in by syndicate figures, in fact, in some cases, with phony work offers using dummy companies of a Sydney vice king.
  - *Loan sharking*, in which hardline criminals act as collection agents and carried out even by so-called respectable companies that have been found to defy the law to charge up to 150 percent interest.
  - *Social security fraud*, whereby one of Australia's top organised crime figures has been able to get a number of weekly cheques while putting three quarters of a million dollars through his bank accounts. The Costigan Commission uncovered one fraud involving a million dollars.
- One could go on and on: protection rackets, credit card frauds, money laundering, car stealing gangs, corruption in the court and gaol systems, penetration of unions and legitimate business, and infiltration of national institutions such as Telecom and Australia Post, even the Federal Attorney-General's Department. So vast and sophisticated has organised crime become in Australia today that it demands special action to control it. In an international sense, it is linked with American Mafia interests and crime leaders in other countries. Sophisticated crime should be met with sophisticated methods. Thus the need for a Crimes Commission.

### **The Remedy**

The necessity of a special approach was recognised immediately the Moffitt Royal Commission began its hearings ten years ago. Before the Moffitt Commission had ended, the New South Wales Police Force had been prompted into setting up a Crime Intelligence Unit (CIU). The Commonwealth police had pioneered this field years earlier and it was actually its reports, relaying a warning to the New South Wales police about what was happening in clubs, that eventually precipitated the Moffitt inquiry. After New South Wales, the Victoria Police Force established a Bureau of Criminal Intelligence, now three times the size of its New South Wales equivalent and the recognised leader in the crime intelligence field in Australia. Other States have followed in a smaller but no less significant fashion.

As a result of the Woodward and Williams Royal Commissions, police task forces have been set up, on a Federal/State co-operative basis. Also as a result of the Woodward and Williams Royal Commissions, all governments, Federal and State, combined to establish the Australian Bureau of Criminal Intelligence, with police seconded to it from all police forces. The State police bureaux of crime intelligence have been invaluable in gathering intelligence and, in fact, organising the major drug busts and other headline attracting crackdowns by police against organised crime. As well, they have been the principal crime intelligence sources for a number of the more successful Royal Commissions.

Despite initial problems, including obstruction, personality differences and inter-force rivalry, the ABCI should, if given full co-operation, prove a potent force in co-ordinating the police attack against organised crime. But as sound as the police structure may be, the limitation of police powers makes it difficult for police themselves to get at the ringleaders of organised crime who insulate themselves from the actual possession of drugs or commission of crimes.

The promotion of the concept of a Crimes Commission recognises this

factor. Agitation for a Crimes Commission actually arose in New South Wales in 1976-77, however, because of a lack of police action at that time because of high level corruption, initially interested people from Sydney and Canberra sought to establish an independent or citizens' commission. Similar proposals have bobbed up since in response to community concern.

The New South Wales Premier, Neville Wran, considered proposals in mid-1978 to set up a State Crimes Commission, and later that year such a Commission was recommended by a Select Committee of the New South Wales Legislative Council. In 1979, the State Council of the Australian Labor Party called upon the Wran Government to go ahead with such a body. It was deferred. The following year, a group of backbench Liberal Party members in Victoria called for a crimes commission in that State and, unable to sway the Hamer Government, first raised the concept of a National Crimes Commission.

Malcolm Fraser, as Prime Minister, committed himself to a Crimes Commission early in 1982, advising his Cabinet that he intended pressing ahead with it, regardless of the possibility of Liberal as well as ALP parliamentarians coming under its scrutiny. When the Fraser Government put the *National Crimes Commission Act* 1982 through Parliament, Liberal members as well as the ALP pushed for various amendments. Some were accepted, resulting in what the Stewart Royal Commission has since described as an emasculation of the legislation. In fact, while the ALP publicly promised to support the legislation, and did so for two readings in Parliament, its members all voted against it on the third and final reading, in late night sittings away from media scrutiny. The legislation went through only on the balance of power vote of the Australian Democrats in the Senate. Fraser appointed Mr Justice Sir Edward Williams, who conducted the Williams Royal Commission, and Williams was in the process of setting up the body when Fraser prematurely called the federal election which resulted in the present Hawke Government winning power. Since Fraser had failed to proclaim the *National Crimes Commission Act*, it went into limbo.

Nobody has been sure what the Hawke Government's intention is, except that Prime Minister Bob Hawke has pledged on more than one occasion that there will be a crimes commission, beginning operation by January 1, 1984, the day after the Costigan Commission's term is due to end. Speculation has been that either Frank Costigan, QC, from Victoria, or Mr Justice Don Stewart, from New South Wales, would become the Crimes Commissioner. But recent events have indicated that they might decline, if offered to them, because of the further watering down of powers likely to be given to a commission or alternative body now being promoted following a National Crime Summit in the Chamber of the Senate in Canberra at the end of July. All governments were represented, along with experts from the judiciary, police, Bar and interest groups such as the Council for Civil Liberties.

A Crimes Commission with Royal Commission powers was advocated by five judges who had looked at aspects of organised crime — Moffitt, Woodward, Williams, Stewart and Connor, as well as Frank Costigan, QC. The only two Police Commissioners who spoke, Mick Miller from Victoria and Peter McAulay from the Northern Territory, also underlined the necessity of it because of the limitation of police powers and resources. However, an alliance dominated largely by representatives of the Law Council of Australia

and the Council for Civil Liberties held sway. Without actually killing off the proposition of having a Crimes Commission at all, they succeeded in creating a climate whereby the government could draw its teeth. Specifically, the lobby that prevailed in Canberra won a pronouncement from Attorney-General Gareth Evans that any Crimes Commission, or alternative body, would not have Royal Commission powers. In particular, it would be denied compulsory interrogation powers.

In his summing up of the two-day summit, Evans opted for an alternative, less effective even than the emasculated Fraser legislation, not only with limited subpoena and interrogatory powers but embodying the continuation of the concept of *ad hoc* Royal Commissions with specific terms of reference on specific aspects of organised crime. Though it might be argued that any body might be better than none, the likely outcome from the Summit will be a commission or authority that will be more of a political sop than a weapon against organised crime.

The alternative being considered even specifies the exclusion of the Australian Bureau of Criminal Intelligence as a back-up or servicing arm for the commission or authority. Since the ABCI and State BCIs are the principal repositories of crime intelligence, with specific charters to fight organised crime, they are the logical servicing arms, especially if there is to be formal Federal/State co-operation. Any exclusion of them should be regarded by the public with the gravest suspicion. It is not insignificant that when the ABCI was originally set up, amidst a great national fanfare, it was mysteriously deprived of an operational arm on the eve of its implementation.

Aside from that, a Crimes Commission or whatever any alternative might be called will be neutered by the elimination of adequate subpoena and compulsory interrogation powers. None of the Royal Commissions could have achieved what they have without such powers. And the granting of such powers to commissions of inquiry is as much enshrined in our traditions as any other aspect of law. If a referendum were held to determine whether the public would want these powers made available to a Crimes Commission, I have no doubt the very great majority would vote in favour. Too much weight is being placed on objections raised through organisations such as the Law Council of Australia and Council for Civil Liberties.

The Law Council does not represent the public, let alone the views of ALL people of the legal profession, as exemplified by Mr Edward St John, QC, and others disagreeing with its stance at the last seminar conducted in Sydney by the Australian Institute of Political Science. Even if it did represent a unanimous viewpoint, the Council represents less than 0.1 percent of the Australian population. As for the Council for Civil Liberties, no membership figures are available, but I would be surprised if its total membership for New South Wales could fill this auditorium. Mr Justice Woodward was prompted to criticise the Council for its criticism of his inquiry, and the Council was able to afford to send one of the largest delegations to Canberra to speak up for the rights of targets of a Crimes Commission, yet I would doubt whether it expended a phone call or letter to Barbara Mackay or others whose families have paid the ultimate price of civil liberty at the hands of organised crime. And the Law Council and Council for Civil Liberties were conspicuously absent in protesting when Mrs Mackay was denied legal aid for an inquest into the disappearance of her husband, Donald Mackay.

Law is one of the more honourable professions and, whilst the Law Society of New South Wales has taken some action against a number of its members, the profession as a whole should look at the cancer within itself that has facilitated much of the sophisticated crime that has made a Crimes Commission necessary. It has been the manipulation of the law, and corrupt practices by elements of the legal profession itself, that has helped insulate crime bosses from normal police detection. Any serious efforts to combat the activities of organised crime figures and their syndicates will inevitably require a clean-up of the legal, accounting and banking fields.

It is intriguing that search and subpoena powers and compulsory interrogation are opposed for a Crimes Commission, yet no protests have emerged over the granting of the same powers in other areas. Fruit fly, rabbit, noxious weed, argentine ant and building and health inspectors have more right of entry than police, and cattle tick inspectors can stop and search cars at will. Police are left with not even the right to demand that people give their name and address. Inspectors for the Department of Social Security can enter homes to check who pensioners are living with and examine all financial records, even tax files. And when it comes to compulsory interrogation these powers are already embodied in the *Bankruptcy Act* and the new National Companies and Exchange Commission. Why not for a Crimes Commission? Why, indeed, should businessmen, bankrupts and pensioners have less rights than murderers, drug traffickers, arsonists, thieves, smugglers, race fixers, pornographers and other racketeers?

## **A CLASH OF CRIMINOLOGICAL IMBECILES: THE GREAT CRIMES COMMISSION DEBATE**

*Dr John Braithwaite, Ph.D.,  
Director, Australian Federation  
of Consumer Organizations.*

### **The Crimes Commission Conference**

Never before and probably never again will criminological debate in Australia reach the heights of a conference on the floor of the Senate with white cars for the participants, free grog on the Commonwealth at intermission, and press gallery journalists peering down at the curious spectacle. It was a less jolly occasion than its forefather, the National Economic Summit. None of the bonhomie we saw on that occasion as trade unionists and industrialists cuddled and chortled together over national consensus and the Commonwealth's free booze. The problem was that almost all of the participants were lawyers — a dour and homogeneous lot who chose not to risk laughter at occasional attempts at humour.

But the lawyerly dominance infused a far more serious failing into the gathering. If there was consensus over anything at the conference, it was that it is the courts which hold the key to controlling organised crime. As I sat there in my humble observer's seat, I found myself musing on what a fundamental indictment of criminological education in this country the event had turned out to be. 'What these people need,' I thought to myself, 'is an undergraduate criminology course.' They surely could not have suffered one, or perhaps they slept through it.

I was so pleased when Professor Hawkins pulled out some first year lecture notes during his address to the gathering; he pointed out that successful prosecution of organised criminals for prostitution or drug running may not change the incidence of prostitution or drug use; at most the kinds of people who deliver the service would change. No one took up his very basic point in the subsequent debate. The conference charged ahead with its deliberations on how best to put more men with black hats behind bars with as little incursion on civil liberties as possible.

### **Do We Have An Organised Crime Problem?**

Another premise which few disputed was that organised crime has a substantial presence in Australia. While rejecting more sensational accounts of Mr Bigs and pervasive international conspiracies, I am happy to accept this premise. Criminal activity in Australia covers the whole spectrum from totally disorganised individualistic crimes to crimes perpetrated by large groups of undisciplined, organised offenders. How large a proportion of the crime problem is accounted for by the latter group is difficult to say. I will leave it to others at this seminar to argue about that. All I would say is that even if 'organised criminals' are responsible for only a small proportion of the crime problem, they are deserving of special concern because of the threat their organised nature poses via corruption of criminal justice officials. A corrupt police force may be rendered ineffective against many types of crime beyond organised crime.

## Do the Courts Hold the Key to Solving the Problem?

One of the elementary things undergraduate criminology courses teach us is that the criminal justice system is often less effective than manipulating other societal institutions for controlling crime — institutions like the family and the economy. Variable crime rates between countries have more to do with their cultures, their values and their demography than with the efficiency of their criminal justice systems. A basic undergraduate criminological education teaches us to be cynical that we can achieve much crime reduction by deterrence, incapacitation or rehabilitation. It teaches us to begin to look for other approaches to reducing crime — housing policy, economic policy, education policy, combating exploitative values with respect to women, and so on. While we are more often than not also disappointed with the results of research in these areas, there is enough evidence to make us optimistic that we are beginning to look in the right place for answers.

It is a testimony to the failure of criminological education in this country that none of the cynicism about the capabilities of the criminal justice system for crime reduction was evident in the Great Crimes Commission Debate. In summing up in the final session of the conference, one delegate said that if there was one thing on which there was total consensus, it was that the criminal justice system needed more resources across the board to fight organised crime. In saying this, he was accurately reflecting a consensus that if more money and investigative expertise were thrown at the problem, there would be more convictions and therefore less organised crime. The only areas of dispute were in how to trade off the civil liberties and prosecutorial concerns and whether we would get more prosecutions by spending big money on traditional police intelligence activities or by setting up some sort of crimes commission.

To say the least, this was a naive consensus. In the United States in recent years there has been some quite remarkable success in putting leading organised crime figures behind bars. Many of those locked up have not been second rung crime bosses, but leaders of major families.

Thus, at the cost of enormous public resources, the American criminal justice system has achieved more than modest success at convicting crime bosses. The question must then be asked, has this success reduced the incidence of crime? The view of a number of the criminal intelligence people I spoke to in the United States in 1981 and early 1982 was that it had not. Indeed, what they felt was happening was that the powerful New York families were moving into the vacuum left by the decimation of Angelo Bruno's family in Philadelphia and similarly were moving into other areas like Florida. The paradox can then be that successful prosecution can lead to organised crime becoming more centralised and therefore perhaps more powerful.

Some would argue that we have seen on a smaller scale a similar phenomenon locally here in Sydney — that the ultimate effect of successful prosecutions against SP bookmakers has been to push out the small operators and centralise control of Sydney SP bookmaking into more ruthless hands.

A sobering scenario to ponder would be one where a crimes commission or some super drug enforcement agency were totally successful in clearing out all the major drug runners in Australia and the American Mafia moved into Australia to fill the unsatisfied demand for drugs in the country. The scenario is implausible because of the unlikelihood of such prosecutorial success ever being achieved, not because of the implausibility of the Mafia wanting to move

in — there is considerable evidence of Mafia interest in Australian investment.

Beyond the displacement hypothesis, there is the fact that really major criminal organisations are not incapacitated by imprisonment in any case. Having a crime boss run his organisation from inside jail may not be any more of a hindrance to the effective operation of the organisation than it is for Henry Ford II to run Ford Australia from Detroit. Legitimate and illegitimate organisations share in common a capacity to delegate and to transmit investment policies across communication barriers like the Pacific Ocean or a prison wall.

One would not want to oppose the prosecution of organised crime figures. However, we should realise that incarceration is no more than an harassing tactic; it is not an organised crime control strategy. And we should be cynical of calls for massive infusions of resources into police forces or crimes commissions simply for the purpose of locking people up.

The simple fact is that if there is a demand for drugs or prostitution or SP bookmaking, a random prosecution strategy will only change who it will be who supplies the demand. If the prosecution strategy is successful, it may increase the cost of these services to the point where the nature of the demand changes somewhat (eg escalating price for marijuana causing people to try cocaine). However, fundamentally, effective control strategies must lie with transforming the market itself. With drug use, this might mean drug education to change the level of demand or installation of a State-controlled market for the product (the New South Wales Marijuana Corporation — a solution to Mr Wran's deficit problems). With SP bookmaking, it might also consist of legalisation and devoting the resources currently dedicated by the State Government to enforcement to making the TAB more competitive with the SP bookies.

### **Why a Crimes Commission Could be a Good Idea**

In an appendix to this paper (pages 28-33) I have attempted to summarise how crimes commissions work in the United States by reference to three American commissions. The American commissions have their faults, but one of them has not been falling into the trap of assuming that scoring victories in court is the measure of the success of crime control strategies. Perhaps predictably, however, Senator Durack and his party returned from their tour of the US in 1982 with the conclusion that the American commissions were a failure because they could not demonstrate prosecutorial success.

Nevertheless, Canberra was keen to find what they saw as an easy way of injecting competent accountants, computer experts and the like into the criminal justice system. They also wanted to have powers to compel testimony by granting immunity from prosecution, powers of access to tax records and the like, but they shuddered at the thought of handing them over to the police. So they settled on a 'crimes commission' model which was really a *de facto* American investigative grand jury situation. The conception was of a commission which would largely interrogate suspects in private using their superior powers and expertise to collect the kind of evidence to support major prosecutions which has eluded our police forces.

In pursuing the elusive goal of organised crime control through a narrowly prosecutorial strategy, Canberra missed some of the real strengths of a crime commission model which was open and public. These strengths are as

evident from Australian public enquiries as they are from the American experience. If a commission like the Costigan Royal Commission finds that a particular union is organising the provision of criminals as frontmen for bottom of the harbour tax evasion schemes, or, as in some American examples, organising drug running, then there is a profound public interest in making this fact public. The public interest arises from the fact that crime control can work other than by prosecution. In this case, crime prevention might be achieved by unionists being shocked by the situation and voting in a new leadership. Destroying the organisational power base of a gang might be a very effective anti-crime measure.

Consider as another example, the mini-enquiry into the Bill Allen affair. This open enquiry did not produce evidence which enabled the Attorney-General to feel justified in launching a prosecution. Was it then a waste of public money? Obviously not: it achieved something more important than a prosecution — in revealing evidence of a potential police commissioner having placed himself in a compromising situation, it prevented such a person from becoming commissioner. Clearly, it is profoundly in the interests of organised crime control to save the State from the risks associated with having a top police officer who has placed himself in a compromising position. One might say the same thing about an enquiry which finds a Chief Stipendiary Magistrate to be compromised, even if a conviction is not the ultimate result.

The whole process of Mr Justice Woodward's Royal Commission into the meat substitution racket was a success because of the way it reformed an industry of enormous importance to the Australian economy, an export industry threatened by the stench of corruption and impure meat. This success was not so much mediated by prosecutions but by the disinfecting force of sunlight cast on the formerly shady relationships among management of certain meatworks, meat inspectors and corrupt police officers.

I put it to you that the Costigan Royal Commission could be viewed as an enormous success if it did not result in a single prosecution. This is because of the considerable impact on the tax evasion industry arising simply from opening up the can of worms to public view. The publicity made a lot of semi-honest people nervous about continuing a relationship with a few very dishonest people. Once bottom-of-the-harbour became a scandal, respectable folk could no longer continue to turn a blind eye to the dirty work of which they were beneficiaries. Administrative reforms in the taxation area have also been an important consequence of the Costigan Royal Commission. As the Prime Minister said in his opening speech to the Crimes Commission Conference, expensive as the Costigan Royal Commission has been, it has certainly paid its way as far as the government's budget is concerned.

The above contemporary examples illustrate why it is important to have a crimes commission with an open, public quality rather than a *de facto* grand jury which merely gathers intelligence behind closed doors. They illustrate why any crimes commission must have an analytic mission, a goal of providing public reports dissecting the nature of criminogenic forces at work in an illegitimate market, rather than simply the mission of gathering the evidence to convict the men in the black hats.

### **Public Reporting and the Unjustifiable Naming of Persons**

The problem with a crimes commission with the open, public qualities which I recommend is that it can put individuals at risk of unfair stigma. I

confess to being deeply troubled by this consequence of open enquiry and reporting into allegations of organised criminality. I find totally unacceptable the kind of naming of individuals suspected of major crime that one finds in the glossy public reports of the Pennsylvania Crime Commission in the United States.

However, one must have a sense of balance about the naming of people in reports. Public enquiries often clear reputations as well as damage them. Premier Wran's reputation is certainly higher today than it was on the day the Street Royal Commission was announced. A profound advantage of high profile public enquiries over secret investigations is the way they can better clear the reputations of persons who have been victims of unfair innuendo.

Even taking account of this balancing factor, the concern over naming people in organised crime investigation reports in a way which implies guilt without trial is a justifiable concern. The suggestion for limiting this problem which I have made to the Attorney-General is that any crimes commission should be prohibited from targeting individuals; it should only be allowed to target organisations and write reports on the activities of organisations. This does not mean that individuals would not be named in such reports; but the focus would be on analysing the activities of organisations, or indeed of whole illegal markets, rather than on targeted individuals. It would be possible to write a report on the activities of the Ships Painters and Dockers Union; but a report on the activities of Jack Nicholls would not be permitted under the Act.

I believe that the abuses of civil liberties one sees perpetrated by agencies like the Pennsylvania Crime Commission arise from the fact of targeting individuals rather than from the mere naming of individuals, from the obsession to get some dirt, any dirt, on a targeted individual no matter what its nature. All of us have some skeletons in our closet; many of us are capable of the inebriated indiscretions of a David Combe, so we can all feel justifiably at risk from a strategy of deciding upon individual guilt and then proceeding to destroy the individual through public exposure. Guidelines are needed for a commission which would divert it from the bloodyminded targeting of individuals.

Limiting crimes commission reports to analyses of criminal organisations would deal with a fundamental civil liberties reservation about giving a crimes commission intrusive powers. Many of the civil libertarians argue that crime in Australia is fundamentally disorganised rather than organised, that there is no justification for encroaching on civil liberties in pursuit of non-existent criminal organisations. By forbidding a crimes commission from making an individual the target of an investigation, by requiring that reports can only target criminal organisations, civil liberties incursions are necessarily limited to areas where criminal organisations exist. If the crimes commission could not locate any criminal organisations, as some of the civil libertarians predict, then it could not produce any reports. With sunset legislation, the crimes commission would then hopefully go out with a whimper rather than a bang after a few years of failure.

## **Conclusion**

My impression is that the people who are supportive of intrusive crimes commissions, people like John Hatton and Bob Bottom, are no less concerned

about protecting civil liberties than opponents of crimes commissions. It is just that the former see the organised crime problem in Australia as assuming more massive proportions than do the latter. They are consequently willing to trade off more in the way of civil liberties to attack the problem.

If I am right, and different public policy positions reflect different perceptions of the nature of the problem more than anything else, then a response to the problem which is contingent upon establishing the nature of the problem may be the route to compromise. If the criminal organisations cannot be specifically targeted, then no watering down of civil liberties can be justified. If the frightening scenarios of the campaigners can be identified in specific organisations, then a sunset period of compelling people to answer questions, intruding into their tax records, etc. should be tried.

However, even in these circumstances there would be little merit in experimenting with a closed crimes commission model which focused narrowly on obtaining convictions. To have any hope of an impact on organised crime, a commission would need to have an open, public quality and an analytical mission. A crimes commission is an idea worth trying, but only if it focuses on manipulating the structure of criminal markets and criminal organisations (as opposed to being another police force) and only if its civil liberties impacts are monitored and evaluated after a sunset period.

## APPENDIX

### CRIME COMMISSIONS IN THE UNITED STATES

There are 11 state crime commissions or commissions of investigation in the United States. New York set the pattern for legislation in other states by establishing a Commission of Investigation in 1958. However, today, Pennsylvania and New Jersey have perhaps the most active and well known crime commissions. This Appendix focuses on these three commissions.

It is therefore a limited focus which excludes other organised crime investigation models such as citizens' crime commissions, parliamentary committees, and that of the Hong Kong Independent Commission Against Corruption.

#### **Scope of Activities to be Investigated**

For all three commissions the definition of the activities to be investigated is broad. While the focus is on organised crime and corruption of public officials, drafters of the legislation viewed it as a mistake to attempt a tight definition. For example, the New Jersey Act empowers investigations 'with particular reference but not limited to organised crime and racketeering'. The American view has been that organised crime, white collar crime and improper political influence are so intertwined that separating them out is neither possible nor desirable.

#### **Reasons for Forming the Commissions**

Establishment of the commissions was generally justified by frustration at the failure of conventional enforcement to deal with organised crime; statistical studies showed that more than half the indictments gained against known organised crime figures were being dismissed, and when convictions did result the criminal was not sent to prison in the majority of cases. Unconventional approaches were therefore sought to counter the capacity of crime bosses to distance themselves from the dirty work and exploit legal rights to the limit with the aid of talented counsel. The rationale for the crime commissions was that they would supply alternative controls on the crime bosses by publicly exposing them, discovering administrative reforms which would put roadblocks in the way of organised crime, collecting evidence of corruption or impropriety by public officials who were captives of organised crime, and by providing a back-door method of imprisoning crime bosses. These rationales will be discussed in turn.

#### **Exposing Organised Crime to the Public**

The Commissions have a duty to provide written reports on their investigations to the legislature. Part of their role is to keep the legislature and the public informed of the state of organised crime and corruption in the community on the theory that 'sunlight is the best disinfectant'. As in Australia, many leading crime figures are 'reputable businessmen' and exposure before the television cameras is a feared threat to that repute. On the other hand, some American police officers with whom I spoke pointed out that far from respectability, many crime figures seek infamy. Their criticism was that some minor organised crime figures who were named in crime commission reports had been able thereby to enhance their reputation on the

street. For standover men who thrive on the fear they instill in victims, infamy can enhance the credibility of their threats. Critics in police forces also pointed to instances of excessive cultivation of publicity as in melodramatic taking of testimony from hooded witnesses in bullet-proof booths.

However, by and large the police from the four American departments I visited were strongly supportive of the crime commissions in their jurisdictions. They saw particular value in the capacity of crime commissions to expose exploitative activities by organised crime which were not necessarily illegal and therefore which left the police powerless to act. An example was the exposure of organised crime takeovers of franchises for union-run dental insurance plans which resulted in union members paying above-market premiums to the mob. Their view was that there is a public interest in warning unionists that their funds are subsidising organisations involved in drug running.

### **Recommending Administrative Reform**

Among the duties of the commissions is suggesting new laws and regulations which will make life more difficult for organised crime. If bribery of customs officials is a concern then a crime commission might hold hearings on integrity checks, personnel policies and standard operating procedures in the customs authority. Leading examples of this function of crime commissions have been the reports prepared by the New Jersey Commission on keeping organised crime out of Atlantic City casinos and preventing them from taking over the unions which service those casinos.

### **Collecting Evidence of Corruption**

The crime commission is one alternative to the police policing themselves. Part of the role is to monitor the integrity of other agencies with responsibilities in the fight against organised crime. This places the crime commission on the horns of a dilemma. On the one hand they have to root out corruption in police forces, on the other they must turn to these forces for information and assistance. For example, when the Pennsylvania Commission produced a report in 1973 on corruption in the Philadelphia Police, relations with the state's largest force became strained. A criticism some police officers and indeed some employees of the commissions themselves made to me was that for this reason the commissions had been very timid in exposing police corruption. Equally, it was suggested that commissioners on short tenure had been hesitant to delve into allegations of corruption against their political masters. The inevitable political ramifications of corruption investigations has been the rationale for a philosophy of bipartisan appointment of commissioners followed by nonpartisan performance of their responsibilities (see Table 1, page 32).

### **The Back-Door to Imprisoning Crime Bosses**

This is the most controversial of the justifications for crime commissions in the United States. Many defenders of the commissions tout it as the greatest strength of the approach; critics condemn it as the greatest weakness. New Jersey provides the leading example with its use of the power to imprison witnesses who refuse to answer questions until they agree to answer. Nine of the leaders of organised crime in New Jersey served extended periods of

court-ordered imprisonment for contempt of commission proceedings. Four finally gave in and answered the questions they were asked; two of these men were murdered after their release. In addition to these nine men, many other organised crime luminaries fled New Jersey to evade commission subpoenas. The police officers with whom I spoke agreed that it was the commission subpoenas which drove nearly all New Jersey's organised crime notables into either neighbouring states or prison.

### **Difference From Australian Royal Commissions**

Apart from this last controversial justification, the rationale for crime commissions in the United States has been very similar to the reasons that are given in Australia for having Royal Commissions. They are, however, cheaper to run than Royal Commissions because they rely on in-house lawyers rather than QCs, they operate in an inquisitorial mode rather than an adversarial one, and they depend on an ongoing team of specialists for support rather than having to recruit a new staff and set up a new administrative structure for each reference. They also have the capacity to begin an investigation, and then if it begins to look like a dry well, move onto something more productive. Once a Royal Commission is set up, in contrast, it must push onto making some findings even if early enquiries reveal the endeavour a waste of money.

### **Impact on American Organised Crime**

There can be no doubt that since the late 1970s the rate at which leading American organised crime figures have been convicted has increased enormously. In broad terms this can probably be attributed to a package of measures in which civil liberties of a small number of people have been traded off against organised crime control. These measures include expanded phone tapping powers, use of agents provocateurs (as in Abscam), expanded access to tax records (now moving back in the other direction), compelling answers to questions in investigative grand juries, undercover operations, Racketeer Influenced and Corrupt Organizations Statutes and crime commissions. Crime commissions may hold only a small part of the key to this recent relative success. There are no direct data which would either sustain or refute a significant impact of crime commissions on American organised crime.

### **Overlap with Preexisting Agencies**

While the senior American police officers with whom I spoke were generally supportive of crime commissions, one criticism related to commissions compromising police investigations by charging ahead with public hearings. In one illustration a state police undercover agent who was attending regular meetings of organised crime figures at a casino was put in danger as a result of commission hearings being conducted on the casino. The New Jersey statute requires the Commission to give the Attorney-General and county prosecutors seven days written notice of any intention to hold a public hearing. It also requires the Commission to give these officers an opportunity to communicate any objection they might have to a public hearing. Commissions must notify police and prosecutors before they apply to a court for a grant of immunity for any of their witnesses; these agencies then have the opportunity to object against immunity before the judge. Such problems cannot be totally resolved when commissions regularly conduct hearings into activities which cut across state boundaries. The New Jersey statute explicitly

provides: 'The Commission shall examine into matters relating to law enforcement extending across the boundaries of the State into other States.'

Commission investigators do many of the same things that police investigators do and routinely hand over valuable intelligence to police forces. However, a Committee to evaluate the New Jersey Commission chaired by a former state Chief Justice concluded that the intelligence gathering was directed at different goals and that there was no undesirable duplication of the work of other agencies.

### **Due Process Protections**

Witnesses before commission hearings enjoy the privilege against self-incrimination and can only be forced to answer incriminating questions after they have been granted immunity. However, because the commissions do not recommend prosecutions, hearsay evidence is admissible in public hearings. The New Jersey Commission is constrained by the State Code of Fair Procedure which includes provision that any individual who feels adversely affected by testimony or other evidence shall be afforded the opportunity to make a statement under oath to clear his name.

### **Structure and Powers**

The structure and powers of the three commissions are summarised in Tables 1 and 2.

**Table 1**  
**STRUCTURE OF U.S. CRIME COMMISSIONS**

	New Jersey	New York	Pennsylvania
When first established?	1969	1958	1968
How many Commissioners?	4	4	5
Are Commissioners necessarily full-time?	No	No	No
Remuneration of Commissioners	\$US18,000 p.a.	\$US15,000 p.a.	\$US50.00 per hearing day
Total budget	Unknown	Unknown	\$US1.5 million in 1980
Total staff	41	39	60
In-house lawyers	6	8	2
In-house accountants	6	6	) 33
Special investigators	14	13	
Is Commission subject to 'sunset' legislation?	Yes	Yes	Yes
What is the life of each Commission?	5 years	1 year (?)	5 years
Term of Commissioners	3 years	2 years	3 years
Who appoints Commissioners?	Governor — 2 President of Senate — 1 House Speaker — 1	Governor — 2 President of Senate — 1 House Speaker — 1	Governor — 1 President of Senate — 1 House Speaker — 1 Senate Minority Leader — 1 House Minority Leader — 1
Legislative limits on party registration of Commissioners	No more than 2 from one party	No more than 2 from one party	No more than 3 from one party
Background of present Chairman	Retired general counsel of Johnson & Johnson Co	Eminent member of private bar	Eminent member of private bar
Background of other Commissioners	1 company director, 1 government lawyer, 1 private lawyer	Unknown	All with private law firms

**Table 2**  
**POWERS OF U.S. CRIME COMMISSIONS**

	New Jersey	New York	Pennsylvania
Can the Commission initiate its own hearings as well as act on references from the government?	Yes	No (?)	Yes
Can the Commission conduct private as well as public hearings?	Yes	Yes	Yes
Can the Commission commit for trial?	No	No	No
Can the Commission subpoena witnesses and documents?	Yes	Yes	Yes
Can witnesses be imprisoned until they agree to answer Commission questions?	Yes, up to 5 years	Unknown	Yes, indefinitely
Are Commission reports and hearings subject to privilege against defamation?	Absolute privilege	No privilege	Absolute privilege
Can Commission witnesses be granted immunity from prosecution?	Yes, use and fruits immunity	Yes, in accordance with s. 50.20 of N.Y. criminal procedure law	Yes, use and fruits immunity

**PRESENTATION OF PAPER***Dr John Braithwaite*

I was upbraided earlier in the day for the title of my paper which suggested that the cream of the Australian criminal justice system were a bunch of imbeciles. I guess it was a trifle impertinent. The only defence that I have for my intemperate title is the David Combe defence 'I was drunk at the time that I wrote it'.

But I do feel angry about the great Crimes Commission debate that on all sides it was advanced on the simplistic assumption that organised crime could be controlled simply by locking more people up. One would have expected a lot more of that kind of high level debate with papers circulated in advance to very high quality people who had had the advantage of among other things, in a large proportion of cases, of a criminological education. I guess criminology hasn't taught us very much, but it has taught us quite a lot about the limits of locking people up as a solution to all kinds of crime problems. Those arguments are in most respects more powerful with respect to organised crime; leaders of criminal empires can very successfully run their empires from behind prison bars.

The thrust of my paper is about the displacement hypothesis. In the last few years there has been considerable success in the United States through prosecutorial strategies in getting more powerful organised criminals behind bars, not just little fish but the big fish are being locked up, and the cynical would suggest that efforts are succeeding to get them to kill each other as well. The result is that a lot of the most powerful organised crime figures have been put off the scene in the United States in the last five years. Nevertheless, a lot of criminal intelligence people in the United States expressed their concern to me that what was happening was displacement. For example, with the virtual wiping out of Angelo Bruno's family in Philadelphia the real fear was that the New York families were beginning to move in so that the result of the successful criminal justice activity, successful in its limited definition, was more centralised control in organised crime in the United States from New York. Similar arguments were advanced to me with respect to Los Angeles, Florida, and Chicago to a lesser extent.

The real disagreement at the Crimes Commission summit was over the civil liberties questions rather than over the premise that the way to get somewhere was for more successful prosecution. If we get to that American situation we should think whether we are going to get displacement. I am reminded of the story of Pedro the Bandito who was a notorious Mexican organised criminal who had his empire encroached on by Joe Bonano from the New Jersey Mafia family. An American prospector in a border Mexican town, Pedro's territory, had discovered a lot of gold after many years of non-success, was bragging about this in the bar, and predictably Pedro stuck him up and went off with the gold. The old American prospector was back in his home town, Newark, New Jersey, in another bar and ran into Joe Bonano who said 'That's terrible. I'll go on down and straighten this fellow out.' Which he did, and asked him, through an interpreter because Pedro the Bandito couldn't speak English, to hand over the gold. Pedro, of course, refused and Joe Bonano pulled out a gun which he pointed at Pedro and instructed the interpreter to tell him again that he wanted to know where the

gold was. Pedro said 'Well, you go out of town, second street on the left, along two hundred yards and the next street on the right, keep going straight ahead until you meet a big pile of rocks, turn right again up a little dirt track, a hundred yards you get to a withered cactus plant, there take seventeen steps to the right, dig down three feet and you will find the gold.' The interpreter turned to Bonano and said 'Pedro says he is not afraid to die'.

But the displacement operates on a number of levels beyond crossing international borders in that kind of way. If there is a demand for certain illegitimate services in the economy then there will be a supply of those services, be those services prostitution, SP bookmaking, drug use of various kinds and so on. Successful prosecution and locking up of the people who control those activities might change the nature of the kinds of people who deliver and control the activities but it won't change the fact that those services will be delivered.

I have tried to argue in my paper that the main strengths of the Crimes Commission model do not relate to prosecution, but arise from the open public quality of certain crime commission models and those strengths are as evident from Australian public enquiries of recent times as they are from American crimes commission experience; I give examples on pages 24 and 25. I illustrate why any Crimes Commission must have an analytic mission, a goal of providing public reports, dissecting the nature of criminogenic forces at work in an illegitimate market rather than simply the mission of gathering evidence to put the men in black hats behind bars.

## ORGANISED CRIME AND THE PROPOSAL FOR A CRIMES COMMISSION

*Professor Richard Harding*  
Dean, Law School, University  
of Western Australia

Let me start by setting out the very recent history of the Crimes Commission debate. The 1982 *National Crimes Commission Act* was a false start — hasty, ill-conceived grandstanding. The real race is being run in 1983.

It began with the presentation at the ANZAAS Congress in Perth last May of a series of six papers written by Mr Douglas Meagher, QC. Based on his experience as Counsel assisting the Costigan Commission, Mr Meagher argued (a) that organised crime permeated a huge range of activities across all levels of Australian society, and (b) that it could only be contained by the creation of a Standing Crimes Commission possessing extraordinary powers and resources, and fortified in its work by a range of sanctions quite novel to Australian criminal justice systems.

Mr Justice Moffitt — whose 1974 Royal Commission Report into Allegations of Organised Crime in Clubs was a model of careful and unemotional reasoning — was the first commentator. He did not seriously dissent either from Mr Meagher's diagnosis or from his proffered cure — the establishment of a Standing National Crimes Commission with extraordinary powers of investigation and intelligence gathering. Echoing Mr Meagher he said at one point: 'It is not possible to quantify [organised crime]; I suspect it is greater than we think.' He went on to say that democracy provides a haven in which organised crime can grow free from interference, and that democracies — and their leaders — must decide whether the point has been reached at which the rules should be changed.

Listening, I was moved to re-read the magnum opus of that doyen of organised crime theoreticians, Donald L. Cressey<sup>1</sup>, who said:

We will show later that police actions against organised crime are hampered by lack of enthusiasm on the part of the Governments which support the police, by lack of co-ordinated intelligence information, *and by a commitment to due process of law* ... Bosses ... order their lives so as to take full advantage of the legal safeguards guaranteed by the Constitution.

Was there here a theme — that good, honourable and decent men such as Mr Douglas Meagher, Mr Justice Moffitt and Professor Donald Cressey, find themselves valuing freedom from the warts of democracy more than they value democracy itself? Certainly, this was not their intent; for each of them the problem is one of a balancing exercise. But to me, as an observer, there was an uncomfortable sensation that the tail might be in danger of wagging the dog.

There was also the sensation that we were being asked to accept a diagnosis — that Australia *is* in the grip of organised crime — on faith. For Mr Meagher's papers are generalised and assertive — 'I am not yet in a position where I could identify by name all the criminal organisations operating in Australia ... I could identify many, ... I could name a lot of

1. D.L. Cressey, *Theft of the Nation* (Harper and Row, New York, 1969) pp. 187-8.

them.' But he does not do so. Again, 'the amount of money involved in organised crime may be calculated in terms of millions, indeed tens if not hundreds of millions of dollars' — hardly sufficient precision for a balance sheet, but good stuff for the press. Was his whole thesis, perhaps, unduly hyperbolic? Certainly, on one of the few occasions when he deals in tangible fact, discoverable by others, Mr Meagher is quite simply wrong: I refer to his interpretation of the findings of the Norris Royal Commission<sup>2</sup> into matters surrounding the administration of the law relating to prostitution. He says:

Whilst the inquiry found little evidence [of police corruption], it is significant that a few of the police officers against whom the allegations were made were subsequently prosecuted to conviction.

That is not true (*see also* Brinsden Report 1977, not published) and the fact that a readily-checkable story was so wrong did not serve to increase markedly one's faith in Mr Meagher's interpretation of those facts which he is unable to share with his audience. One did not need two million documents and super-sophisticated computer programmes to identify error; nor apparently did such aids save Mr Meagher from error.

So, at ANZAAS, when it was at last my own turn to comment, I reminded the speakers and the audience of the following propositions, to which I still adhere:

*Where radical change is proposed to the balance between the executive and the citizen, the onus is upon those who wish to argue for such change to show that it is necessary and desirable.* Specifically, there is a positive onus to demonstrate that *organised* crime exists; an onus then to show that it can *only* be dealt with by unusual procedures; and a further onus to justify the particular unusual procedures suggested as opposed to some less radical new procedures.

The very next day Mr Justice Kirby — who can always be relied upon to put pressing social issues into a broad and revealing perspective — asked whether Mr Meagher was not in truth starting from the wrong point by concentrating on the end-product of criminal laws rather than the appropriateness of those laws to modern society. Inimitably, he said:

Accordingly, as a law reformer, when I read Mr Meagher's paper, it struck me as vital that Australians should pay attention to the causes of the organised crime disclosed by him. We should also pay attention to the overload of the criminal law. We should ask ourselves whether we cannot remove some of the opportunities which result in organised crime. Let us by all means attack organised crime. But let us also attack it at its source by paying attention to the *causes* and not just the *symptoms*. Quite the wrong way to attack organised crime would be to catch up in computers, raids, phone taps and enhanced police powers and activities, the large numbers of otherwise good and decent citizens whose present activities may be *criminal*, but would not generally be regarded as *wrong*. (Victoria College of Advanced Education, Graduation Ceremony Address.)

Soon, Mr Phillips, QC, Director of Public Prosecutions for Victoria, added his comment to the effect that traditional prosecution processes were perfectly capable of coping with the problems in question; and Dame Roma

2. Report of the Royal Commission into Matters Surrounding the Administration of the Law Relating to Prostitution (Government Printer, Perth 1976).

Mitchell raised the question of whether the powers of a Standing Crimes Commission of the sort proposed by Mr Meagher were reconcilable with the standards laid down by the International Convention on Civil and Political Rights. The pendulum of debate had started to swing.

Thus it was that at the opening of the National Crimes Commission Conference in the Senate Chamber on July 28th, the Prime Minister — who had unequivocally told Parliament on May 19th that a new National Crimes Commission would begin operation early in 1984 — backed off a little. 'No final decisions have been made' as to whether a Standing Commission is preferable to upgrading the traditional police, and 'the Government would be greatly assisted in reaching decisions [as to the functions, powers and composition of any such body] by the views expressed at this Conference'. The stage was thus set for one of the most fascinating conferences it has ever been my privilege to attend.

As is well known to all of you, the outcome was an unequivocal retreat from the Meagher model of a Standing Crimes Commission with sweeping powers. Instead, it was stated by the Attorney-General, Senator Gareth Evans, that talks would be held with the States with a view to establishing a national body with responsibilities for intelligence-gathering and the co-ordination of investigation, such agency to have provisions to make a graduated response to perceived problems by way of recommending use of a State police Task Force, a joint Task Force or a direct exercise of Royal Commission type powers.

What I wish to do in the remainder of this paper is to comment briefly on the following issues:

- (a) whether there truly is an organised crime problem;
- (b) whether so-called criminal 'intelligence' information can justifiably be gathered to the extent contemplated;
- (c) whether police forces are at present capable of carrying out the enhanced role which is envisaged for them; and
- (d) whether there is any real likelihood of the desirable level of police co-ordination being achieved.

Before doing so, let me spell out more explicitly the Evans model, for it has not really received the saturation coverage which it deserved. There were eight strands to this model:

1. Some kind of national agency should be established with responsibility for the gathering of criminal intelligence (in this respect replacing the ABCI) and for co-ordinating criminal investigation.
2. This agency — perhaps to be known as the Crimes Authority — should conduct its functions in relation to organised and sophisticated crime and such matters as are explicitly referred to it by one or more of the Governmental units participating in the system.
3. The agency should be set up under Commonwealth law. Its organisational structure should make it clear that the States would have a major input. For example, there could be three Crime Authority Commissioners — one appointed by the Commonwealth, one by the Standing Committee of Police Commissioners and one by the Standing Committee of Attorneys-General.
4. Provision should be made for the Authority to make graduated responses, as appropriate, to the problems coming forward as a result of intelligence gathering and investigation — viz by way of an intra-State Task Force,

a joint or multi-State Task Force or by a direct exercise of powers through the Authority itself.

5. However, the Authority's own investigatory powers should be limited to Model B (Green Paper) powers — ie in essence should be of the traditional kind which places the Authority under both judicial and executive control as regards such matters as the issue of search warrants and the granting of witness immunity. Self-incriminating answers could not be compelled.
6. All Governmental units would, of course, retain their existing powers to appoint *ad hoc* Royal Commissions, if appropriate. The expectation would, however, be that the necessity for doing so would arise less frequently and that, where it did arise, there would be co-ordination of terms of reference etc. through the Authority.
7. The Authority's activities would be subject to standard review mechanisms, being both justifiable in the normal way and subject to the activities of the Commonwealth Ombudsman.
8. The political accountability of the Authority would be to the Commonwealth Parliament through the Federal Attorney-General and also, where relevant, to the Parliament of participating States through the relevant State Attorney-General.

Senator Evans had prefaced his exposition of this model by accepting that traditional police forces are under-resourced and implying strongly that an integral part of the development of the above model must be the development and improvement of those forces. As for the details of the Crime Authority scheme, it seems that discussions began at inter-Governmental level the week following the Crimes Commission Conference. By the time this Seminar is held, there may well be more information available as to the means of possible implementation of the suggested scheme.

### Organised Crime?

With these preliminaries, then, let me turn to the four points upon which I would like to comment. The first is whether there truly is an organised crime problem of the nature and general extent which is alleged.

As I said earlier, it worries me that Mr Meagher wants his readers and listeners and the Australian public to take this on faith. Mr Costigan, at the July conference, took this point head on: 'To whom should the existence of organised crime be proved,' he asked, 'if not to Governments?' His own confidential reports, in his view, do prove the case.

The trouble is that there is too ready a human propensity to perceive large phenomena as different in kind, not merely degree, from small phenomena of the same general type, to see as unitary that which is fragmented. By this process we make situations intellectually more manageable; we also enable ourselves to deny that our existing institutions have broken down in relation to the phenomena which they were designed to manage. We can retreat to the position of saying, in effect — 'No wonder traditional policing isn't working any more; it wasn't designed to deal with massive, organised crime but with individual wrongdoing and the preservation of the peace.' We create a new folk-devil, and then seek to exorcize it with burning moral fervour.

A small example of this process at work, but then being successfully by-passed, was heard on AM, ironically on the second day of the Crimes

Commission Conference itself. Here is the transcript of a story from John Highfield:

The European Economic Communities' much maligned agricultural policy has developed yet another blemish: this time it's over a disclosure that a massive \$150 million a year subsidy has been going to olive growers in Italy and a lot of those growers have no olive trees.

Every year for the past decade Italian olive grove owners have claimed assistance for 200,000 tonnes of fictitious olive oil. A confidential report just sent to the European Economic Community Commission calls it 'paper oil' and the scandal came to light when a bureaucrat in Brussels noticed a huge discrepancy between the amount claimed by olive grove owners and the official Italian production figures. A team of investigators drawn from other Common Market countries was sent secretly to Italy and they went through the books of consumption and export. What they found is almost unbelievable and the Commissioner has been so embarrassed that it has taken five months for the story to leak out. *There were suggestions at first that organised crime and the Mafia may have been involved. But close reading of the confidential document reveals that it is probably, despite the hundreds of millions of dollars involved every year, a cottage industry of individual olive grove small holders taking advantage of a slack bureaucratic system.* (Australian Broadcasting Corporation, 2 B.L., A.M., 29 July 1983.)

Common Market officials, instead of chasing a folk-devil, were able to deal with the properly-diagnosed problem in a quite mundane way — by counting all the olive trees in Italy!

Another caveat to enter is this. The rationale offered for the idea of organised crime — crime which is structured and not random, continuous and not intermittent, national and not parochial, corrupting as well as predatory — is that it is so much more cost-effective and efficient for the big operators to run it this way. A recent book by Dr Peter Reuter, *Disorganised Crime*, draws on the perception that the areas of crime so readily assumed to be 'organised' are in fact conducted in a manner which is quite non-cost-effective and inefficient. He concludes: 'The assumption that all crime that requires organisation induces conspiracy is a delusion that does public policy no good.'

A final point I would make here relates to the Costigan Commission itself. One of the most riveting moments at the Crimes Commission Conference occurred when Mr Redlich, one of the Special Prosecutors in relation to matters dealt with by Mr Costigan, stood up and told us that very little he has received from that Commission has been anywhere near ready to use as a basis for prosecution. To an observer that compels the conclusion that it is all rather less tangible than those immediately and intimately involved seem to think — that Mr Costigan has not in fact proved his case to Government and its agents, let alone to the general public.

My purpose, then, has been to put on the record my scepticism as to a point which was largely presumed at the Crimes Commission Conference — that 'organised crime', in a specialised sense, in fact exists in Australia. However, it is *not* my purpose to argue that it does not exist; frankly, I do not know one way or the other. But my original critical starting point remains undisturbed — that it is for those who argue for the existence of 'organised

crime' and, as a corollary, for extraordinary anti-democratic powers to combat it, to make their case. So far they have not done so.

### **Criminal Intelligence**

At the Canberra conference, one of the most telling speeches was made by Richard Hall, who is entitled with the publication of *Greed*<sup>3</sup> to some credence in this area. He concentrated on the process of gathering, collating and cross-referencing so-called 'intelligence' data. Much of it, he pointed out, is imprecise, derived from unreliable people with unreliable motives. Detectives sift through their information from their individual informants, and because of their subjective knowledge make an evaluation of it. To bureaucratise and depersonalise this process, to put it willy-nilly into the memory of one of Mr Meagher's computers, is to confer upon it a significance to which it is not entitled.

In essence, then, I take Mr Hall's argument to be that, whilst criminal intelligence is not actually useless, it is dangerous and liable to become positively misleading as well as oppressive inasmuch as, once formalised, it takes on a dynamic of its own. Moreover, to structure an agency whose sole or primary *raison d'être* is to collect intelligence is to encourage formal entries of information which might well be sifted out altogether if left to the normal procedures and judgments of working detectives.

The available evidence suggests that there is much to be said for this perspective. If we go back to the White Report into Special Branch Security Records (South Australia, 1977) and the Privacy Committee Report on Special Branch Records (New South Wales, 1978), we find the most astonishing collection of scuttlebut, prejudice and irrelevancy masquerading as 'intelligence'. Let me quote Mr Justice White's conclusions (pp. 21-22) for they would apply equally — as Mr Justice Kirby pointed out in his paper to the Crimes Commission Conference — to 'organised crime' intelligence as to 'subversion' intelligence:

8.7 A suggested justification for this procedure is that the information collector never knows in advance when the person under notice will come under further notice in the future; if this opportunity for indexing him slips by, it may be forgotten later that he had been noticed previously; a second time under notice may give a new significance to an earlier occasion if both are recorded; for example, the same person might appear in different demonstrations, organisations and places, which, in the end, present a significant picture of subversive activity.

8.8 In my view, the suggested justification is without foundation. My perusal of Special Branch files shows that many hundreds of persons have done nothing more than take an active part in many causes where time and changing opinion have usually proved them to be right in the eyes of most Australians — campaigns against involvement in the Vietnam war, conscription for the purposes of that war, peace rather than war, the importance of the environment and ecology, and so on. They are the kind of activities that active persons with a social conscience and a vision for a better Australia are entitled to be involved in without the branch of suspected subversion.

3. Richard Hall, *Greed* (Penguin, 1981).

8.9 The sum of a series of non-subversive activities does not total a subversive activity, merely because the information collector does not approve of them or merely because Communists also join in them, sometimes cynically, sometimes in good conscience. This observation is true, even where the non-subversive causes are misguided, even temporarily damaging, to other sections of the community. Its truth can be seen more strikingly where the causes espoused by supposed subversives eventually prove to be in Australia's best interests, as seen later by most thinking citizens. In retrospect, they are seen to be as loyal as their critics and watchers, but in the meantime they are placed on cards and files as security risks.

8.10 The vices of the collection system lies in the too ready assumption, in the first place, that the organisation or activity itself might be subversive and, in the second, that the persons involved therein have personally done something which might ultimately prove to be subversive, when neither assumption is justified.

8.11 The rights to privacy and to freedom of political opinion demand that more specific and cautious evaluations should be made of situations, organisations and persons before information is collected and stored. The criteria for identifying subversion must be reasonable and realistic, and those thought to be involved in such subversion must only be treated as suspects where the suspicion is based on reasonable grounds.

In five years' time, an objective perusal of the Crime Authority's criminal intelligence file is likely to invite criticisms which match the foregoing. It is almost inevitable that there will be abuse; that is the nature of surveillance. The debate about even the modified Evans proposal, then, should face up to the question: *do we wish, at a time when the supposed benefits are purely speculative, to foster criminal intelligence gathering in the virtually certain knowledge that it will, in much of its manifestation, constitute an invasion of privacy and a distortion of the relationship of the Executive to the individual?*

### **An Enhanced Role for Existing Police Forces**

At the Canberra Conference, it was received wisdom that (a) existing police forces are under-resourced and (b) that if they were properly resourced they could do much to fill the perceived hiatus in the policing of sophisticated crime. With these perspectives I agree.

However, in a serious debate about an important problem, there can be no sacred cows. The question must, therefore, be asked whether State police forces are recruited, trained and managed in such a way that the injection of funds would, without more, lead to a markedly improved performance in this area.

If there is agreement about one thing, it is that crime patterns are changing, becoming more complex and sophisticated, being planned more carefully. In a word, more brain-power is going into crime. But is more brain-power going into policing and crime detection?

Without wishing to labour the point, a recent publication of the Australian Institute of Criminology (Swanton, Hannigan and Biles, *Police Source Book*, 1983) makes it clear that the problems identified by Chappell and Wilson (*The Police and the Public in Australia and New Zealand*) in 1970 and by Wilson and Western (*The Policeman's Position Today and Tomorrow*)

in 1972<sup>4</sup> remain virtually unchanged. Educational standards of entry are still low; lateral entry by lawyers, accountants, computer experts, organisation and management specialists etc. is impossible; promotion for the proven high-fliers proceeds at a snail-like pace; an obsession with 'sworn personnel' means that clerical support tasks and work peripheral to the actual business of policing is still done by police themselves.

Certainly, police forces are under-resourced, but are they utilising the resources they have in an optimum manner? In a context where additional federal funding for State policing appears to be on the political agenda, the public and the body politic are entitled to an answer to that question. I do not know what the answer will be; but I do believe the question should be confronted as part of the total process of dealing with the new dimensions of crime which are concerning the community.

### Co-ordination between Police Forces

The Evans model — and every other model which has been mooted — presupposes that substantial co-ordination and co-operation can and will be achieved. Is that supposition justified?

Certainly, recent policing history does not encourage great optimism. The Moffitt Report<sup>5</sup> (paras. 132, 166 and 199 in particular) documented the chronic tension which existed in the early 'seventies between the New South Wales and the Commonwealth Police Forces. The Stewart Report, ten years on, likewise documents the lack of co-ordination both between various State police forces and, once more, between State and Federal police (pp. 448 *et seq.*, 512 *et seq.*). Has anything changed?

I cannot give an answer to that. But I do believe the political and social climate is ripe for change, if it is ever to occur. The Crimes Commission Conference — an unprecedented national event — is both a symbol of this and a possible catalyst for the beginnings of change. Whether or not one is convinced by the argument that 'organised crime' is now rampant in Australia and that, to quote Mr Costigan, QC, the country could be a 'jungle' in five years' time unless extraordinary procedures are created to take national action against it, one can certainly agree that crime should properly be regarded as a *national* problem rather than a series of discrete State problems. To that extent we have come quite a long way. My own State — Western Australia — until quite recently classified its prison population by State of origin — crime was thus able to be seen as something committed disproportionately by 'Eastern Staters'. In reality, of course, it is simply crime committed *in Australia*, though having to be handled at the immediate operational level by a State-based agency. That is so whichever State one happens to live or work in.

So, as I say, the positive thing coming out of Woodward and Williams and Stewart and Costigan is a perception that parochial analyses of crime patterns are now quite outmoded. Against this background, the prospects for improved police co-ordination must be excellent.

4. Both books published by Queensland University Press.

5. Royal Commission of Inquiry into Allegations of Organized Crime in Clubs (1974) Report (Canberra, Australian Publishing Service) [chaired by Mr Justice Moffitt].

**Summary**

The Evans model is a positive one upon which State and Federal agencies should seek to build. But we must proceed circumspectly, not in a headlong rush. In doing so, the factors I have referred to should be taken into account.

**PRESENTATION OF PAPER**  
*Professor Richard Harding*

Bob Bottom said at one point that four of the eight top organised crime figures in this city at the moment were shoplifters ten years ago (page 17). I suppose in another context we would regard that as admirable upward mobility and be applauding them. I refer to that not entirely facetiously because I think it is indicative of the kind of orchestrated moral panic which has attended the early stages of this debate, and which I am glad to say is starting to disappear from the debate after the Canberra so-called Summit. The trouble with orchestrated moral panics is that they are very simplistic in themselves and they obviously lead to simplistic supposed solutions. Their attraction is the comforting view that there is nothing much wrong with society in itself, but rather that there are enemies of society. You find much of the rhetoric of the debate concerns such phrases as 'cancers', a health kind of image, and 'jungles', a civilisation image, and these are indeed words used by Mr Meagher and Mr Costigan both of whom are, of course, very prominent in this debate. Bob Bottom with much of his paper has done his best to tune into this moral panic so as to set up, as I say, simplistic solutions. If you look at his paper you will find references to Mr Big and Mr Big Enoughs (page 16). Journalistic lingo is of course very striking, and the long run of examples — all generalised, all assertive — are equally striking. But when all is said and done there isn't a great deal there.

Of course, it helps if you do have the cast of mind that sees conspiracies where conspiracies don't exist. I myself was at the National Crimes Commission Conference and I was not aware of the fact that I have become a member of an 'alliance' or a 'lobby' (to use Bob Bottom's phrases on page 20 of his paper) to try to destroy the notion of a Crimes Commission being set up. It must be understood by those who talk about Crimes Commissions that people can genuinely and individually reach similar conclusions from entirely different viewpoints, via an entirely different path of reasoning, and yet both conclusions can be valid. They are not organised, they are not part of a conspiracy, a 'lobby', an 'alliance' or whatever it is. But if you see a mini-conspiracy at the National Crimes Conference, obviously you can readily see organised crime at the level of traditional crime writ large.

What we have in Australia I think (I am not asserting — I cannot prove it), is lots of traditional crime writ large. Everything is expanding. BHP is expanding and taking over Utah so we are told; everything has to get bigger to survive. Does it turn into this special self-perpetuating monster called 'organised crime' — illustrated by Mr Meagher at his ANZAAS paper with five-legged octopuses at the bottom of the harbour and six-legged octopuses and occasionally an eight-legged octopus? Is this what we have, or do we have traditional crime writ large? I can't swear to you what we have, but what I do know is that those who urge unusual solutions have the onus of showing that their diagnosis is a correct one.

Now, let's come to the diagnosis. What we are told to do is to take it on faith. A great deal was made of Mr Meagher's six papers — they took three hours to deliver at ANZAAS. In his six papers setting out organised crime there was not a single documented fact as far as I could see, and I sat through them all and I read them all, that proved his thesis. There were lots and lots

of assertions and Mr Meagher said 'I can't tell you the detail, it is confidential' (apart from that which has escaped into the public arena via the various Costigan Commission Reports). They show to my way of thinking lots of traditional crime writ large. Mr Costigan took on this point quite openly and unapologetically at the Canberra Conference and said 'To whom should the existence of organised crime be proved if not to Governments?'. My answer is: to me and to you and to the public that Bob Bottom wants to have a referendum with to see if they agree that an organised Crimes Commission should be set up. This elitism of saying 'I know best and I have told the government and they will act upon what I have told them, I hope' is just not on in a democratic society. We have to prove our case before we embark upon major social engineering, and once you start looking into the occasional phenomenon that can be looked at properly often the situation is quite different from that which those who believe in organised crime take as an article of faith. I gave an example in my paper on page 37. Mr Meagher asserted that there was widespread organised police corruption in relation to prostitution in Perth and he referred to the Norris Royal Commission. Now, that was one of the few times that Mr Meagher actually dealt with publicly discoverable material. I could check it, you could check it, he could check it; and he got it wrong. Yet he wants us to take it on faith.

I refer in my paper on page 40 to the olive oil scandal in Italy. If Bob Bottom had been investigating this we would have had organised crime, rather than a series of individual people looking at the Common Market regulations and thinking 'Wow! We can take those for a ride' and inventing paper oil, which is what they did. People do have the same ideas, the same ways of going about things. The fact that a lot of people do the same thing doesn't mean it is organised in this enduring corrupting way that we are asked to believe. If, as a consequence of this seminar, anyone here is moved to enter the prostitution business and decide to run a few girls there are a limited number of ways as to how you can do it. There aren't any very original ways of actually becoming a pimp. You have to get some girls, you have to get a location, you have to find a way of collecting your money, and then you have to make a decision as to where to operate. You might decide to operate where everyone else is operating on the sort of television marketing approach — namely that if Channel 7 is putting on a blockbuster, Channel 9 will put on a blockbuster and increase the total audience for the two blockbusters — so you might move up to the Cross. Or you might take the other approach and move out into the suburbs. But that is the limit of your choices. Is it organised crime or is it traditional crime? To me it is the latter and it is up to those who say we have this monster of organised crime to prove it. All the Royal Commissions that we have had have not yet established this. They have proved, in my view, traditional crime writ large, organised and planned just as all of us plan our activities from time to time. In a way I am tilting at windmills, but inasmuch as the Crimes Commission debate, despite its rhetoric and despite affirming that it believed that organised crime did exist, seems tacitly to have accepted this analysis. It has come up with the Evans model which I set out in my paper (page 38) and I will make two or three comments on aspects of this.

Firstly, I do not like criminal intelligence gathering unless it is subject to clear guidelines, clear objectives, and clear monitoring procedures to make

sure that it does not take on a dynamic of its own. Data collection tends to replace judgment, and there is a pseudo-objectivity in data. We have to be careful of data collection for its own sake and I quote from Mr Justice White (pages 41 and 42), and I think it is a very apposite quotation in the context of this debate and perhaps in the context of other things going on in Canberra.

Secondly, it is suggested that existing police forces can take over the role of policing of what I consider is probably traditional crime writ large. It is admitted they have not been doing so as well as they might, and there tends to be an assumption that this is a resource problem. Let me join John Braithwaite with his very important preliminary caveat that the criminal justice response to this kind of problem is not in itself adequate. But, to the extent that we are trying to improve it, I just want to ask a question and not in any way try to rubbish any police force or undermine their positions. Are they in fact as efficient as they could be? It was almost a kind of sacred cow in Canberra that they were. Nobody wanted really to get into this issue, but in my paper (pages 42 and 43) I raise what I think are very important issues as to the internal procedures of police forces with regard to recruitment, promotion, lateral entry (which of course doesn't exist), allocation of clerical and administrative tasks, complaints systems, and so on. Now, a lot of the problems come from the strength of police unionism. Undoubtedly, there are great management problems in police forces, but I don't think it should simply be taken on faith that the police forces as currently organised are necessarily the panacea for the problems of this increasing degree of traditional crime. Canberra is going to be asked to give a handout of a massive kind. There should be some questions as to conditions on the handout, not a tied grant, but indication from police forces that they look at their procedures of recruitment and so on from the point of view of becoming more efficient.

On page 43 I referred to the co-ordination problem between police forces — it will always be with us. Maybe, as I say in the paper, now is the best moment of all to try to improve that co-ordination.

To summarise, I think the Crimes Commission debate in its unadulterated form is probably now over. I certainly hope so. It is running against the tide of so many other things that are going on in Australia. The Senate Report for example on the Burden of Proof is an important document, and certainly does not look for any diminution of the weight of the burden. The Criminal Investigation Bill, the *Human Rights Act*, the Sex Discrimination Bill, the *Freedom of Information Act* and so on are all going in that direction. A Crimes Commission proposal would tug in exactly the opposite direction. It is not on. Even the Evans model worries me a little, principally because of the intelligence gathering matter which seems to need a lot more examination. What I do believe is that a simple solution would not work, and a single solution will not work. We need a lot of approaches to crime in our society. We need law reform approaches, we need differentiated sentencing. We must identify those things it is worth sending people to gaol for and those it is not worth sending them to gaol for. We still have not done so. We muddy these things constantly. I would like to see particular reforms such as the outlawing of nominee companies. There is no legitimate reason for nominee companies in my view.

These are details, but I will end by saying that above all I think that the appropriate approach is this:

Where radical change is proposed to the balance between the executive and the citizen, the onus is upon those who wish to argue for such change to show that it is necessary and desirable. Specifically there is a positive onus to demonstrate that *organised* crime exists; an onus then to show that it can *only* be dealt with by unusual procedures; and a further onus to justify the particular unusual procedures suggested as opposed to some less radical new procedures. (See page 37.)

## ACCOUNTABILITY TO PARLIAMENT AND ORGANISED CRIME

*John Hatton, MP*  
Member for South Coast, NSW

### Introduction

My concept of a National Crimes Commission does not fit the model of an all-powerful centralised crime monitoring organisation, but one based on the fundamental tenets of Australian democracy.

Organised crime is not new and has always existed. Its existence and its much emphasised potential to have wide-ranging detrimental effects on our society, I submit, is due to the recentralisation of power, together with the complexity and widespread affluence of modern society. There is widespread agreement that organised crime exists, widespread debate as to its form and definition, widespread disagreement as to the adequacy of mechanisms to counter or to contain and monitor organised crime. But more importantly there is widespread concern that a new mechanism designed to handle the problem may do more damage by infringement of civil liberties than the disease.

The purpose of this paper is to relate my opinion, based upon experiences as a parliamentarian, state my concerns and opinions and suggest some options. Organised crime described in such terms as war, cancer, takeover or other emotive phrases, conjures up vivid pictures and engender excited responses. Organised crime is not new, however, it has always existed but I firmly believe from my observation that exposure of the penetration of organised crime into our society by Royal Commissioners, Justice A.R. Moffitt, Justice Sir Edward Woodward, Justice Sir Edward Williams, Justice Donald Stewart, and Mr Frank Costigan, QC, and in papers presented by Mr Douglas Meagher, QC, cannot be ignored. Generally the picture is one of omnipotent, large, vertically integrated ruthlessly disciplined structures inflicting enormous damage on society and with the potential to do incalculable harm and one against which urgent action must be taken before it is too late.

To totally ignore this view, in my opinion, is folly. But neither can the Reuter<sup>1</sup> analysis of crime in New York referred to by Professor Gordon Hawkins during the ABC's programme 'The Law Report' (26/7/1983) be ignored. Reuter found, in applying standard methods of examining business structures to the study of crime, that what is revealed is not monolithic structures but a series of small competing often ephemeral structures based on co-operation or individual initiative to capitalise on circumstances in an economic climate in order to make an illicit profit.

So these are the extreme positions and hence one can see the difficulty in arriving at an acceptable definition. My view of organised crime is cast somewhere in the middle. I do believe that there are large organisations able to grow and flourish through influence peddling and with the assistance of corrupt officials including police and politicians. I also believe, however, that there are myriad small and individual organisations able to feed illicitly off society because of its complexity and failure of the legislative process to keep up with the need to reform the law. If there is no institutionalised corruption,

1. Reuter, Peter. *Disorganised Crime* (M.I.T. Press, Cambridge, Mass. 1983).

criminal activity is sporadic and ephemeral. Where institutionalised corruption exists criminal activity is hierarchical and enduring.

It is my view that organised crime has become powerful in our community because of two factors. The first is summarised in the words of the Premier of New South Wales, Mr Neville Wran, in response to a question I asked on the 22nd February 1979. The Premier said:

Organised crime relies for its existence on the technology and the affluence of our society.<sup>2</sup>

The second reason — and by far the most important in my view — is the recentralisation of power. Organised crime has existed in organised society for thousands of years; organised crime in a community of decentralised power structure is more likely to surface on any one of the multiple pinnacles of power, and be dealt with at that level. In modern society political power is centralised within well organised party political machines and within executive government, in vertically integrated corporate structures, in private enterprise and bureaucratic structures in public enterprise (the Public Service). The opportunity to corrupt and extend the power that effects that corruption is proportionately magnified. Given this to be the case, the answer is not to centralise the organised crime control mechanism on an all powerful National Crimes Commission for such structure is liable to catch the same disease.

In discussion of crime, whether it be organised or otherwise, we must remember it's simply business. Perhaps the most free of free enterprises operating both within and outside of the law for maximum economic gain. From my own personal observation there is organised crime in large measure which does depend on political patronage and corruption of police and public officials, and the establishment of a symbiotic relationship with the existing power structures. This needs to be recognised. However, one must take into account the remarks of Justice Michael Kirby who continually emphasises the need for law reform, and at the recent National Crimes Commission Conference in the Senate Chamber in Canberra, in a paper entitled 'Another ASIO' vigorously attacks the concept of establishing a centralised crime-busting organisation.

At this national summit differences were highlighted. The Government had made public statements that organised crime was a menace and must be tackled at the highest level, Royal Commissioners solidly backed this. They pointed to the failure of existing agencies to deal with this massive problem. There was a large body of opinion however, which not only argued against the Models A and B put forward for a National Crimes Commission, but contested the necessity for its establishment.

These objections not only stemmed from very real and proper concerns for safeguarding civil liberties and an understanding of sociological forces within our society which tend to foster criminal activity, but also from the fact that many people in the conference had not had the experience of Royal Commissioners, Justices Moffitt, Woodward, Williams, Stewart and Mr Costigan, QC.

I perceive now that the Federal Government has a very real problem following upon the statements made by the previous Liberal Government emphasising the menace of organised crime and the need for action. There is

2. Hansard. Session 1978-79, Vol. CXLIII, p. 2548.

a large body of opinion which has rejected the necessity for a National Crimes Commission and nationally divided opinion on what form any crimes commission, if established, should take. It is in this climate that this discussion is taking place, and I put forward the concept of a National Crimes Commission which, hopefully, will use and strengthen existing structures to safeguard in large measure civil liberties and ensure accountability and yet provide a meaningful and effective response to the problems organised crime poses.

Organised crime is seen by the proponents of a centralised crime commission as an entity external to the functionings of the State, and at war with the State, and as the State is losing this war, it must be given more power to win the battle. The simplistic idea seems to be that the 'good' people need more power to defeat the 'bad' people. Organised crime is not separate from the State but part of the State (interpreting State in the widest sense).

Organised crime cannot exist without the corruption of government and public officials. It is institutional corruption that provides the necessary insulation between the criminal act and the figures of organised crime. If an attack on the criminal hierarchy were successful if it left institutional corruption intact many more criminals would soon appear to take the place of those deposed.

The answer is to use the existing mechanisms in society but to decentralise the power structure and achieve greater accountability using the State and Federal parliaments in a way that basic concepts of democracy envisage. Use of committees of Parliament decentralise power, backbench 'crime control' committees can subpoena witnesses and documents, hold open and closed hearings, bring expertise to specific areas, and are fully accountable through the legislature.

The National Crimes Commission then should consist of a Parliamentary Standing Committee on crime control established by the Federal Government with parliamentary crimes committees established in each State Parliament. (See **Appendix I and II**, pages 58-61, an approach arrived at jointly by Arthur King and myself. For most of the ideas regarding the possible administrative arrangements I am indebted to Dr Geoffrey Hawker of Canberra.)

The major areas of profit for organised crime are illegal gambling, drugs and vice. These are all areas where there are few complaining victims and a good deal of ambivalence in society about the need for proscriptive laws to control these activities. Because of this ambivalence officials do not feel they are doing anything *very* wrong when they tolerate the existence of such activities in their area. This attitude and the very high cash flow generated makes the corruption of public officials inevitable.

This corruption is not restricted to policy. It is generally recognised that for organised crime to succeed its corruption extends to include public servants, members of the judiciary, members of Parliament, and not infrequently, executive government itself. Thus any approach to the problem of organised crime that ignores or plays down the importance and extent of this corruption is one-eyed and misdirected. The *National Crimes Commission Act 1982* was criticised by Mr Justice Stewart for not expressly providing that 'the Crimes Commission may investigate any corrupt omission or exercise of discretion by a public servant'.

There has been a growing awareness of the extent of the twin problems

of organised crime and official corruption in the last eighteen months. The dismissal of the Police Commissioner Elect in New South Wales, Bill Allen; the revelations of official inertia by both the Costigan and Stewart Royal Commissions; and the inquiry into the actions of ex-Chief Stipendiary Magistrate, M.F. Farquhar, have all played their part in creating an increasing public disquiet about the power and influence of organised crime.

It is now generally accepted that organised crime and official corruption are serious problems in Australia today. This awareness of the growth of the problem has led to the questioning of the effectiveness of our current structures of law enforcement and administration of justice.

If we accept that the problem is serious, and that our present structures are unable to deal with it then three possibilities for remedy are available. They are:

1. Create some new structures.
2. Reform the existing structures.
3. Attempt to remove the basis of the problem by law reform and more open government.

### **Law Reform**

Let us take these points in reverse order. Most of the areas of making a profit for organised crime are areas of victimless — or at least non-complaining victims of — crime. These areas are, of course, illegal gambling, drug abuse and vice. In all of these areas there is no complaint, generally speaking, from the victim of these crimes. Where there are crimes that generate high cash flow and yet no complaining victims there is clearly a tremendous potential for the corruption of public officials. Police, politicians, officials in Immigration, Telecom, and in the various Attorney-General's departments are all in a position to be able to provide some immunity or service to organised crime.

Clearly, if the drug, licensing, vice and gaming laws were reformed, most of the areas of profit for organised crime would disappear overnight. However, to suggest that law reform is a practical solution to the problem or organised crime in Australia is misguided for two reasons. Law reform is not a permanent solution. Organised crime makes its profits from exploiting the gap between what people — or at least some of them — want, and what the law allows them to obtain. As long as we have proscriptive laws this gap will exist, if not in the areas of illegal gambling and drugs, then in some other area as yet unforeseen. As long as the opportunity to make large profits by illegal means exists we will have the same, or a similar, problem. The law, it seems, always lags behind the desires of the population and organised crime exploits this gap.

Secondly, law reform is a very, very slow process. The prospects for significant law reform in the areas of vice and usage of illegal drugs are slight indeed. While the long term solution may well be law reform, it is not a remedy that is available in the immediate future.

### **Reform of Existing Structures**

The next general approach which we could take to this problem is to reform the structures that already exist. Certainly there is a great deal that could be done to restructure some of the law enforcements and judicial

systems we now have. However, none of these reforms are available as an immediate solution because the basic reform necessary is a move towards more open government. Organised crime, along with its concomitant official corruption, can best thrive with closed bureaucratic structures. If the bureaucracy and judicial system were more open to scrutiny then it would be much more difficult for officials to indulge in corrupt practices.

The best, and perhaps the only, effective defence against corruption, is public scrutiny. Corruption can only occur where it can be hidden, it cannot be hidden if there is effective accountability by police and public officials. Allegations of corruption are frequently levelled at police, yet many other government departments and statutory authorities which are just as closed to public scrutiny, abound with opportunities for corrupt practices, but are infrequently investigated.

There have been many reforms of police structures recommended in recent Royal Commissions, notably those of Mr Justice Williams and Mr Justice Stewart. Among the more progressive changes are:

1. Lateral recruitment. What is suggested is that all positions above, perhaps, the rank of Inspector be advertised nationally and any officer serving in any police force in Australia may apply for a job in any other force. This would ensure the rotation of the top levels of management of police thus providing some guarantee against entrenched corrupt practices.
2. Such a reform would require, amongst other things, portability of pensions between States and between State and Federal governments.
3. Police forces should be open to inspection by the office of the ombudsman or some other similar method of external scrutiny instituted.
4. Officers in high risk corruption squads, such as drugs, should be rotated at regular intervals, and no officer should serve for more than, say, three years in these squads.
5. Uniform police should also be used for short periods in these high risk corruption squads, these police being seconded for periods of about three months.
6. Special duty squads should be introduced. These squads should have across the board jurisdiction thus ensuring that no one officer, or no one squad, can provide an immunity to arrest.

There is nothing especially new about these kinds of changes, most of them are consistent with the principles of greater mobility and accountability advocated by the recent inquiries into Public Sector Administration by Coombs<sup>3</sup>, Wilenski<sup>4</sup> and Corbett<sup>5</sup>. While these changes would help they are not available as an immediate solution to the problems we now have. Lateral recruitment is perhaps the most basic change, and even if introduced immediately, its effects could not be measured for many years.

3. H.C. Coombs (Chairman), Royal Commission on Australian Government Administration: Report. 5 vols. (Canberra, A.G.P.S. 1976).
4. Peter Wilenski. *Review of N.S.W. Government Administration, Directions for Change. Interim Report.* (Sydney, Govt. Printer, 1977.)  
*Unfinished Agenda, Further Report.* (Sydney, Govt. Printer, 1982.)
5. D.G. Corbett (Chairman). *Report of Inquiry into the Public Service of South Australia.* (Adelaide, Govt. Printer, 1975.)

### Creation of New Structures

Because the prospects for law reform and more open government in the immediate future seem dim, many people have called for a new approach to the problem of organised crime. One of the most popular of these new approaches is the call for the establishment of a National Crimes Commission. Much lip service has been paid to this concept of a National Crimes Commission. However, very little analysis of what a Crimes Commission would be, and do, has been evident. What has been evident is a belief amongst the proponents of a Crimes Commission that some modification of our democratic institutions is necessary in order to effectively combat organised crime.

Recent comments by the Attorney-General, papers given to the ANZAAS Conference by Justice Moffitt, and Douglas Meagher of the Costigan Commission, and the *Crimes Commission Bill* 1982, all propose some modification to a few basic rights. The emphasis varies from the Attorney-General on the civil libertarian side to Mr Meagher on the inquisitorial side, but all suggest some rights and liberties be foregone for the greater good. The rights most under attack are — the right to remain silent; guarantees against self-incrimination; the presumption of innocence; and the right to privacy.

At its most inquisitorial the proposed Crimes Commission would have the following powers:

1. The power to summon witnesses.
2. The power to compel answers.
3. The power, and the facilities, to covertly collect criminal intelligence.
4. The power to subpoena documents, and
5. Extensive jurisdiction across State borders.

Any institution with such extensive powers and so little accountability would be an innovation indeed into our system of government.

The Crimes Commission's power to summon witnesses and compel answers is frequently conceived in a somewhat theatrical manner. The image created is of the shadowy moguls of organised crime being dragged unwillingly into the light by the penetrating questioning of the Commission. I suggest that little benefit would be gained by the public questioning of such people, and many traditional rights endangered. Further, such an inquisitorial model is not necessary as the same ends could be achieved without the abandonment of hard won civil liberties.

Another element that is common to almost all proposals for a Crimes Commission is the inclusion of an extensive facility for the collection of criminal intelligence. The basic function of intelligence gathering and the keeping of dossiers on individuals is anti-democratic. Normally law enforcement is reactive. A crime is committed, a complaint is made to the police, the police investigate and collect the evidence which is then presented to a court to determine guilt or innocence.

A crime intelligence unit operates in quite a different way. Individuals or groups are declared 'targets' and all available information is collated. Should this pooled information confirm the already held suspicion that the 'target' is involved in illegal activities then a surveillance operation is mounted. This kind of operation takes the initiative away from the criminal and involves the police in actively seeking out crime before it occurs. It is argued that this operation is preventative rather than reactive and therefore its results are not always

visible to anyone other than the potential criminal who aborts the crime because of the surveillance.

This approach to law enforcement is common to security organisations, ASIO used it in a recent annual report, claiming that they had considerable success in foiling terrorist plots in their early stages. But the unmasking of the conspirators early, before the event occurred, precluded any court action, or one might add, any public examination of ASIO's claims.

The dangers in such an approach to crime control are apparent:

1. Intelligence gathering tends to become an end in itself.
2. The temptation is to get that little bit more information to complete the picture before acting frequently means no prosecutions result.
3. Most of the evidence so gathered is inadmissible in court.
4. The compilation and ordering of information brings into existence a commodity that can be sold back to the criminal community by corrupt officials.
5. Intelligence information is not shared, but jealously guarded by the agency that collects it. (We need only look at the history of the Australian Bureau of Criminal Intelligence if confirmation of this last point is felt necessary.)

The South Australian Police Commissioner was sacked and a Royal Commission held over this very issue in 1978, yet now there seems little controversy over the keeping of dossiers on 'suspects'. The same ends can be achieved by more open and less coercive means. Rather than forcing individuals to answer questions and covertly spying on them why not offer some reward or encouragement to come forward and give testimony? I speak here of immunity statutes and the use of a witness protection plan.

Anyone sufficiently involved in organised crime to have detailed knowledge will not testify because they fear both arrest and retribution by the organisation they are involved in. Today those fears are fully justified. Immunity statutes passed at a State and Federal level would contain consistent guidelines to be followed when granting witnesses immunity from criminal prosecution. A witness protection programme would provide a measure of security for witnesses willing to testify. (See **Appendix III**.)

Immunity statutes *de facto* exist. All that is suggested is that the procedures become formalised and open to scrutiny. Every police force offers rewards and immunities to its informers as they must if they expect to receive any worthwhile information. Objection is not taken to the process itself, but rather to the clandestine way in which it is now carried out. Information so gathered would have the advantage of being admissible in court in a way that covertly gathered intelligence is not. It is one thing to collect intelligence. It is quite another to collect evidence that may be used to sustain prosecutions.

The power to summon witnesses and compel answers, I would argue, should be restricted to public officials. If one accepts that official corruption is a necessary condition for the existence of organised crime then this is where we should be directing our attention. Public officials, not private citizens, should be compelled to attend such a Crimes Commission and compelled to answer any questions. There is a long tradition of examination of public officials in our system of government. There is no inquisitorial tradition whereby a private citizen may be compelled to attend and answer questions.

There already exists in our system of government a body that has the

power to summon witnesses and compel answers. It is also a body that is accountable for its actions in a way that few other organs of government are. I speak here of a **Parliamentary Committee**.

### *Strengths and Weaknesses*

It is relatively simple to implement. No legislation is required; the proposal could be quickly in place.

It is consistent with party policy and would be adequate in the light of commitments made elsewhere.

The Committee would be a highly accountable body, distinguished from the executive but sensitive to it, for which precedents exist.

A Parliamentary mechanism will enhance the prospects of Commonwealth-State co-operation. The support of the Commonwealth and of some States only will be required. 'States Rights' wrangle is avoided.

The tabling of Minority reports of committees in the Parliament mitigates against committee control by special interest groups (including executive government).

Committees as an arm of the legislature can be more influential on government in matters of law reform and structural change.

**Note:** It is emphasised that the 'Crime Control Committees' be Standing Committees therefore ongoing, a continuous monitor, recommending changes/improvements to existing structures such as police, the law, judiciary.

Starting the committee will be inexpensive and relatively easy. A committee can use expert and knowledgeable public servants on short term rotation and secondment and so can free individuals from the inhibitions of their departmental situation; a Parliamentary Committee can attract scarce expertise for short periods.

Parliament in the establishment of the committee lays down guidelines to safeguard civil liberties, eg right to silence, legal representation, publication of proceedings under privilege.

Committees are a low-cost initiative.

The committees are a continuous monitor on the effectiveness of existing crime control agencies working in conjunction with them where thought appropriate (eg ombudsman, police) but retaining complete independence.

Gives whistle blowing public servants and others a place to lodge complaints.

Can provide witnesses with legislative protection against recrimination.

### *Weaknesses*

Executive governments are reluctant to pass work to Parliamentary Committees.

The turnover of parliamentarians is high and their capacities for this sort of work are doubtful.

### *Support and Opposition*

Support can be expected from:

- \* staff associations and unions
- \* members of parliament
- \* civil libertarians
- \* academics, critics

- \* some parts of the legal profession and opposition from:
- \* executive governments
- \* some judges, Royal Commissioners, lawyers.

*Example of Attack*

As an example merely, a Committee might follow the clues of the Connor Board of Inquiry into casinos:

every SP bookmaker has to have some people within Telecom on his payroll . . . substantial bribes are paid to Telecom employees up to a high rank.<sup>6</sup>

Note that the A.B.C.I. Inquiry of Telecom (Project Lion) has been terminated after noting that:

the task force did not have the resources to inquire into Telecom . . . Telecom records are not structured in such a way as to make (relevant) information available.

(Internal report 44)

6. Xavier Connor (Chairman). *Report of Board of Inquiry into Casinos*. (Melbourne, Govt. Printer, 1983.) 14.11-12.

## APPENDIX I

### PROPOSAL TO ESTABLISH A PARLIAMENTARY COMMITTEE ON CRIME CONTROL — A COMMITTEE TO BE ESTABLISHED INITIALLY IN THE COMMONWEALTH AND IN ONE OTHER STATE PARLIAMENT (PREFERABLY NEW SOUTH WALES) AND LATER IN ALL AUSTRALIAN PARLIAMENTS

The idea of a Crimes Commission as a powerful body distinct to some degree from the executive government is a fundamentally mistaken one. To give to an agency which cannot be controlled the powers of summoning witnesses and compelling answers, collecting intelligence and subpoenaing documents, is to make a dangerous decision which cannot easily be revoked.

To think of a Crimes Commission as an agency of the executive government, or once removed as a statutory authority, is then a step in the wrong direction. A preferable direction would be at once more modest and yet also more radical.

That would be a proposal to establish a system of Parliamentary Committees on crime control. To do this would involve some redefinition of what we understand organised crime to be and its control to require. It would also require a different approach entirely to the organisational form and personal practices of the reconstituted body to control crime.

For parliament, through its committees, to take an effective role in the control of crime (as outlined below) is clearly likely to raise some acute political problems. The resistance of the executive to extensions of parliamentary activity of a scrutinising type through committees is one factor to be considered; another would be the often cited incapacity of parliament to do anything much at all.

The proposal, then, is to establish initially in the Commonwealth and in one other State parliament (preferably New South Wales) and later in all Australian parliaments committees on crime control. The function of the parliamentary committees on crime control within each parliament of the federation would be to investigate crime and its connection with government employees especially those of senior rank. The committees would commonly sit jointly, having a common agenda, venues and deliberations. A joint report to the respective parliaments would be made, but provision for separate and minority reports should be available.

In the case of the Commonwealth, for example, the committee would scrutinise Commonwealth public service and related government agencies using the powers of parliamentary committees to call witnesses, take evidence and make reports to parliament. The committee would have power to call for evidence in private and public hearings, to operate the procedures for the criminal indemnities provisions set up pursuant to joint Commonwealth-State legislation (as described above), and to undertake inquiries in its own right in the light of information so gathered.

#### **Constitution**

The constitution of each parliamentary committee must be considered in the light of the requirements of each particular parliamentary assembly. The scheme suggested here applies to the Commonwealth Parliament and would, with suitable revision, apply as a model for the parliaments of the States.

The Commonwealth Parliamentary Committee on crime control should be constituted as a joint committee of the houses. It would not be necessary in the first instance for the committee to be of the Joint Statutory type (as with the broadcasting of parliamentary proceedings, public accounts and public works). However, the status of joint statutory committees could be considered at a later stage. At the outset, in order to commence the proceedings which are so evidently necessary, the constitution of the committee as joint (as with Australian Capital Territory, electoral reform, foreign affairs and defence, the new Parliament House and parliamentary privilege) would be sufficient.

The best comparison would be with the joint parliamentary committee on foreign affairs and defence which has an ongoing presence as a committee but a shifting focus of attention. This would be important for the development of the work of criminal control in a co-ordinated way (see further below).

### **Membership**

The membership of the committee could be six or eight, drawn equally from both Houses. The selection of seven or nine members would allow predominance for the House of Representatives where, in any event, the Chair should lie. It would be important to have a membership balanced both by party and by State representation. Party representation could be Government three or four; Opposition three or four; and Independent/Democrat one. State representation should be given equally.

A committee in a State parliament would likewise require membership for both houses with a balanced party and non-party representation.

A systematic interchange between committees established in parallel will permit an orderly and national approach to crime and corruption. To locate this function firmly within the parliamentary committee system and to emphasise within that framework the investigation of public officials as to their honesty will be to create a clear alternative to the present models. Those models emphasise a considerable para-police or prosecutory role which would be but lightly scrutinised by parliament. In the approach adopted here the parliament would exercise a more substantial role, in terms which an executive government would have reason to accept. In the short term some joint activities between the Commonwealth and the State parliamentary committees on crime control would be sufficient to bring results in terms of administrative change and criminal proceedings. These are benefits which provide a real alternative to the inadequacy of the other proposals.

Parliamentary committees over recent years have demonstrated that they are very good at this sort of work. From nearly all parliaments in Australia, and especially from the Commonwealth, have come a series of reports on crucial aspects of Australian political and social life. The extension of the parliamentary committee mechanism in the way suggested here would not be difficult.

It is sometimes argued that the turnover of parliamentarians amongst other factors makes sustained attention by a parliamentary committee to any particular subject very difficult. The record does not in fact sustain such a doubt (the cases of the Public Accounts Committees are the first of many). The committee would have sufficient time during the course of a parliament to prepare and undertake investigatory work. This is the case at present and the scrutiny of public officials in this particular way poses no new problems.

Additionally, it is important to recognise that the limited tenure of parliamentarians is itself an essential guarantee that accountability mechanisms do have a substantial meaning.

Some supposed weaknesses in the parliamentary committee scheme should be noted. Since the task of the committee is considerable in the short term the question of staff and support 'resources' will arise. But these will be in the nature of clerical and executive support. The publishing of the committee's work and expedition of the hearings will be important, as will careful attention to the rights of public servants who appear before the committee. For this reason early consultation with trade unions and staff associations would be required in support of this general proposal and in terms of its subsequent implementation.

In summary, the use of a parliamentary committee would permit a co-ordinated approach to the issue of crime control, and would ensure the accountability of those undertaking the work.

A parliamentary committee would be distinct from the activities of the Ombudsman, Administrative Appeals Tribunal or other apparatus of the administrative law. It might, however, be seen as part of a wider system of personnel management and grievance review within the public sector. A parliamentary committee would give whistle blowing public servants somewhere to go which was not in the direct line of accountability from official to permanent head to minister which so often had made revelations of dishonest activity impossible for officials in subordinate positions. Close consultation with the public sector staff associations and unions would be required to implement these arrangements but the unions can be expected to welcome the definition of an area of corruption and criminal activity which will allow attention elsewhere to be focused upon an improved system of employees' rights.

## APPENDIX II

### THE NEW SOUTH WALES UPPER HOUSE PARLIAMENTARY COMMITTEE INTO ORGANISED CRIME

People seeking to discredit the suggestion of a joint Standing Committee of the Federal Parliament have referred to the operations of the Committee of the Legislative Council in New South Wales under the chairmanship of The Honourable Derek Freeman, MLC.

The Freeman Committee did cause a full scale investigation into the tow truck industry in Parramatta resulting in the dismissal from the police force of at least thirteen police officers. However, the way the committee operated brought discredit upon the Parliament for despite some very sincere members, it was used as a vehicle to gain cheap political advantage.

The following points should be noted about the Freeman Committee:

1. It was formed just prior to an election.
2. It consisted of members of only one House, at that time comprised totally of representatives not elected by the body politic in New South Wales, and therefore not directly responsible to the people.
3. It was a bipartisan committee but no provision was made for a minority report to be published.
4. It had no investigatory arm or departmental or expert backup; an element in itself which encourages speculation rather than the considered findings of careful inquiry.
5. It was a Parliamentary Select Committee established in haste for blatant political purposes; not a Standing Committee with an ongoing role and long range objectives.

Any comparison between this and the model that we have suggested overlooks the safeguards built into the model at the parliamentary level. The National Crimes Commission of national standing has to maintain a national image of probity and an international reputation of responsibility. Crime control committees as an integral part of the national structure are required to maintain high standards or the members risk discredit.

## APPENDIX III

## WITNESS PROTECTION PROGRAMME

1. An essential requirement for any law enforcement agency must be the protection of witnesses able to assist in giving evidence against organised crime leaders. From the days of Al Capone the American gangster who controlled organised crime in the 'thirties, the Kray brothers in England who controlled crime syndicates in England during the 'sixties, to Terrance John Clarke and the Mr Asia syndicate in Australia who in a short time built up and controlled a massive drug trafficking empire during the 'seventies, organisations have ruthlessly disposed of anyone who infringed on the rules.  
Organised crime leaders realise that witnesses make them vulnerable, and will go to any length to prevent people from giving evidence against them. Because corruption is another arm of organised crime special precautions must be taken by governments, government departments and law enforcement agencies to ensure that the interests of witnesses are fully protected.
2. One of the best examples of the growth, control and ruthless enforcement by an organised crime leader on its members was Terrance John Clarke, a New Zealander, who in a few years established an international drug trafficking network using Australia as a base. Members of the syndicate who infringed on the rules of the organisation were either murdered or bashed senseless. For instance, Harry Lewis a member of the group was shot by Clarke at Port Macquarie, Gregory Ollard and his girl friend Julie Theilman were murdered and their bodies dumped in bushland in Sydney. Another member who was a little more fortunate was Duncan Robb, he had been giving information to the Narcotics Bureau and when Clarke found out about it, he bashed Robb with a baseball bat until he was unconscious and then left him for dead. One of Clarke's lieutenants was Christopher Martin Johnstone, he also fell foul of Clarke and was subsequently murdered and his body dumped in a quarry in the United Kingdom. A member of the group to survive Clarke's wrath was Allison Dine, she became crucial to police investigations into the syndicate and subsequently entered a witness protection scheme which has the support of the government in the United Kingdom.
3. In effect, the witness protection scheme accepts responsibility for the witness for the duration she or he is required to assist the law enforcement officers. When the witness is no longer required to attend court or to render further assistance arrangements are then made for the long term security of the witness. This may require a change of name, a new environment, job security or it may even require the expenditure of a large amount of funds over a lengthy period until the preceding conditions are fulfilled. Where the witness has a family, equal consideration must be given to each member of the family and arrangements made for obtaining necessary documents that will ensure that member of the family's security is not breached or that pressure cannot be brought to bear on the witness through a member of the family.
4. Other matters that must be taken into consideration when considering the welfare of a witness is what action is going to be taken against him in

relation to his involvement as part of an organised crime group. There are a number of instances where the witness is in fact one of the leaders of the syndicate and for some reason has decided to become a witness for the prosecution. In some instances it may be necessary to give him immunity from prosecution. On the other hand he may have to serve a term of imprisonment for his part in organised crime. In this case special arrangement would have to be made to ensure that the witness serves his term of imprisonment in seclusion and in complete security away from other criminals to avoid him being murdered.

5. Where the person concerned is an informant working or supplying information to a law enforcement agency care must be taken to ensure that the person knows exactly what risks are involved in his actions, what is required of him by the agency, and what assistance he can expect to receive from the law enforcement agency. In some instances, these details are recorded on paper to avoid criticism at a later date.
6. Some police forces in Australia now have a witness protection scheme whilst others deal with the matter in the light of the individual circumstances. This procedure is sometimes risky and may produce circumstances that will put the witness or informant at a disadvantage or cause him to lose confidence in the organisation using him as a witness. As a result he may cease to supply information or become hostile.
7. It is therefore important that each of the alternatives for maintaining the security of the witness or informant is worked out well in advance so that the officers and law enforcement agency know just how much security is available. It may also mean that they will have to deploy members of their own staff to provide a physical security in addition to any one of the other proposals.
8. For the reason set out detailed research is needed to be carried out to establish what is required.

## PRESENTATION OF PAPER

*John Hatton, MP*

I do not come here with any formal knowledge or any formal training. I come here as a Parliamentarian with really heartfelt concerns based upon experience and based upon observation. I am learning all the time — perhaps that makes me unique as a politician!

I put some propositions forward in my paper covering such matters as decentralisation of power, the complexity of social organisation, the failure of the law to keep pace, and affluence as reasons why crime exists in its 'written big' form, to quote Professor Harding. I want to deal with the imposition of new structures on top of the old, the role of the Parliament and accountability. I accept, for example, that organised crime is not at war with the State, and that is one of the things at the National Crimes Commission which did disturb me. It is an integral part of the State and of society. It has always existed and probably always will exist and I do not assume for one minute that we are going to stamp it out. The best we can hope to do is to plumb its depths and its widths, to examine its methods of operation, where it is able to take advantage and where it is able to be controlled, and to keep pace with it.

Central to what I have said in my paper is that whatever model of crime that you accept, whether it is the entrepreneurial ephemeral model where a person takes advantage as an individual or with one or two others to make a quick dollar 'get in and get out' ie, the Reuter view based on a study in New York, or whether you take the vertically integrated organised crime all powerful view, if crime exists it exists because people, the public officials that you are paying as taxpayers, are not doing their job. They are not facilitated to do their job, not able to do their job, do not want to do their job, are not encouraged to or are actively discouraged *from* doing their job. This is where I hit upon that central theme of accountability and when I talk about a public official I include the Parliamentarian as well as say, the policeman and others.

I take a line somewhere in the middle of the first and last papers before me. I don't believe that we should or can ignore Costigan, Meagher, Moffitt, Williams or Woodward. I think we would ignore those people at our peril. After all they were set up in response to a perceived need or a threat or something that had to be examined. They did it and they did it with power, the powers of a Royal Commission, and they came forward with firm recommendations. They made very strong comments and I for one am not prepared to wipe all that aside and say, 'you have not proven your case'. If you want to be very academic about it that may be true, but I think it would be most unwise to dismiss the findings and say that institutionalised corruption or vertically integrated very powerful organised crime does not exist. I also believe, however, that there is a lot of the ephemeral opportunist individual type crime.

Parliament ought to be looking at law reform, accountability and access for information. I am one of the people in this debate who have come around almost a full circle. Originally after I had talked to drug addicts in a drug rehabilitation programme, talked to police at the State and Federal level and observed what has happened on occasions in the Parliament, after I had read Royal Commission Reports, I thought to myself 'My God! It is a terrible thing this organised crime — we had better get stuck into it. We need more power,

we need other structures.' I have come back almost to the reverse of that. We need to work within the structure we already have. We may need more power, we certainly need more accountability but above all we need less secrecy, and that is where I depart from a number of people who supported the National Crimes Commission models that were discussed at some length.

I won't name the Justice concerned, but one of the Royal Commissioners in a discussion I had with him said that if we did really tell Mr So and So (one of the Bigs of organised crime) what we know about him it may not be a bad thing. It might be a good thing. It might make him more careful or again it may slow down his activities. Freedom of information, access to records held by the Australian Bureau of Criminal Intelligence or those held by the Special Squad in New South Wales, may be a very good thing in terms of prevention of organised crime as well as preserving civil liberties.

I contend in my paper that organised crime is able to exist in both the forms that I have mentioned because of the complexity of society, because of the affluence of society, but mainly because of the centralisation of power. Crime has always existed. If society is organised in a decentralised way, in its tribal state or its city state form, then obviously with a number of pinnacles of power the chances of organised crime or crime in any way surfacing on one of those pinnacles of power is much greater than if you have a pyramidal structure where it can be buried within the bureaucracy, within large party political structures and within executive government, or within vertically integrated corporate structure in private enterprise. I put it to you that is a very important point. More accountability means more exposure and therefore more control and more ability to monitor organised crime.

Centralisation of power can be either in executive government, a private corporation, the public service or, for example, in the CIB of the police force.

This is where I strongly support the present Minister for Police who seeks regionalisation of crime squads. In fact the Knapp Commission in New York found that if you want to control corruption to some extent then you make the local superintendent responsible for what is happening in his precinct. We must in our way of dealing with situations recognise the difference between a policeman who takes the bottle of whiskey or a few dozen bottles of beer and the officer who is involved in actually facilitating crime. When talking about a corrupt policeman I do not think of the fellow who is taking a few dozen bottles of beer, but the officer who is a part of 'a police force' within a police force. If the officer in charge of a precinct was told by a superior (external scrutiny) that A, B, C and D were taking that occasional bottle of whiskey etc and told to do something about it, it would not be necessary to get rid of them out of the force, he could let them know that somebody else is watching. That is how society works in terms of crime control. If somebody knows or is not quite sure whether he will be caught out, then habits change. The superintendent has the responsibility, he knows he is exposed but he finds that there is understanding, and provided he brings things to a reasonable perspective within his precinct, then everything is alright. That is the sort of perspective we need, not the perspective that says once you have transgressed in a small way you are automatically compromised and thus have become almost inevitably a part of institutionalised corruption. I recognise a real concern about the inquisitorial model of the Crimes Commission. However, the powers that Royal Commissioners have used time after time should not be

forgotten. We have accepted those, so there is some dichotomy in that debate. The fact that a National Crimes Commission may not be directly accountable is one thing that has certainly worried me. I believe that if you set up a centralised power structure then it will suffer from the same disease as those centralised power structures which are already riddled with the disease which helps to promote institutionalised corruption and facilitate organised crime.

Where does the citizen go? That is my main everyday interest in organised crime and what is happening in the State. For example, if a politician is involved and if that politician is involved in the party in power; if a powerful policeman is involved, if a member of the judiciary is involved, where does the ordinary citizen go? That is the importance of a National Crimes Commission. I am suggesting that there ought to be a place where he goes, and I am suggesting there ought to be a Crime Control Committee of Parliament in each of the State Parliaments and in Canberra, and that the guidelines should be carefully set out. At the moment the ordinary citizen can go to the Ombudsman but, of course, the Ombudsman has only limited powers. If the citizen has really deep-seated complaints in some areas he can go to Federal Police and find there is a jurisdictional problem which prevents enquiry into the State police. He can go to the State police and find that there may also be jurisdictional problems or he is not quite sure whom to talk to and so on. He may go to the Attorney-General and he may or he may not get action (and I have personal experience in those regards). I do not write off a National Crimes Commission and say there doesn't need to be one. I say there needs to be one, but it needs be where the power is — in the Parliament. It is no coincidence that it is in the Parliament where it can be accountable, where the people who are in power themselves can be removed from office, and that is central to any power structure as far as I am concerned. The Parliament is accountable — it can be made more accountable. Parliament must accept its responsibilities.

We also overcome the problem of the State/Federal jurisdiction and jealousies. Mike Cleary described backbenchers as 'pot plants on the backbench'; Ted Mack described them as letterboxes. Whether you describe them as baby kissers, letterboxes, letterstickers or phone abusers or whatever, they are quite busy people but they are not professional parliamentarians. That is the important thing. We need to facilitate them to become professional parliamentarians. The models are there, in the United Kingdom with the watchdog committees that are set up to look at various structures. For example, wouldn't it be nice to have a watchdog committee that could tell me what was going on in Telecom or at the Metropolitan Water Sewerage & Drainage Board or in the police force or whatever. The powers are there; you don't need new Acts of Parliament but you need to ensure that the power structures don't take over the Committee system. It needs to be a bi-partisan, all party committee with representatives of both Houses where they exist. It needs to have careful guidelines, it needs to have resource back up, it needs to have staff and access to information. It does have direct access to the legislature, and therefore has some power in that regard and its recommendations are debated on the floor of the Parliament. I think that is important. It can subpoena witnesses and documents, hold open and closed hearings, and have publication under privilege. The United Kingdom has found that the committees they set up in 1979 have surpassed even their wildest

expectations. Even ministers are beginning to realise that they need not any longer be responsible to the public service or even ministers for the public service, but in fact can be ministers for the people which is a pretty new thing in a modern democracy. These committees can look at the adequacy of law and look at law reform which in my belief is a slow process. They can examine the administration of law, the administration of corrective services, the administration of the police, and other existing structures. For example, the police; whether the force needs more manpower, the powers available to the police, the adequacy, the training, the equipment, the technology available to the police force, and lateral recruitment. Many of these reforms, like lateral recruitment, are resisted by the Police Associations in various States, but it would not be the minister who is saying it, it would not be the Government saying it, it would be a bi-partisan committee. It would be the Parliament saying it. In my view that makes it more difficult to resist change.

A couple of points I want to emphasise in conclusion. I often hear criticism of the Freeman Committee that was set up in the New South Wales Parliament. The Freeman Committee was set up just before an election, it was bi-partisan, it had short term goals, it did not examine matters at great depth, it suffered from a lot of weaknesses and it was not representative of an elected House at that time. All of these criticisms and more are listed in my paper (*see Appendix II*, page 61) but you *can* have an effective Parliamentary Select Committee, a Standing Committee, a Committee that has long range goals, that is facilitated, that can enquire. With all its weaknesses the Freeman Committee did expose a lot of what was going on, much of which is still shaded from even the eyes of a parliamentarian like myself. The Parliamentary Committee I propose will have a shifting focus of attention. It is a place for people to go, for John Citizen to go, the public servant to go. It should examine whistle blower legislation for example. It is a place for a member of Parliament, a policeman and other people to go and it is a place for Parliament to refer matters.

I am saying that we can use the existing power structures. We can, through a Parliamentary Standing Committee, make use of people in universities, make use of people in the police force, make use of people in corporate affairs, people inside and outside the public service, in fact co-opt the expertise. I suggest a model of a National Crimes Commission based on a Federal Crime Control Committee with each State Parliament Crime Control Committee working hand in glove, meeting between States, meeting between State and Federal bodies as the necessity arises. The Government has a problem. At the Crimes Commission Summit I perceived that as the Prime Minister and the Attorney-General had said 'Crime is a terrible thing — we need a structure', they were going to get a structure but what they got was disarray, a healthy disagreement. The Government Crimes Commission model didn't get endorsement. The Standing Committee system is one model that can get a political acceptance and can work.

## FUTURE DIRECTIONS IN THE INVESTIGATION OF CRIME\*

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 Canada.

It was terribly dangerous to let your thoughts wander when you were in any public place or within range of a telescreen. The smallest thing could give you away. A nervous tic, an unconscious look of anxiety, a habit of muttering to yourself — anything that carried with it the suggestion of abnormality, of having something to hide. In any case, to wear an improper expression on your face (to look incredulous when a victory was announced, for example) was itself a punishable offence. There was even a word for it in Newspeak: *facecrime*, it was called.<sup>1</sup>

When speculating in 1983 about the future, and especially the directions we are likely to follow in pursuit of the investigation of crime, it seems rather appropriate to commence with a brief recitation of one of George Orwell's visions of the year 1984. Orwell's chilling notion of citizens being subjected to constant surveillance by 'telescreens' to detect 'improper expressions', while fictional, is still disturbingly close to certain real life situations in contemporary society. Current and widely available technology already allows few of our public or private activities to remain immune from scrutiny by determined surveillors. Although also a fictional account, the recent film, *The Conversation*, starring Gene Hackman in the role of a professional eavesdropper, dramatically illustrates the surreptitious methods presently in use to gather information from unsuspecting persons. Electronic surveillance techniques, in company with wiretapping, are now standard investigative tools used by police agencies as well as private companies and individuals.<sup>2</sup>

The impact of these and other forms of technology upon the future investigation of crime, and upon our civil liberties, is potentially profound. However, in this paper it is not proposed to devote major attention to this technology *per se* but rather to examine two general questions which are intimately concerned with its future use, namely, who will have the principal responsibility for investigating crime in succeeding years, and how will we select and train crime investigators?

A search for some possible answers to these questions appears justified at a time when, in this country, a National Crimes Commission is in the process of being established in response to widely expressed criticisms of traditional police capabilities to investigate complex criminal activities, and a major piece of legislation, awaiting federal parliamentary approval, proposes

\* Keynote address presented to the Criminology Section, ANZAAS Congress, Perth, Western Australia, May 16, 1983, and printed in *Aust. & N.Z. Journal of Criminology* (1983) 16 No 4. This paper by a former member of the Institute of Criminology, and former Commissioner, Australian Law Reform Commission, is included because it deals with the idea of an Australian National Crime Commission and refers to the American experience with Crime Commissions.

1. Orwell, G. 1984. (New York: Harcourt Brace Jovanovich, 1949) p. 54.

2. Krajick, K. "Electronic Surveillance Makes a Comeback". *Police*. (1983) 6:8.

sweeping revisions to police powers in the field of criminal investigation.<sup>3</sup> These Australian developments have been matched by similar actions in other common law jurisdictions, including Canada, where reforms are currently being considered of police investigative powers contained in the nation's Criminal Code and a Royal Commission has recommended significant changes in the investigative responsibilities of the Royal Canadian Mounted Police (RCMP).<sup>4</sup>

Since the author is at present involved in research, sponsored by the Federal Ministry of the Solicitor General, into the management of criminal investigations in Canadian police agencies, much of the illustrative material blended into this paper is taken from Canadian sources.<sup>5</sup> But as it is hoped to demonstrate, the issues which arise from this consideration of the future of criminal investigation frequently transcend national boundaries, and particularly those of countries like Canada and Australia which already share many common cultural, political, economic and related traditions. As a former Canadian cabinet minister said several years ago:

I have become gradually aware, during the past twenty years, that Australia has more in common with Canada than any other country. We are the only two federations with British parliamentary government. Our history under the British Crown is roughly equal in length. Though both economies were originally based on farming, and still depend on exports from the farm for much of their national incomes, both are highly urbanised — Australia even more than Canada. There are wide disparities in the developed wealth and the potential of the Australian states, though not as great as among rich and poor provinces in Canada. Both countries have problems of federal-provincial or federal-state relations. But all this

3. A *National Crimes Commission Act* received Royal Assent on 24 December 1982. The Act, which is to come into operation on a day to be fixed by proclamation, is designed 'to establish a National Crimes Commission to investigate criminal activities, in particular organised criminal activities, with a view to the prosecution of offenders'. Several versions of proposed legislation to effect reforms in the field of criminal investigation have been considered by the Federal Parliament in Australia since the Australian Law Reform Commission (ALRC) reported on the matter in 1975. See ALRC 2, *Criminal Investigation* (Australian Govt. Publishing Service, 1975)
4. The Federal Government in Canada has committed itself to a major reform of the National Criminal Code which was originally enacted in 1892. A number of proposals for the reform of this Code have already been presented in a series of reports of the Law Reform Commission of Canada. See, in particular, Law Reform Commission of Canada, *Our Criminal Law* (Ottawa: Minister of Supply and Services, 1977). Extensive proposals to revise the investigative responsibilities of the RCMP are contained in the findings of a Royal Commission, chaired by Mr Justice D.C. McDonald, which reported in 1981. See Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police. *Freedom and Security under the Law*, 2nd Report, 3 volumes. (Ottawa: Minister of Supply and Services, 1981).
5. This research is being conducted in three phases, the first of which has involved a review of the growing body of literature available concerning the management of criminal investigations. See Chappell, D., Gordon, R. and Moore, R., *Criminal Investigation: A Selective Literature and Bibliography*. *Canadian Police Journal* (1982) 6:13. In the second research phase a survey has recently been completed of municipal police agencies regarding a wide range of issues associated with their handling of criminal investigations. See Chappell, D., Gordon, R. and Moore, R., *Criminal Investigation: A Survey of Canadian Police Departments*. (Ottawa: Ministry of the Solicitor General, 1983). In the third phase of the research, which is to commence shortly, a study is to be made of the management of criminal investigations in one of the largest of the Canadian municipal police departments.

does not make Australia a mirror image of Canada: the differences are almost as illuminating as the similarities. (J.W. Pickersgill, *The Financial Post*, Toronto, 26 June 1976.)<sup>6</sup>

## Responsibility for Investigating Crime

### *Current Arrangements in Historical Perspective*

Under current arrangements the principal responsibility for investigating crime in most societies rests with established police forces. Canada and Australia are no exceptions to this rule. In Canada, for instance, under a 'tiered policing structure', the RCMP provides most of the investigative services at the federal level of government and also, under contract, similar services for all of the provinces with the exceptions of Quebec and Ontario.<sup>7,8</sup> Municipal police, who represent about 60% of the nation's total law enforcement strength, furnish investigative services for Canadian cities and most of the larger towns scattered across the country.<sup>9</sup>

Within these various Canadian law enforcement agencies the investigative function is performed largely by a specialised group of officers, working in plain clothes, who are normally referred to as detectives. Such officers, on average, account for approximately 16% of the Canadian police establishment although this percentage varies substantially from force to force with larger departments, like that of metropolitan Toronto, employing up to 20% of their personnel resources as detectives while some smaller departments employ as few as 10% of their officers in this role.<sup>10</sup>

Briefly sketched, these current arrangements for the investigation of crime may, at least at first sight, appear to be well entrenched in societies like Canada and Australia, both of which have been strongly influenced in the development of their policing structure by English law enforcement concepts. Yet the establishment of modern urban police forces dates only from 1829 when Sir Robert Peel formed London's famous Metropolitan Police Force.<sup>11</sup> Before that time the principal responsibility for investigating crime remained, albeit shakily, in the hands of individual citizens, bolstered on occasions by the assistance of enterprising individuals, many of whom were working in collaboration with criminals and who offered, for a fee, such services as 'thief catching' and the recovery of stolen property.<sup>12, 13</sup>

6. Crabb, P. *Canadian Studies in Australia: Aiding Understanding of our Northern Pacific Neighbour: Australian-Canadian Studies* (1983) 1:5.
7. Stenning, P.C. *Legal Status of the Police: A Study Paper Prepared for the Law Reform Commission of Canada*. (Ottawa: Minister of Supply and Services, Canada, 1982)
8. Grant, A. *The Police — A Policy Paper: A Study Paper Prepared for the Law Reform Commission of Canada*. (Ottawa: Minister of Supply and Services, Canada, 1980)
9. The RCMP also provide some municipal police services under contractual arrangements. Most such arrangements have been made in regard to western provinces like Alberta and British Columbia.
10. Chappell, D., Gordon, R. and Moore, R. *Criminal Investigation: A Survey of Canadian Police Departments*. (Ottawa: Ministry of the Solicitor General, Canada, 1983) pp. 10-11.
11. Critchley, T.A. (1967) *A History of Police in England and Wales 900-1966*. (London: Constable, 1967)
12. Goddard, H. *Memoirs of a Bow St. Runner*. (New York: William Morrow and Company, 1954)
13. Howson, G. *Thief Taker General. The Rise and Fall of Jonathan Wild*. (London: Hutchison, 1970)

Even after the rapid and widespread implementation of Peel's policing innovations in England and abroad it still took some time for modern police forces to assign detectives to investigate crime.<sup>14</sup> It seems that because the French, who had a well organised and efficient police force long before England, used detectives as part of an elaborate and repressive undercover espionage system, there was a reluctance in England to emulate this Continental model.<sup>15</sup> It was not until 1842 that a detective department, comprising two inspectors and six sergeants, was formed at Scotland Yard by the London Metropolitan Police. Critchley records that the department, which was labelled the 'Defective Department' by *Punch*, had a troubled beginning as 'detectives had been forbidden to hob-nob with criminals, and there remained a strong prejudice against allowing them to work in plain clothes'.<sup>16</sup>

Despite these, and other early difficulties, a more elaborate Criminal Investigation Division (CID) was established by the London Metropolitan Police in 1878. Commencing with an initial group of 250 men, the CID soon expanded in size and rapidly assumed a predominant role in the investigation of crime, a role which has continued until the present day in the London Metropolitan Police and in most other police forces throughout the western world.

#### *Challenges to the Role of Detectives: Internal Change*

The Queen (Victoria) fears that the Detective Department is not so efficient as it might be.<sup>17</sup>

Questions regarding the efficiency of detective departments in solving crimes began almost as soon as they were formed. Queen Victoria's fears were expressed in regard to the 'Jack the Ripper'<sup>18</sup> murders which terrorised London in the late 1880s, and the lack of success of the CID in finding the Ripper killer or killers. But whether criticism emanated from royal or more humble sources, no serious challenge to the role played by detectives in investigating crime appears to have surfaced in England or elsewhere for almost a century after the establishment of London's CID.

The challenge, when it came, seems to have emerged first in the United States during the 1970s. Amidst a sustained review of the operation of the American criminal justice system, spurred by widespread public alarm concerning the state of crime, a series of empirical research studies began to raise serious questions about the effectiveness and efficiency of detective work.<sup>19</sup> The most widely publicised, and heretical, research study was that of the Rand Corporation which conducted a national review of the criminal investigation process for the United States Justice Department in the mid-1970s.<sup>20</sup> As Reppetto has suggested, the Rand study made two basic points about detective work:

14. Ericson, R.V. *Making Crime. A Study of Detective Work*. (Toronto: Butterworths, 1981)

15. Critchley *op. cit.* p. 160.

16. *ibid* p. 161.

17. *ibid* p. 161.

18. The identity of the Ripper remains a mystery to this day and has spawned a prolific literature. For a convincing analysis of the case see Knight, S. *Jack the Ripper: The Final Solution*. (London: Granada Publishing Limited, 1977)

19. Chappell, D., Gordon, R. and Moore, R. Criminal Investigation: A Selective Literature Review and Bibliography. *Canadian Police Journal* (1982) 6:13.

20. Greenwood, P. and Peterselia, J. *The Criminal Investigation Process*. 3 volumes. (Santa Monica, California: The Rand Corporation, 1975)

- (1) Criminal investigation is an inherently low-yield undertaking, and  
 (2) It is carried on inefficiently. For example, it notes:

'The single most important determinant of whether or not a case will be solved is the information the victim supplies to the immediately responding patrol officer. If information that uniquely identifies the perpetrator is not presented at the time the crime is reported, the perpetrator, by and large, will not be subsequently identified.'

'Differences in investigative training, staffing, workload, and procedures appear to have no appreciable effect on crime, arrest or clearance rates.'

'The method by which police investigators are organised (ie, team policing, specialists vs generalists, patrolmen-investigators) cannot be related to variations in crime, arrest, and clearance rates.'

All of these tend to support the proposition that detective work is inherently non-productive, ie, when one searches for the needle in the haystack most of the time one will not find it, no matter how hard or systematically one works.<sup>21</sup>

While doubting that detectives had any substantial impact on the pre-arrest phase of a criminal investigation the Rand researchers were convinced that detectives could influence to a major degree the legal outcome of the post-arrest case preparation stage. The Rand study therefore concluded that police agencies should '(reduce) follow-up investigation on all cases except those involving the most serious offences' and '(place) post-arrest (ie, suspect in custody) investigations under the authority of the prosecutor'.<sup>22</sup> Reforms of this nature should, said Rand, permit agencies to dispense with up to half of their detective force. In deploying their remaining detectives Rand felt emphasis should be given to the creation of 'investigative strike forces (which) have a significant potential to increase arrest rates for a few difficult target offences, provided they remain concentrated on activities for which they are uniquely qualified.'<sup>23</sup>

Not surprisingly, the Rand study findings were quickly disputed by United States police (for example, by Gates and Knowles<sup>24</sup>). However while a number of more recent research studies (for example, Bloch and Bell<sup>25</sup>; Eck, 1981<sup>26</sup>) suggest that Rand's appraisal of the productivity and efficiency of detectives may have been unduly pessimistic the Rand study's identification of the crucial role played by uniformed officers in gathering information leading to the successful apprehension of offenders has remained intact.<sup>27</sup> This very important but, in retrospect, scarcely surprising finding, when combined with several contemporaneous investigative developments which remain to be

21. Reppetto, T.A. "The Detective Task: State of the Art, Science, Craft?" *Police Studies* (1978) pp. 5-6.

22. Greenwood *et al*, *op. cit.* (1) x-xii.

23. *ibid* (1) ix.

24. Gates, D. and Knowles, L. "An Evaluation of the Rand Corporation's Analysis of the Criminal Investigation Process". *Police Chief* (1976) 43:20, 74.

25. Bloch, P.B. and Bell, J. *Managing Investigations: The Rochester System* (Washington, D.C.: Police Foundation, 1976)

26. Eck, J.E. "The Effectiveness of Detective Follow-Up Investigations". Paper presented at The American Society of Criminology 33rd Annual Meeting, Washington, DC, November 11, 1981.

27. *ibid* p. 9.

described, have raised serious doubts about the conventional wisdom of strictly allocating the principal responsibility of investigating crime to detectives rather than uniform officers.<sup>28</sup>

While the Rand suggestion that up to one half of the detective force could be deployed in other more fruitful police activities may be open to debate, many police administrators have been obliged to review the management of their criminal investigation operations in search of fresh approaches to this aspect of law enforcement.<sup>29</sup> These approaches have included an enhancement of the role of uniform officers investigating crime<sup>30</sup> and the development of formal screening devices designed to prevent the wasteful follow-up by detectives of criminal events judged to have a low probability of solution.<sup>31</sup> A number of attempts have also been made in many larger police departments in North America to decentralise detective operations, blending the resources of uniform and non-uniform personnel in designated geographic zones while a smaller residual core of detectives provides investigative services in regard to major crimes like homicide, rape and large-scale fraud and theft.<sup>32</sup>

Using presumed innovations of this type, many police managers in the United States and Canada have demonstrated a willingness to adapt their criminal investigation operations in ways designed to meet some of the immediate criticisms of Rand, and other research groups, although it would appear that few, if any, departments have effected significant reductions in the proportion of personnel assigned to detective work. Police union opposition to such reductions, when attempted on even a small scale, have been immediate and intense — a fact which may explain why police administrators have been less assertive in this area than in some other fields of criminal investigation reform.<sup>33</sup>

### *External Change in Investigative Responsibilities*

While internal change continues to occur in police departments throughout North America, and possibly in Australia, in the ways in which criminal investigations are handled, it would seem to remain a basic 'article of faith' among law enforcement officers that the principal responsibility for investigating crime should rest with public police agencies. Such a belief, however, does not appear to be shared by all governments, nor by all private citizens.

In the case of governments, of which federal and state (provincial) varieties in Australia and Canada are no exception, the boundaries of police jurisdiction over the investigation of crime have begun to be redrawn, gradually, in ways which have narrowed the responsibilities of existing police forces. This type of incremental development has been especially noticeable in

28. Chappell *et al* (1982) *op. cit.* p. 27.

29. Anderson, D. "Management Moves in on the Detective". *Police* (1978) 3:4.

30. Bloch, P.B. *et al. op. cit.*

31. Eck, J.E. *Managing Case Assignments: the Burglary Investigation Decision Model Replication*. (Washington, DC: Police Executive Research Forum, 1979)

32. Brand, D. and Koroloff, J.M. "The Changing Role of the County Sheriff — Part VI. Team Policing: Management of Criminal Investigations". *Police Chief* (1976) 43:65.

33. A recent example of such opposition has occurred in Vancouver. During 1982 the Chief Constable of the Vancouver Police Department sought to transfer back to uniform duties about one fifth of his detective force. The move was immediately challenged by the Vancouver Police Department Union and the dispute remains currently in arbitration.

the investigation of organised criminal enterprises, often associated with activities like narcotics trafficking, loan sharking, security fraud and currency manipulation, where governments have relied increasingly upon the investigative powers of Royal Commissions and other special forms of inquiry, as well as new public agencies, rather than upon the continuing services of established public police forces.

In Australia this development has been clearly evidenced most recently by the appointment of a series of Royal Commissions on drug related issues (Williams, 1980;<sup>34</sup> Woodward, 1979,<sup>35</sup> Stewart, 1983<sup>36</sup>) and on the activities of the Painters' and Dockers' Union (Costigan, 1982<sup>37</sup>). The latter Royal Commission continues to conduct its inquiries and has 'in many respects [been] operating as a *de facto* Crimes Commission' for many months.<sup>38</sup> The growth of these alternative investigative bodies, which represent an obvious threat to the 'investigative turf' of the traditional police, can be attributed in substantial degree to widespread official dissatisfaction with the performance of public police when dealing with these organised criminal enterprises.

A narrowing of the boundaries of police crime investigative responsibility can also be discovered in the private sector of the economy. As part of a well-documented and continuing international growth of the private policing industry many companies now contract for or employ their own security staff in preference to or in lieu of relying upon the services of official law enforcement agencies.<sup>39</sup> While in many cases these arrangements probably reflect a desirable and necessary assumption of costly services by private rather than public bodies, they also run the risk of insulating certain investigative activities, which may present a potential threat to individual liberty, from scrutiny by the community and, particularly, by the courts.

As Shearing *et al* have commented:

In the late 18th and early 19th century when ideas for a 'new police' were first being advanced the issue raised over and over again by critics was the threat to individual liberty they would pose. In responding to private security and private justice systems this remains a critical issue. In the mid-1800s new ground had to be broken in seeking an appropriate balance between liberty and order as the problems presented by the public police were new, and novel solutions had to be developed. This process has continued ever since. Today the public police are required to work within an elaborate set

34. Royal Commission of Inquiry into Drugs (1980) Reports. 4 vols. (Canberra: Australian Government Publishing Service) [Chaired by Mr Justice Williams]
35. Royal Commission of Inquiry into Drugs (1979) Report. (Sydney, Government Printer N.S.W.) [Chaired by Mr Justice Woodward]
36. Royal Commission of Inquiry into Drug Trafficking (1983) Report. (Canberra, Australian Government Publishing Service) [Chaired by Mr Justice Stewart]
37. Royal Commission of Inquiry into the Activities of the Painters and Dockers Union (1982) Reports. 4 vols. (Canberra, Australian Government Publishing Service) [Chaired by Mr Costigan, QC]
38. Federal Attorney General Press Release (1983). "Joint Statement by the Special Minister of State, Mr M.J. Young and the Attorney General, Senator Gareth Evans. Review of National Crimes Commission Act". 37:83.
39. A most useful bibliography documenting the literature in the area of private policing is contained in Shearing, C.D., Farrell, M.B. and Stenning, P.C. *Contract Security in Ontario*. (Toronto, Centre of Criminology, University of Ontario, 1980) pp. 322-331.

of legal restraints which limit their right to infringe upon individual liberties. The development of private security has once again brought us face to face with the problem of the control of policing. We are once more faced with novel problems which the existing safeguards to protect individual liberties are ill-equipped to deal with.<sup>40</sup>

The general concerns expressed about the threat to individual liberties posed by the lack of adequate controls over investigative powers of private police tend to extend to the other forms of public commissions and inquiries established to deal with the crime problem. In British Columbia, for example, where this author presently resides, proposals made during the 1970s to form a Provincial Crime Commission were abandoned by the government because it was concluded that the benefits accruing from such a Commission would be outweighed by the injustices that might result to individual citizens. This conclusion was reached following an extensive feasibility study which examined the operations of crime commissions in Quebec, New Jersey and New Mexico as well as canvassing the views of a wide range of persons throughout the province including judges, prosecutors, police, defence counsel and private citizens.<sup>41</sup> Among the injustices which it was felt might occur if British Columbia were to establish a Crime Commission were threats to the rights of an accused person to receive a fair trial because of adverse publicity which might result from public hearings conducted by the Commission; a lack of adequate protection for the personal reputation of citizens (and their businesses) brought before the Commission; a lack of recourse for innocent citizens defamed in a Commission inquiry; and recent Canadian experience from Quebec suggesting that such a body could be too readily embroiled in public controversy leading to embarrassing conflict between law enforcement agencies, the legal profession and politicians. In addition, the Quebec Crime Commission history provided little evidence that positive action in the form of a reduction in organised criminal activity resulted from the Commission's investigations and public hearings.

Given this comparative experience it is significant that the new Federal Government in Australia has recently announced it intends conducting a review of the functions, powers and composition of a National Crimes Commission in this country before implementing legislative provisions regarding such a body. As an official statement notes:

While the task of reaching consensus on this subject will not be an easy one, the magnitude of the problem of organised crime revealed in the series of recent official reports . . . demands that the effort be made. We are hopeful that the proposed review will produce an outcome which, while it may not satisfy everyone in every respect, will be generally acceptable not only to the Commonwealth, States, and their various law enforcement agencies, but also to civil liberties group and the community generally.<sup>42</sup>

The provisions of the *National Crimes Commission Act 1982*, as presently enacted, give very extensive powers to the Commission whose functions would include investigation of:

40. Shearing *et al op. cit.* pp. 251-252.

41. British Columbia Ministry of the Attorney General. *A Study of the Feasibility of a Crime Commission for British Columbia*. (Unpublished Confidential Report, 1978)

42. Federal Attorney General Press Release (1983) *op. cit.* 3.

- s.4(i) any circumstance suggesting that an offence has been, or may be being, committed against a law of the Commonwealth or of a Territory;
- (ii) any allegation that an offence has been, or is being, committed against a law of the Commonwealth or of a Territory;
- (iii) any circumstance suggesting that a person has or may have, or any allegation that a person has, influenced or attempted to influence an officer of the Commonwealth or an officer of a Territory to do any act or thing contrary to law or to his duty or authority as such an officer; and
- (iv) any activity that is, or appears to be, impeding the implementation or enforcement of a law of the Commonwealth or of a Territory . . .

The legislation does attempt to provide some focus to the Commission's investigations by requiring that it:

Seek, so far as practicable, to direct its activities in relation to:

- (a) organised criminal activities, that is to say, offences that appear to be connected with one another and involve several offenders and substantial planning and organisation;
- (b) offences involving the use of sophisticated methods, planning or techniques; and
- (c) bribery or corruption involving officers of the Commonwealth or officers of a Territory.

(*National Crimes Commission Act*, 1982: s.4)

A presumption which may be drawn from this directive, and from the events and debates leading up to the enactment of the *National Crimes Commission Act* late in 1982, is that current investigative activities conducted by established public police forces in Australia have either failed to have a similar focus, or have been ineffective in coping with these forms of crime. A further presumption may be made that, if the provisions of the *National Crimes Commission Act* remain in this form when ultimately proclaimed, the Federal Police, as well as forces of any State or Territory affected by the scope of the legislation, will be relegated to the role of investigating relatively minor and mundane criminal acts.

The possibility of such a situation occurring is likely to be neither acknowledged nor readily accepted by Australian police agencies. Nonetheless, the developments described earlier in the area of criminal investigation external to public police agencies seem to be moving inexorably in this direction, and will continue to do so unless traditional police forces are prepared to effect quite radical changes (for police) in selection and training procedures for detectives. For, as will be seen shortly, these procedures are currently structurally locked into a system which makes it exceedingly difficult for police to acquire, or utilise, the types of scientific skills presumably required to tackle the investigation of 'organised criminal activities' and 'offences involving the use of sophisticated methods, planning or techniques'.

#### *Future Crime Investigators — Who Will They Be?*

Before turning to the selection and training of detectives the point has been reached at which an attempt should be made to answer the first question raised at the outset of this paper, namely, 'Who will have the principal

responsibility for investigating crime in succeeding years?'. The necessarily limited review provided in this paper of the history of criminal investigation suggests that we are in the midst of a significant change in the allocation of external investigative responsibility for serious crime, with a noticeable movement occurring of this responsibility from public police forces to other types of public agencies, and to private police. Meanwhile, within public police forces, the predominant role of detectives in the investigation of crime has been subjected to challenge and changes are taking place which, among other things, place greater emphasis upon the investigative function performed by uniform officers.

Many of these suggested changes bring with them significant problems of their own including, as mentioned earlier, difficult dilemmas associated with the protection of individual liberties in the case of crime commissions, and private police. For public police forces there now exist extensive procedural rules and guidelines, formulated by legislation, court decisions and administrative fiat, which seek to balance and protect individual rights against powers necessary to investigate and prosecute crime. While controversy will undoubtedly continue regarding the methods and priorities used to achieve this balance the fact remains that public police agencies are now well-versed, and relatively well-trusted, vehicles for the investigation of crime in countries such as Australia and Canada. Thus before we move too far in the direction of allocating additional *loci* of responsibility for investigating crime we should examine closely our current investigative resources to see whether they may be adapted to meet new challenges from criminals.

### Selecting and Training Crime Investigators

The detective side of police work, in an English force at all events, is, it must be admitted, a somewhat matter-of-fact occupation, in which hard work and knowledge of the criminal classes are essential. Crime in real life is largely the work of professional criminals of poor intellectual capacity, no social accomplishments or charms, and little imagination, though they may have a great deal of low cunning. To cope with them successfully, powers of abstract reasoning and scientific knowledge or apparatus serve less than the more commonplace resources which may be summed up in the word 'information' . . . [It] may need a 'master brain' to defeat the machinations of 'master criminals', but, as someone has said, it requires an ordinary policeman to deal with ordinary crooks, and it is from them that society has most need to be protected.<sup>43</sup>

This view of the 'detective side of police work', although expressed more than fifty years ago in regard to English forces, probably portrays with reasonable accuracy the predominant philosophy applying to this aspect of policing in most Australian and some Canadian police forces.<sup>44</sup> Reppetto<sup>45</sup> has

43. Moylan, J. *Scotland Yard*. (London: Putnam, 1929) p. 178.

44. In Canada this philosophy is most likely to be found in smaller municipal police departments who do not have to respond, under usual circumstances, to a high volume of sophisticated crimes. However, in provincial and federal forces there is an undoubted movement towards a far more scientific approach to detective work of the type also identified, and described below, by Reppetto. Part of this movement has been associated with the increasing recruitment into such forces of university graduates as well as a flow of serving police officers back to tertiary institutions to obtain qualifications in areas like business administration, criminology, political science, psychology and accounting.

45. Reppetto *op. cit.* p. 9.

aptly labelled this view as the 'craftsman approach to detective work' which assumes that candidates for such positions can be selected from among the general ranks of uniform police who, in turn, require little formal education (usually only high school) in order to be recruited into law enforcement agencies.

Repetto contrasts the 'craftsman' detective with two other versions of detective work — the 'artist' and the 'scientist'. The former version sees the detective as:

the individual of brilliant insights, a master of interrogation and other skills, who engages in an intuitive exercise which ultimately leads to the solution of a crime. Though this version is usually found in fiction or on the movie or TV screen, it is by no means unknown in professional policing . . . [W]hile scholars and police professionals are wont to scoff at notions that detective work is an art, it is useful to recollect the careers of Alan Pinkerton and William Burns, the founding fathers of America's two great private police agencies. Neither man ever attended a police training course. Instead, they abandoned their trade of cooper or tailor and moved directly into detective work with amazing success both as investigators and then as chiefs.<sup>46</sup>

The scientific version of detective work portrayed by Repetto is epitomized by agencies like the United States Federal Bureau of Investigation (FBI) who select college educated civilians with qualifications in areas like law and accounting and who seek to apply a range of scientific principles to the solution of criminal investigations. Which version of detective work is adopted by a police agency has obvious implications not only for the selection and training of crime investigators but also on the general management of criminal investigations. In the case of the craftsman approach little attention is likely to be given by police to 'master criminals' — thus the investigation of 'offences involving the use of sophisticated methods, planning or techniques' will probably be at best reactive and haphazard. On the other hand, an agency whose predominant mission is guided by a scientific version of detective work will probably give high priority to the investigation of complex criminal enterprises and may assume a largely proactive stance towards such behaviour, rather than awaiting notification of its occurrence from external sources.

It would be foolish to assume that any of these versions of detective work are mutually exclusive, and especially so in Australia where police resources are consolidated into large agencies serving substantial populations spread over vast geographic areas. The craftsman approach may be very appropriate in dealing with minor thefts and burglaries in small towns or rural areas but utterly inappropriate in dealing with a narcotics trafficking conspiracy which involves participants in a number of police jurisdictions within Australia and overseas. 'Cracking' a conspiracy of this type may not only require the deductive skills of a detective possessing accounting qualifications to analyse and interpret complex financial transactions but also the 'artistic' nuances of an undercover agent to provide key intelligence information about the operations of a drug ring.

Looking to the future of crime investigation within public police agencies, Repetto has forecast a number of developments which seem very relevant to Australian and Canadian conditions. First, noting the research activity

46. *ibid* p. 8.

referred to earlier in this paper regarding the management of criminal investigations, Reppetto argues that the trend will be towards the further development of the scientific approach to detective work:

[D]etectives will be more likely to be selected from the college educated and required to undergo more intensive classroom training in skills such as interrogation and intelligence. They will also be supervised more closely and evaluated according to sophisticated qualitative and quantitative measures.

Secondly, says Reppetto:

It is expected that the craftsman-type detective will be relegated to neighbourhood level policing while the artist may become increasingly rare, given the twin pressures of scientific management and restrictions upon police undercover operations. Wilson (1978) has noted that even many drug enforcement officers are beginning to doubt the ultimate effectiveness of 'buy and bust' methods and may consequently shift more personnel to intelligence operations.<sup>47</sup>

In Australia the evidence from a series of recent Royal Commissions and other inquiries into the state of organised crime strongly suggests that the nation's police forces have not as yet become major participants in this movement towards the scientific approach to detective work observed by Reppetto. Rather, these forces often appear to have been attempting to tackle problems which undoubtedly require the application of scientific approaches to detective work with personnel, and management philosophies, dominated by the craftsman style of crime investigation.

That this craftsman approach continues to predominate in Australian policing circles is scarcely surprising when it is remembered that the basic recruiting policies governing Australian police forces still place substantial emphasis upon the selection of persons who meet above-average standards of physical fitness and prowess but who require, at most, the completion of a high school education. Once socialised into the law enforcement process by a number of years working on the beat as uniform officers these general duties police become eligible for consideration for selection as detectives, working in plain clothes.

The internal selection process, which may vary somewhat from force to force in the emphasis placed on factors like seniority, examinations, previous arrest records, case preparation skills, the development of informant networks and so on, results in the admission to detective work of a group of police officers who receive the majority of their subsequent training 'on the job'.<sup>48</sup> Selection as a detective is, of course, a much sought after status for it brings with it a variety of fringe benefits including working under less supervised and scrutinised conditions as well as achieving, in the eyes of the public and one's peers, a certain element of prestige.<sup>49, 50</sup> Because of this status officers, once

47. *ibid* p. 9, see Wilson, J.Q. *The Investigators: Managing F.B.I. and Narcotics Agents*. (New York: Basic Books, 1978)

48. In addition to on-the-job training Australian police forces, like their counterparts in Canada, are usually able to provide a range of specialist courses for detectives during the course of their careers.

49. Neiderhoffer, A. *Behind the Shield: The Police in Urban Society*. (Garden City, N.Y.: Doubleday, 1967) pp. 31-85.

50. Sanders, W.B. *Detective Work. A Study of Criminal Investigations*. (New York: The Free Press, 1977) pp. 39-46.

selected as detectives, are reluctant to return to uniform duties and the majority, at least in Australian police forces, are likely to remain detectives for the balance of their police careers.<sup>51</sup>

Within this traditional policing structure effecting change is not an easy matter. Police unions, for instance, have remained fiercely resistant to suggestions that direct lateral entry should be permitted into police forces of people with special skills and qualifications, including those with a college education. Such resistance has also been evident in relation to proposals to introduce a tiered recruiting process which would match different law enforcement job descriptions with particular qualifications and skills. Under such proposals the qualifications and skills required to be a detective would differ markedly from those required to be a general duties police officer. (See, for example, Task Force Report.<sup>52</sup>)

Despite a somewhat gloomy prognosis for the possibilities of achieving change in this area of policing there are one or two encouraging signs which should also be noted. Within Australian police forces a growing number of officers have begun to recognise the need to acquire a range of new skills and qualifications to manage modern law enforcement operations, including coping with the ever-expanding utilisation of computerised police information systems and the use of sophisticated technological aids to the investigation of crime. Although still a small minority within police bureaucracies whose principal promotion policies have been largely guided by considerations of seniority rather than ability, these officers should ultimately be in positions of authority which permit them to deal with crime investigation in the scientific manner suggested by Reppetto.

Accompanying this internal development within Australian police agencies has been an external trend, produced by the dynamics of the 'job marketplace', which has led to an increasing number of college educated applicants seeking careers in policing. Facing a shrinking range of job opportunities in more traditional avenues of employment for university graduates, these new recruits, providing they remain in law enforcement work, could provide a further impetus for change in the management of future criminal investigations.

## Conclusions

So how will we select and train crime investigators in the future? For Australia the most likely answer to this question, at least in the short term, is probably that we will continue to rely upon much the same methods of selection and training that we have had in the past and that the craftsman approach to detective work will continue to predominate. However, in the longer term, if the internal and external developments identified earlier

51. It should be noted that research is lacking in the area of criminal investigation generally within Australian police forces and it is therefore difficult to make definitive statements about the selection, training and evaluation criteria adopted in regard to detectives within the various police forces. Recent research conducted on this topic in Canada reveals that a quite wide range of practices are adopted in this area including, in many of the larger police forces like the RCMP, the rotation of officers through uniform and plain clothes duties throughout their police careers.
52. President's Commission on Law Enforcement and Administration of Justice. *Task Force Report: The Police*. (Washington, DC: U.S. Government Printing Office, 1967) pp. 122-125.

prevail, there may be a slow shift towards a more scientific approach to the investigation of crime.

Meanwhile, for any government confronted with immediate needs 'to do something about organised crime' the pressures may simply be too great to await the occurrence of this shift. Thus options like the establishment of a National Crimes Commission may be adopted in order to provide Australia with a new and powerful form of criminal investigation agency possessing, presumably, the skilled personnel and related resources currently lacking in the nation's police forces.

If an alternative scenario to the one just sketched is to be enacted it will require immediate and imaginative action by police and government. Perhaps some of the components of such an alternative can be found in British Columbia where, as noted earlier, the crime commission solution was rejected by government in favour of reliance upon the resources of existing law enforcement agencies. These resources were not, however, utilised in traditional ways. Instead, federal, provincial and municipal levels of government combined to form a Coordinated Law Enforcement Unit (CLEU) staffed jointly by carefully selected detectives from forces in the province and a cadre of civilian researchers and intelligence analysts.<sup>53</sup> With ultimate political responsibility for the operations of the new organisation vested in the Attorney-General of the province, and the more immediate activities of the unit being managed by a policy board comprising government officials and police, CLEU's principal objectives remain:

- to provide long term study into the activities of [individuals or groups] believed to be involved in organised crime. . . .
- to stimulate and co-ordinate inter-departmental and intra-governmental co-operation between the various federal, provincial, and municipal agencies and the British Columbia Department of the Attorney-General.
- to provide the proper atmosphere under which the various agencies could develop the intelligence-gathering process and expedite information exchange.
- to develop investigation to the point where it established that a criminal offence had been, was being, or might be committed, and to act upon it for purposes of prosecution and protection of life and property.
- to identify the antecedents, criminal associates, and the complete scope of criminal activities or organisations and persons involved in organised crime in British Columbia.
- to identify the nature and extent of the organisation and its links with crime figures elsewhere in Canada or abroad.
- to analyse and predict organised crime trends so that steps could be taken to prevent further development.<sup>54</sup>

The general consensus, following almost a decade of experience with CLEU, is that it has functioned well, especially in regard to gathering and utilising information about the operations of organised crime in the province.<sup>55</sup> As such, CLEU certainly deserves consideration as a possible

53. Murray, T. "The International Review of Police Development". *Police Studies*. (1982) 5:21.

54. Walsh, M.E. *The Co-Ordinated Law Enforcement Unit of British Columbia, Canada. A Case Study*. (Seattle, Wa.: Battelle Human Affairs Research Centers, 1982) pp. 1-2.

55. *op. cit.* pp. 34-36.

alternative model for implementation, with modifications to suit local conditions, in an Australian setting. An Australian Bureau of Criminal Intelligence (ABCI) is already in existence and this organisation would seem to represent a logical starting point for the creation of a unit like CLEU. The ABCI operational charter is to:

provide facilities for the collection, collation, analysis and dissemination of criminal intelligence with a view to providing such intelligence to the police forces of the Commonwealth, the States and the Territory to enable them to combat organised crime in Australia and, in particular, to assist them to combat illicit drug trafficking.

(Australian Bureau of Criminal Intelligence Agreement, 1982: s.(2))

What ABCI currently appears to lack is its own co-ordinated investigative resources and management team directed towards specific and carefully selected organised crime targets. Whether in the present political climate it would be possible or desirable to reach agreement among the various levels of Australian Government about the provisions of these resources, and whether even if agreement were obtained the nation's police forces would truly co-operate with this proposed co-ordinated investigative venture, are questions which remain unclear. Nevertheless, it is suggested that they are questions which should at least be debated as part of the present review of the National Crimes Commission concept in Australia.

## DISCUSSION PAPER

## NATIONAL CRIMES COMMISSION? YES OR NO

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On the 28th and 29th July, 1983, the Commonwealth Government held a conference in the Senate Chambers inviting representatives of the various State Governments, members of the judiciary of each State, civil liberties groups, Law Society groups and the Police Association to debate a Green Paper prepared by the Commonwealth authorities relating to the establishment of a National Crimes Commission.

The Prime Minister opened the conference and stated, quite unequivocally, that while the conference was there to discuss the matter there would be a National Crimes Commission commencing in January, 1984. At the end of the two-day conference it was quite clear that the Attorney-General and Special Minister of State had not received any consensus for a National Crimes Commission and in fact if one carefully analysed the submissions made by various organisations, the majority of participants in that conference were strongly opposed to the Commission, albeit for various reasons, some of an extremely selfish nature.

The Council for Civil Liberties in each State who strongly opposed such a Commission found themselves, at the end of the day in company with such bodies and organisations as the New South Wales Police Association, the State Government of Queensland, The Law Council of Australia, the Bar Association of Victoria, various judges, academics and criminologists. It is doubtful whether the Council for Civil Liberties in each State have ever found themselves associated with such strange bedfellows.

The most interesting part of the Green Paper presented at the National Crimes Commission summit is the reference on page 3 of that paper, point 2, where it is said, and I quote:

The main areas in which organised crime appears to have flourished are Drugs, Prostitution, Pornography, Gambling, Theft and Taxation Fraud. A threshold question does arise as to whether the criminal law itself might be reformed in at least some of these areas so as to reduce the range of activities deemed criminal in the first place and to remove, accordingly its attractions for organised crime.

This, in my submission, is the most important issue to be considered, when one considers a need or otherwise for a National Crimes Commission.

The onus of establishing whether we should have a Commission or not is placed on those who believe there ought to be a Commission. It is incumbent on those to establish that onus and to establish the onus beyond reasonable doubt of a need for a Commission, a need to take such draconian steps to infringe individual civil liberties in our society to protect the majority of society from organised crime.

Having regard to the words referred to above, on page 3 of the Green Paper, one can see that many of the areas in which organised crime is alleged to have flourished are areas which are not even considered by the majority of Australians as criminal.

Thus:

- (a) *Illegal Gambling*. SP operators and the like. You overcome this in the area of organised crime if it is legalised and properly policed. It will take gambling out of organised crime and will also have the added advantage of taking it away from police graft and corruption.
- (b) *Pornography*. The same rules apply. What is pornography? Child pornography — yes, it should still be illegal. But I thought that we had overcome the issue of censorship in other areas in this country many years ago.
- (c) *Prostitution*. Well, it is basically legal or at least decriminalised in the State of New South Wales except near churches, residential areas and the like. It merely has restrictions on it that most businesses have. Take it out of the criminal area, take it away from crime, legalise it — again you overcome the problem.
- (d) *Drugs*. The most dangerous drug in the world, of course, is alcohol, but forgetting that, as that is legal, and not involved in organised crime — ‘soft’ drugs and ‘hard’ drugs. In the area of ‘soft’ drugs, marijuana, decriminalise it, take it away from organised crime. In the area of ‘hard’ drugs establish the English system for heroin addicts and people relating to the same and make heavy jail penalties and heavy non-parole penalties applicable in the case of sellers and dealer ‘hard’ addictive drugs. Take the small soft drugs out of the criminal law. It is estimated that seventy percent (70%) of the population approve of marijuana, thirty-five percent (35%) smoke it, including many of the people at this seminar.

Thus if you go to the Green Paper prepared by the Commonwealth Government the only other areas that organised crime flourishes are in Theft and Taxation Fraud — an area which should be able to be controlled by the present crime agency. It was interesting in Canberra to note that the only persons that came out strongly for a National Crimes Commission were ex-royal commissioners with the exception of Mr Justice Alistair Nicholson of the Supreme Court of Victoria who strongly opposed the establishment of the same.

There can be little doubt that the enactment of the Crimes Commission Act by the last Federal Government was hasty. Public debate was non-existent. The necessary consultations were not carried. The views of Costigan, QC, Justice Stewart, and Costigan’s offsider Meagher, QC, have or did dominate the issue. Whilst respect must be given to those persons who have carried out detailed and thorough analysis into areas where it is suggested that organised crime does exist people do become somewhat obsessed with what they are dealing with. In one of the keynote addresses the eminent jurist, Mr Justice Kirby compared the proposals for the National Crimes Commission calling it, and I quote ‘another ASIO’. He says at the end of his paper and again I quote:

The hard business of real law reform is to tackle the problem of criminal justice system, of our criminal justice system, not to create new institutions, the need for which is doubtful and the real alternative to which have not been tried.

Noted criminologist, Ivan Potas, said and I quote: ‘certainly unless the Crimes Commission can offer something different (rather than “more of the same” in the way of law enforcement) then in my view a Crimes Commission cannot be justified and the whole project should be abandoned’.

In two days of listening to noted speakers, criminal jurors, State Attorney Generals, criminologists, police officers and the like, no empirical evidence was submitted to the conference to warrant the implementation of such a draconian measure as a proposed Crimes Commission with a considerable curtailment of our civil liberties. If people want to do something about crime in our community they can start by looking at our own police force.

Our own police force needs:

- (a) Improved training schemes;
- (b) More scientific approach to crime investigation;
- (c) A spirit of co-operation between police agencies and police forces in each State — not a spirit of jealousy and fear that their own deeds may be found out by another association.

Australia has in various areas, sound and effective police forces that merely need greater government assistance, better training programmes and better educational qualifications.

No more damning critique was made of the National Crimes Commission when a judge of the Supreme Court of Victoria, an eminent jurist, Mr Justice Nicholson, said on the first pages of his paper, and I quote: 'If one is to look for historical comparisons with the National Crimes Commission I would equate this proposal in terms of potential danger with a Communist Party Dissolution Bill of the 1950s.' He said and I quote:

I doubt if there is a real community awareness of the extent of the affront to privacy and liberty involved in the conferring on a Royal Commission or similar body of compulsory powers to examine witnesses or produce documents. I must confess that I now appreciate the enormity of such power. I must confess that I had not appreciated the enormity of such powers myself until I was firstly in the position of being able to procure their exercise as Counsel assisting an enquiry and secondly when I exercised such powers myself when conducting an enquiry.

A great warning to the community by a jurist.

It is my submission that the taking away of basic civil liberties of a subject can only be justified when it has been established by those who hold the onus satisfy beyond reasonable doubt that it is in the interest of the community as a whole that those liberties be cut from the community.

I oppose the National Crimes Commission, I oppose the recommendations of the Green Paper and call upon the Federal Government to totally abandon the idea of a National Crimes Commission.

## PRESENTATION OF PAPER

*J.R. Marsden*

Before commenting on my paper I will have to refer to page 20 of the paper by Mr Bottom already referred to by Professor Harding. He talks about an 'alliance' established in Canberra between a number of people. As I was one of the participants, and I was from the Council of Civil Liberties, I must say that I know of no meeting, no caucus establishing that alliance unless it was at 1.30am in the morning in the lobby or hotel bar in Canberra when Professor Harding and I had a drink and neither of us was in any state to establish an alliance at that hour of the morning! What worries me about the people that propose a National Crimes Commission and their comments about it is that they go off with hysteria but without facts. On page 20 of his paper Mr Bottom says:

As for the Council of Civil Liberties, no membership figures are available, and I would be surprised if its total membership for New South Wales could fill this auditorium.

Membership figures are available from the Council officers and they will certainly fill this auditorium three times over. He then goes on to say:

The Council was able to afford to send one of the largest delegations to Canberra to speak up for the rights of targets of a Crimes Commission.

The size of the delegation from the New South Wales Council was two, they both paid their own way, the Council did not pay their fares; there was one delegate from Western Australia, one delegate from Victoria and one delegate from South Australia. This certainly was far from the largest delegation.

In the next paragraph Mr Bottom says:

And the Law Council and the Council for Civil Liberties were conspicuously absent in protesting when Mrs Mackay was denied legal aid for an inquest into the disappearance of her husband Donald Mackay.

Wrong — the Council certainly was not absent, and certainly made some submissions on that point. However, if Mr Bottom would like to join the Council and be party to all these things for a mere \$10.00 I can give you an application form at the end of this meeting and you would be very welcome to join.

Mr Hatton said that we should be very, very careful in ignoring such people as Woodward, Moffitt, Costigan, Meagher, and others. Similarly we should be very, very careful in ignoring comments made by such people as Mr Justice Kirby who referred to the proposal for a National Crimes Commission as not dissimilar to ASIO; Mr Justice Nicholson of the Supreme Court of Victoria, an ex-Royal Commissioner himself, who said that the establishment of a Crimes Commission was as dangerous as the Communist Party Dissolution Bill in the 1950s; Mr Justice O'Connor of Victoria also made similar comment; and the former Judge of the South Australian Supreme Court, Dame Roma Mitchell, now Chairman of the Human Rights Commission who expressed deep concern of the possible breach of Australian obligations under the International Human Rights Treaty if the various proposals were implemented. There is no doubt also that it is an amazing

situation when one as a civil libertarian and involved with the Council of Civil Liberties finds oneself as a bedfellow opposing a National Crimes Commission with such interesting people as John Greaves of the Police Association, the State Government of Queensland, the Law Council of Australia, the Bar Association of Australia, various judges, academics, and criminologists, not normally people who support similar views to that of the Council for Civil Liberties.

There are two very important questions which I refer to in my paper. One is that are the areas where organised crime is alleged to exist the areas which should still remain in the criminal law? (Page 84.) For example, SP bookmaking: there are very few people at this seminar, if they have a bet, who can honestly say that they have not had a bet with an SP. Certainly, I was brought up in an hotel and I can assure you they were part and parcel of my average daily life and I never thought there were any criminals involved.

Similarly, prostitution which has been decriminalised in New South Wales. If it is involved with organised crime, those organisers don't have much ability in controlling price, because you can go up to the Cross and you will get a different price from each girl you approach. Of course, we have the old one — drugs. Organised crime is involved in the drug trade, most of us indulge in the use of the most dangerous drug in the world, alcohol. We are prepared to sit back and say these are areas where organised crime is involved. These are areas where the criminal law ought to keep its nose out of. These are areas that ought to be changed in the law.

Already referred to by Professor Harding, is the point that if we are to take away the civil liberties of the subject, and sometimes that is necessary for the good of the whole community, then the onus is on those who seek to take away those liberties to establish that there is a dangerous element of organised crime in our community. Despite two days at the Canberra Conference no one established that, even on a balance of probabilities. In fact, all that was established were statements that: I've been there, I am a Royal Commissioner, I have seen it, I can't tell you about it but I can assure you that it exists and it is frightening. The public are entitled to know if they are going to have their liberties infringed, and when that onus has been established and established even on the balance of probabilities, then there may be reason to look more closely for the necessity for a National Crimes Commission.

## DISCUSSION PAPER 2

## A SOMEWHAT DIFFERENT APPROACH TO CRIME

*A.I. Ormsby*

A Solicitor of the

Supreme Court of N.S.W.

The author of the following paper is a Sydney solicitor admitted to practice in 1934. Prior to the war he conducted a number of jury trials. During the war he served with the AIF and when two brigades of the Sixth Division were sent to Ceylon to prevent the Japanese invasion he was detailed to do court martial work. From 1945 to 1975 he had an appointment at the children's court in Albion Street where he became familiar with juvenile delinquency. Since 1975 he has conducted many jury trials and regularly appeared before magistrates and judges in criminal matters. As a result of a long standing association with men and women charged with criminal activity he has formed certain opinions which he expresses in this paper.

The author has no confidence whatsoever in Royal Commissions directed towards criminal and semi-criminal matters. We elect members of Parliament hopefully to deal with these matters. It is their business to inform themselves and take such steps as are necessary to combat crime. Unfortunately they waste so much time with party politics today that their efficiency is impaired. Very seldom does anything really satisfactory emerge from any form of judicial enquiry. The judges' time is more often than not wasted. The legal profession and the press are the only ones who get any real benefit. Terms of Reference are often frustrating and legal gentlemen involved more often than not prolong hearings indefinitely. For instance, the Commission to enquire into the Painters' and Dockers' Trade Union has turned into a witch hunt. The members of this unique and historical trade union bitterly resent any suggestion that any criminal activity of individual members bears any relationship to organised crime within the union. Many other examples could be quoted but they have all been well publicised.

Law Reform Commissions have also achieved very little, largely one feels because they are composed of academics and other legal gentlemen with little practical experience rather than retired judges or practitioners with criminal experience.

For instance, why has our criminal law never been codified and distinguished from the host of bureaucratic regulations with which we are forced to contend in this day and age?

Why do we still have 12 member juries when 6 would suffice?

Why is there still so much inexcusable delay in hearing cases? Etc, etc.

Any significant organisation in criminal activities today is limited to professional sport, gambling, prostitution and drug traffic. The first three have always been so and only hurt a limited portion of the community who quite frankly deserve what they get. Admittedly some organisation is required for once only jobs but house breaking and armed robbery are more often than not individual efforts encouraged by organised receivers all of which are easy to detect and bring to trial.

The only real organised crime Australia has to worry about seriously is the drug traffic and this is the main problem to be considered in any seminar on crime.

The solution involves two main considerations:

- (1) Have we enough specialist police and law enforcement officers and have they sufficient special training to cope?
- (2) Are our penalties severe enough for this most despicable crime bearing in mind that some countries have the death penalty and flogging.

The tremendous effect of drug addiction on the community and particularly on the adolescent should be the main consideration of any seminars but apart from the above comments which are generalities I would like to draw attention to another aspect of criminal behaviour in respect of which I am well qualified to give an opinion and one which is so often left in abeyance or delegated to academics and 'do gooders' who fail because of insufficient experience in their subject.

I take the following points on juvenile delinquency:

1. Nearly every person who has a sizeable criminal record has at least two or three juvenile convictions.
2. Most juvenile delinquency consists of crimes in company of others often in the beginning rather escapades than serious crime.
3. All juvenile delinquents resent appearances in childrens courts rather than adult courts for the same reason that you and I resented being called children after attaining the age of 13 or 14.
4. In children's courts every effort is made to avoid frightening the offender rather than to impress with the gravity of the situation.
5. The whole atmosphere of the courts is designed to give children the impression that they are VIPs rather than offenders.
6. Legal aid should not be given to children unless they seriously intend to defend the charges.
7. Magistrates are too ready to grant probation or give bonds whereas even a few days unpleasant detention might well have a satisfactory effect.
8. A well known Sydney magistrate remarked to me, 'Better a good penalty the first time otherwise they will back again'.
9. In the course of a joint trial I was conducting before Judge Godfrey Smith the judge remarked to Counsel for the co-accused, 'Everyone has no criminal record at some time in his life'.
10. On one occasion a lad of 16 I was representing at his parents request turned to other youths as I entered the remand yard and said in a loud voice, 'Here comes my mouthpiece'.
11. A girl of 16 watching 'Prisoner' on television said, 'I'd like to go to gaol for a while if it's like that.'
12. Vandalism is particularly common with juvenile delinquents and youngsters under 25. Many have set fire to cars just to see them burn.
13. It is highly significant that youngsters regularly playing sport seldom get into trouble. Police Boys Clubs have been highly successful in keeping boys out of trouble.

Following on the above comments it is felt that nothing should be done that will give the young person the impression that he or she is other than a delinquent. In fact parents should co-operate with courts in this respect. Once it used to be said, 'Spare the rod and spoil the child' and 'children should be seen but not heard'. These old adages worked.

I personally have always felt that the war against crime should first be directed to the young person who should face full adult responsibility from the

age of 14 onwards. Boys of that age have been convicted of murder, rape, arson, theft, armed robbery, etc. Indeed in 1936 I had a boy of 16 who was one of six youths sentenced to death for rape. Whilst special care should be exercised in sentencing juveniles it is felt that they should appear to receive no special treatment and every effort be made to ensure that they will be discouraged from further criminal activity.

If drug addiction was stamped out and if juvenile delinquency were reduced, adult crime would follow the same pattern. Surely this is a matter for the legislature and pressure should be brought to bear on local members. In this very much over-governed country members of Parliament should be able to find time to give attention to something that is possibly our most serious national problem.

## DISCUSSION PAPER 3

David Nelson  
Barrister-at-Law

In several of the papers there is a statement to the effect that where any proposed law will cut down the freedom of action of a person then the onus lies upon those proposing laws to prove their necessity. Such an assertion seems to hide within it another statement to the effect that all laws cut down personal freedom.

Such an attitude is foreign to the common law tradition. It is the kind of abstract *a priori* statement to which the common law tradition of proceeding case by case is quite foreign. We know by our own experience that properly formulated laws can confer freedoms or powers upon individuals which they could not hope to achieve by their own selves. The law of probate confers effective power of disposition of assets after death and social security laws confer title to income in disadvantaged persons which income would otherwise be hopelessly beyond their economic grasp. I speak only of the legal aspect of such systems. If they were not filled up by economic activities they would, of course, remain objectionably abstract.

It is therefore the pragmatic tradition of the common law that a proper set or mix of laws may enhance freedom whilst repressing wrongdoers and crime of all sorts. We have freedom precisely because we live under such laws. We also know that freedom resides not only in appropriate sets of laws but in the will to carry them out. Thousands of lawyers in this State devote their lives to making the detailed arrangements work. Many thousands of other citizens each day join in the process. The attitude which equates law with oppression is in fact a useless attitude. It is also trite that from time to time the arrangements are found to be inadequate. It is part of our tradition to make new arrangements in such cases.

The way I see the reports of the various Royal Commissioners going back to the Moffitt Report of a decade or so ago, is that trusted and competent persons have reported that in some respects our laws are being flouted and that thereby some parts of our freedom may be being endangered. The question then can be restated: Has the time come when society should adopt more effective arrangements for the protection of freedom and the repression of criminal activities? If the answer to that question is yes, then the next question is: What are the appropriate arrangements?

It seems to me that the case for a National Crimes Commission has not yet been made out, but that the case for a particular unified ordinary police criminal intelligence system linked directly to a special division of the Federal Attorney General's Department has been made out.

The central reasons for this conclusion on my part are:

- (1) a Federal Crime Control Commission will not necessarily make a local police force any more effective or efficient. Though drugs generate a stupendous cash flow, which tends to become centralised, the drug problem from the point of view of the general community continues obviously to be very much a local or precinct phenomenon. The same can be said of prostitution and gambling;
- (2) because of the dispersal of our main centres of population each local office of a Federal Crimes Commission would tend to become a local entity and compete with local police and annoy them.

Any measures to be adopted should be of such a design as to see that any new system really will work. How can this be done?

Commonwealth legislative powers include such diverse subjects as interstate trade and commerce, banking, money, corporations, communications and exclusion of foreign criminals. All of these areas of power would seem to have a very probable pragmatic relationship to criminal phenomena likely to be attached to drugs, prostitution and gambling on any considerable scale.

The Commonwealth has direct legislative power in each such power area to place direct obligations upon state police. State policemen are no more exempt from Commonwealth laws than other citizens. Once a reporting obligation has been placed on a state policeman by a valid Commonwealth law, that officer is *pro tanto* a Commonwealth officer. The same can be said of Police Commissioners and other police officers. Section 96 grants could then be made to the states to make up for the additional economic burden placed upon their police forces.

The grants could be so conditioned that those particular police forces would be required to adopt proper organisation and discipline and adequate training of personnel. The states may have an effective power of political objection but I cannot see that there is any legal or constitutional objection. At the same time vigorous exercise by the Commonwealth Attorney General of his power to prosecute state offences and also the creation of a proper range of Commonwealth offences also vigorously prosecuted would, when allied to a strong relationship with a Federal Criminal Intelligence Bureau, create a proper social tension. Much would depend upon the selection of the person to head the special division of the Commonwealth Attorney General's Office and upon the choice of the Federal Police Commissioner and of the head of the Federal Criminal Intelligence Bureau. Mutual respect and co-operation between these officers would be a matter of great importance. The offences to be created should be of an ordinary character. The whole system might be overseen by a permanent Select Committee of both houses of the Federal Parliament.

The question of what methods and degrees of investigative intrusion into private or business communication would be permissible, could be taken up by that Committee as needed.

All single instances of grant of search warrants of all types associated with the Criminal Intelligence Bureau activities should be referred to the permanent magistracy and judiciary with extraordinary searches authorised only by judges having Supreme Court status and upon definite criteria. Honorary Justices should be excluded from the system. A report relating to search matters should be furnished to the Select Committee annually, and the Committee should have the power to call for and examine individual sets of papers. It should however be a contempt of Parliament to publish any matter without the leave of at least one of the Houses of Parliament.

At the present time I do not see that more is called for and in particular I do not see any reason why the protection against self incrimination should be taken away before a balanced and responsive police investigative system has been really tried. In my opinion it is only if measures such as the above fail in point of fact that a Crime Commission of any sort with power to compel answers, notwithstanding that they may tend to incriminate, should be considered.

## DISCUSSION

*Tim Hogan,*

It seems to me that talk of setting up a Crimes Commission has difficulties because it is likely to be seen as taking over the role of the judge and jury system. Whether that is the case or not, that is what it could appear to be doing in the minds of the public generally.

The second difficulty I see is the idea of appointing a Royal Commission to investigate every affair of State is not good for the law itself. It makes the law appear as if it does not want to deal with those matters that it refers to Commissioners. I feel, therefore, that on those two grounds the establishment of a Crimes Commission is dubious in merit.

*Dr G.D. Woods, QC, Public Defender*

I want to approach this matter from a different tack, taking up a point raised by Professor Harding. He made reference at one stage to nominee companies. It seems to me that one of the major difficulties in this area is secrecy and this is a matter that has been referred to by all the speakers. If we want to have a system of economic organisation which allows legitimate businesses to operate on a legal basis which facilitates their economic activities by company structures, we inevitably in some measure also facilitate the darker side of economic activity, which is what we are talking about at this seminar. Now, nominee companies are companies which are set up for the purpose of allowing people to own property without that fact becoming a matter of public record. They are undoubtedly used frequently not only for legitimate purposes of proper economic planning but also for the purposes of keeping secret improper activities. For better or for worse we live in a society which allows this to happen. If we want to have a capitalist society which encourages people to plan their businesses, to be able to move capital around from venture to venture, from State to State, from nation to nation for the purpose of what might be seen as economic efficiency, then we have to accept that inevitably we are going to have problems identifying all the criminals. The revelations and disclosures of Royal Commissions about crime appear to us to be extraordinary bombshells when they happen — the Moffitt Commission and the Costigan Report and so on. In my view a proper state of affairs would be one where economic ownership generally was a matter of public record. The secret trust (which is at the centre of the nominee company concept) is in my view an insuperable barrier to the elimination of or any serious attack on organised crime in this country, however big organised crime be.

The second leg of an attempt to seriously attack this problem relates to the matter of the secrecy of taxation records. The taxation records in this country are traditionally regarded as sacrosanct, as it were, in the same fashion as information passing between doctor and patient ought to be regarded as sacrosanct. It seems to me that if you want to have society that allows financial secrecy, financial mobility, financial efficiency in the capitalist sense, then we are going to have no success in attacking organised crime. In my view taxation secrecy ought to be abolished. Paul Ward and I have argued in our forthcoming book and previously in published articles that if the Australian population won't wear complete taxation secrecy, with taxation records being a matter of public record and being accessible to anyone who wants to pay their 50 cents or whatever, why not have a system of optional taxation secrecy

so that people can, if they want to, have their taxation records made public. You might say, 'Well, nobody will do that.' Well, if it were made optional, it would then become very difficult for people in public life, people holding public office such as parliamentarians, judges, people with important positions in the police force, and so on, not to disclose, not to have their taxation business made public.

So firstly it seems to me that there is no justifiable reason why all taxation records ought not as a matter of compulsion be public; secondly if that is not feasible, why not make them optionally public so that it is not necessary to go to the trouble of having vast investigations into organised crime to discover little bits and pieces of information which form no pattern and which result in a body like this being unable to come to any conclusion at all about the scope and significance of organised crime. If all these matters were public from the beginning the ordinary police processes of tracking down criminals could be used through the companies office and through the taxation offices to keep tabs on who was doing what to whom in all those fields of naughtiness which have been mentioned at this seminar as aspects of 'organised crime'.

*D. McCrane, Law Student*

I am here as a lay person but I do have an interest in the law. There is a saying that goes something like this: 'When good men stand by and do nothing, evil triumphs'. It seems to me that anyone with some knowledge of legal history looking back at the development of the branches of law would note that even then there was a jealousy amongst those branches as to who was going to triumph. It seems to me that to some extent the legal profession are still defending their own bailiwick. At this seminar there seems to be a concentration of the legal field zeroing in on the lay person's view, and the lay person's view I see expressed by Bob Bottom. It has been said that there must be more evidence produced before we can consider a National Crimes Commission, and until we get that evidence we cannot stop what must be obvious to most people who take an intelligent interest in current events — Royal Commissions coming up with information which shows not only is there a suspicion of it but almost certainly there is a presence of organised crime in Australia which has been imported from overseas.

Already at this seminar we have had one particular situation quoted of a certain policeman who was a candidate for Police Commissioner. That particular policeman was sent on an overseas trip through a friend of his who was actively engaged in the gambling field in the manufacture of poker machines. He was sent on a free trip to Las Vegas which has a known connection with the Mafia in America, despite the particular laws in America which tried to prevent the involvement of the Mafia in those fields. Here we have a peculiar situation where this gentleman for some reason is a recipient of favours. Now, you have only got to ask yourself, 'Why is that so?' and I think the reason must be that he is the recipient of those favours because at some later time he will be in a position to return those favours.

Those connections obviously must be directed not simply towards the involvement of crime in Australia but towards a situation of multi-national crime. For example, the 'Mr Asia' syndicate was originally a group of individual petty crooks and within about four or five years those people became involved in multi-national crime stretching all over the world. Where did the money come from? It came from drugs. That is where the money is

these days, it is in drugs and prostitution. People seem to think there is nothing wrong with SP betting, there is nothing wrong with a flutter at the local casino, there is nothing wrong with prostitution. But, in America when prohibition came in, it was the worst thing that ever happened to that country because the inflow of money into the criminal system from prohibition funded the later expansion into all the other areas of crime. This is how crime develops. It feeds on funds. It becomes big business. It is run by people who have big business skills. They are not fools. They might be criminals, but they are not fools, and they know that the resources that they need to run their businesses are money and influence, and the way in which they get that has already been shown in the development of crime in this country. To stand back and say that we have to preserve our civil liberties, and that until we have incontrovertible evidence we are not going to have a Crimes Commission that is going to do something about this problem, is just putting our heads in the sand and ignoring the problem. If we do not do something about it our grandchildren are going to pay for it.

*J. Swan, Assistant Commissioner, Legal Division, Corporate Affairs Commission, N.S.W.*

On the question of the nominee companies the 1983 amendments to the companies legislation will bring about disclosures of the holders of shares not only at the first stage but also at every other subsequent stage. As presently drafted the legislation has its limitations in that if the first holder of the shares, such as the first nominee company, says that it is holding the shares as a bare trustee the Commission was inhibited in carrying out its enquiries further. The amendments will allow further enquiries to be made and to force the disclosures of the subsequent holders of shares.

*Penny O'Donnell, Journalist, Australian Broadcasting Corporation*

I would like to ask Professor Harding what kind of evidence he would need to believe that there is a problem of organised crime in Australia, and if he got that evidence would he then support a National Crimes Commission?

*Professor Harding*

I had better make myself a little clearer than I obviously did in speaking to, rather than reading, my paper as some slight confusion has obviously slipped in. Let me actually quote from page 40:

My purpose, then, has been to put on the record my scepticism as to a point which was largely presumed at the Crimes Commission Conference — that 'organised crime', in a specialised sense, [which I have defined elsewhere] in fact exists in Australia. However it is *not* my purpose to argue that it does not exist; frankly, I do not know one way or the other.

Alright, what about all these Royal Commission reports, reports which Mr Hatton implied I was ignoring, particularly Costigan and Stewart, and I think the last speaker perhaps had this kind of angle to his remarks? I am not ignoring them. They show massive major planned crime in particular areas and they have been very valuable reports. The Costigan Report has had immense value in Australian social life in terms of the publicity it has thrown on to tax matters and in terms of the publicity it has thrown on the painters and dockers and so on. The Stewart Royal Commission has had great value as well. We should respond to them; we are responding to them. We are finding that in responding to them that the evidence is just a little softer than

it was presented to us by the media and by the Commissioners themselves. As I say in the paper one of the most riveting moments at the Crimes Commission Conference was when one of Mr Costigan's special prosecutors publicly said he couldn't actually put together any case on the basis of what he had received from the Costigan Commission (page 40). He needed 20 or 30, or 10 or 50 (I forget the actual number) solicitors to try to put it all together which raises a real doubt as to how good the information is. But that is ungenerous. It is a valuable Commission, its findings are valuable, it is being acted upon, it should be acted upon, but where in my view Costigan and others go wrong is that they then take it on a stage further.

What I am about to say isn't quite so true of Mr Justice Stewart, but it is quite interesting that a lot of these people who conduct these Commissions seemed to have had nothing to do with criminal law previously. I think they are always extraordinarily surprised how wicked and resourceful people can be, and being surprised they are shocked, and from shock springs moral fervour and from moral fervour springs consensus and from consensus springs fascism. I think that Mr Costigan and others often misinterpret the phenomena they have so admirably identified and they see there something much bigger — they draw diagrams of octopuses and tendrils and so on — bigger than is perhaps the true case. Do we have a Mr Big of tax evasion? Well, perhaps we do — I don't know, but we certainly have lots and lots of Mr Littles just as we have lots and lots of Mr Littles in the olive oil scandal in Italy which ripped off the E.E.C.

We have struggled for 200 years in Australia and for a 1000 years in England to establish a certain tone of society, in which the executive bears a certain kind of relationship to the individual. That society has worked, broadly speaking. It has changed and it has continued to work. I am actually a true conservative. I want to conserve what we have got. I do not want to throw things away and so I want to proceed slowly. You should not get stampeded by a moral panic, by language about jungles and cancers and what will life be like for our grandchildren. If life is not much good for our grandchildren it won't be because of SP bookmaking, and it won't be because of prostitution rackets; it will be because of nuclear energy and its misuse, it will be for all sorts of other reasons — sexism, and racism and great political instability brought about by these things. They are in a different league from what we are talking about, so proceed slowly. Show that the case is there.

I am not saying that traditional police forces should not have enhanced roles in relation to traditional crime writ large. I am accepting that they should have greater resources. But I am entering a caveat saying: let's be certain in giving them these extra resources that they are going to use them properly, a caveat I would make with any organisation that gets extra resources from the State. Show that you can use those resources properly, and actually I think the police forces can. Traditional policing, for all the criticism that it receives, criticisms that I have contributed to, is not too bad. The examples that have come forth at this seminar are all either through the *ad hoc* Royal Commission turning something up or else traditional policing turning something up.

So I am saying *make out the case*. If it is made then I will answer your question, which until it is made remains a hypothetical one. Do I think a National Crimes Commission is the right way of dealing with organised crime? It is a hypothetical question and until I know precisely what the extent of

organised crime is, what areas it goes into, what 'organised' means, why it is so special, it remains a hypothetical question. It is up to the politicians, Mr Hatton and his colleagues and the people they employ in Commissions and the police forces to bring forth the evidence of this particularly horrendous phenomenon that requires particularly horrendous powers to upset the balance between the State and the citizen.

*John Greaves*, President of the Police Association, N.S.W.

I agree with Bob Bottom, that the National Crimes Commission Summit we attended was heavily weighted against those who perhaps have a perception of what is going on in Australia today. I would like, on my Association's part, to speak on two points.

You have your visible crime which I would put into the category of gambling, prostitution, and drugs. Against that, of course, you have your white collar crime which is the bottom-of-the-harbour deals and things such as that. To my knowledge there is a backlog at the moment of perhaps 200 matters still to be heard dealing with white collar crime. Whilst you have that backlog in the court situation, crime will flourish especially in the white collar area. We have seen parliamentarians stepping away from responsibility on the bottom-of-the-harbour deals. Originally they all came out strong and heavily on what they were going to do and what they weren't going to do; but when they found that some of their constituents were involved they started to back and fill a little and water things down. Then we come to the situation which is the old chestnut — if we can't get at anyone let's knock the coppers. Why aren't they doing this? Why aren't they doing that?

We have had a man on the moon since 1969. The law remains the same in the *Crimes Act* since 1900 other than a few variations. We send our policemen out into the field and I have often said to them 'For heaven's sake, stop being the conscience of the public. Let the public receive what they expect', but that is the wrong attitude because I think the public believes that the police are doing the right thing by society. I believe the courts support that. I hear my friend John Marsden often turn around and say 'Oh, the police do this, and the police do that!'. There is a brake on society. If police are getting out of control, the courts decide that they are getting out of control and consequently they will deal with them accordingly.

Why should the police be hamstrung in today's crime with the 'cowards' castle', where unsworn statements can be made from the dock, where the accused can turn around and can refuse to answer. Dr Greg Woods is turning around and talking about the taxation law — that an inference can be drawn if you don't disclose your interests. But notice can be taken of that. Why don't the courts take notice if you don't turn around and tell the truth or give an answer to a question that is asked of you, why don't they take judicial notice that someone is trying to hide something?

I do support the stand Mr Hatton is making. I believe he is blinkered to a large extent where he turns around and sees 'blue under the bed' all the time in relation to the police force. They are the corrupt ones; they aren't doing the job. You know it gets me on the raw, as you probably realise, that we are singled out more and more, but if there are corrupt police the flow from that must be corrupt magistrates, there must be corrupt judges. It must flow, you can't have one without the other. It is like the receiver and the thief, they flow together. Academics must come down out of the clouds and must put forward

good and valid reasons as to change that can be made to assist society to combat this cancerous sore. No doubt, it is there. Eminent judges have seen it. They cannot pinpoint it, they cannot get to the bottom of it and they cannot produce the evidence as the courts require but they know it is there. If they know it is there and they cannot produce the evidence what are the parliamentarians doing about it because that is the logical step. The parliamentarians are the ones who can change the law and can assist all those who are charged with upholding the law to carry out their duties as they should. Perhaps then we might eradicate a lot of corruption both in the police force, in the judiciary and in the parliamentary situation.

*Virginia Bell, Solicitor*

I would suggest the argument appears to have focused on the concept that if you are for a Crimes Commission it is because you accept that organised crime exists, and if you are opposed to a Crimes Commission it is simply because you do not recognise that organised crime exists. I would be prepared to say I think there is strong evidence for the existence of organised crime in New South Wales but I most heartily oppose the establishment of a Crimes Commission. My reason is this: a Crimes Commission will depend on its investigating officers, they may be drawn from the police forces as they presently exist, they may be seconded from other government departments, from Attorney-General, from Customs or elsewhere, they may be advertised through the *Sydney Morning Herald* and *The Australian*, but what I will promise you is that within a year the investigating teams supporting a Crimes Commission will have been infiltrated or affected by corruption.

With all due respect to the last speaker I would like any person here to seriously maintain or accept that there is in Australia a single police force that is *not* affected by corruption. It is an absurdity. If you look at any of the evidence that has been prepared by judges in the Commissions that have been mentioned you will recognise that on every occasion when it has been necessary to examine the operations of police whether it is in Victoria, New South Wales, South Australia or elsewhere, the evidence has strongly pointed to there being corrupt elements. We are blind and we are crazy if we do not acknowledge that institutionalised corruption within police forces exists. If you accept that, then ask yourself why won't that happen with a Crimes Commission? Isn't it time to worry about establishing a body that will be given more extensive powers than we presently vest in our police? If you acknowledge that they are likely to become corrupt, then they are not going to look for Mr Big but they are going to turn their attention to some one or some group of people who can provide a smokescreen whilst the Mr Bigs continue to operate successfully. I refuse to accept that if I go to the hills of Thailand and buy a quantity of heroin for \$5.00 and if I come back here I can't sell that same quantity for \$5,000.00. I don't accept that I won't be able to get people to bring it in on the planes to Australia, I don't accept I won't be able to pay off police to turn a blind eye to my activities, I don't accept that I won't be able to pay off politicians not to put pressure on the police when it is demonstrably clear that they are not doing their job. If you accept that corruption is every bit as much an evil as organised crime, then I think we must look on a broader level how to cure the perceived problem. I would undoubtedly think that with regard to drugs you have to look at the question

whether or not it is worth us paying the price in continuing to make the dealing in heroin an illegal offence.

*N. Harrison*, Public Prosecutions Office, N.S.W

There are a couple of points that I want to make in support of Professor Harding. The last speakers were at pains to tell us that there were rotten apples in the barrel as far as the police force is concerned. I am not going to stand here and dispute that, I think there probably are. The last speaker did not put any alternative proposal as to what might be done in terms of investigating crime. I am not here to argue whether there is organised crime or serious crime, there is certainly a large degree of serious crime. The court system in this State is particularly overburdened with criminal prosecutions, in fact it is bursting at the seams. Most of the prosecutions that are being put through the court system are not the serious offenders. They are not the sort of people that these proponents of a Crimes Commission are aiming at as their target.

Professor Harding talks in his paper particularly about the quality of the police force and whether in fact a combination of Federal and State squads would achieve some greater success than has been achieved in the past. I support the suggestion there should be a further allocation of resources to the police forces in the various States and in the Commonwealth. The problem has been that in the past, as Professor Harding has indicated, there has been a great deal of distrust between the Federal police and the State police. The Federal police look at the State police forces and say that they are corrupt — won't have anything to do with them. They look at the Moffitt Royal Commission which identified police officers who were suspect or under shadow, and what did the State police do — they either promoted them or pensioned them off as medically unfit. The State police look at the Federal police and say they are 'cowboys', they are plastic policemen and they quote the Greek conspiracy as an example of incompetence in the Federal police force. If that continual bickering is going to continue it won't matter whether we have a Crimes Commission or a Select Committee or whatever. We will not get to the root of the problem. I would hope that an allocation of resources to the police coupled with lateral recruitment in terms of solicitors, accountants, professional people coming in at senior levels of the police force (so that they are not indoctrinated with this 'members of the club' mentality) will achieve some good.

*Dr Jeff Sutton*, Director, Bureau of Crime Statistics & Research, N.S.W.

It seems to me that the essence of what we are talking about is whether we can locate, identify and prosecute people who plan crime in groups. I don't suppose that anybody could deny that such crime must exist even if it is not on the level of the more hysterical statements which are put forward in various places. At the very least we are talking about a more sophisticated development of a paradigm group crime, eg two or three armed robbers who gather together in a group and who plan a job on the next day. The question is how successful are we in solving this type of crime, because most strengthened enforcement involves trading civil liberties against success. That appears to be what we have done in the past. For instance, there was a lot of argument about car seat belts; whether we should wear them or not. Many people said that the compulsory wearing of seat belts was an infringement of civil liberties, which without any doubt it is in the sense that you have to do

something which you may not wish to do purely on a personal level. However, because the measure is successful, and shown to be so, then we accept it. The same applies in a variety of areas; for instance, we might accept the restriction of advertising with respect to the use of cigarettes because it can be shown that smoking is harmful and advertising increases consumption. Perhaps random breath testing is a more controversial example but it still applies. We accept random breath testing and now, it has been demonstrated that at least for the time being it is having a highly desirable effect.

So the question is: are we prepared to give up civil liberties of the kind described in this seminar because the result will be successful?

I would be more prepared to give them up if it could be shown that a professionalisation of investigation and, in the legal profession, respect in the use of intelligence and statistical data could be demonstrated. Unfortunately this is not always the case. The information which is gathered is often not respected. I am not talking just about ignorance with respect to the use of information, and the giving out of platitudes and imprecise statements simply because the officials fail to understand how to use objective data, as such. I am not talking about the ideologies which don't respect data because it is already known what they want to achieve so there is no use for conflicting facts. What I am talking about is the respect for a comprehensive gathering of information; that it be reliable, that it be accurate and that it be publicly accountable so that we can understand that members of Crimes Commissions, police special squads, and so on are actually gathering data which we can respect and regard as accurate, that it has been used in a responsible manner, and that people are prepared to make public the sorts of methods that they are using in conducting such investigations and so on. Those are the matters which I think are essential if we are to give up the civil liberties which we are being asked to give up in respect to a National Crimes Commission or indeed any other extended powers of police investigation.

I am glad to say that, in many ways, the Police Association, the Police Department and others are accepting the need for increased education and the need for a more professional and sophisticated approach. It would be a good thing if it could also be recognised that there is a need for accountability, and for the public to be able to see that professionalisation of the police force is a true professionalisation, and that, of course, is a matter which could also be addressed by the legal profession.

### *Bob Bottom*

One could say a lot about organised crime and, indeed, a lot about what has been said at this seminar, but I would like to conclude with a couple of comments.

Professor Harding and others have made much of the fact that supposedly there is no proof that organised crime exists. I dismiss that as absolute academic bunkum because it has been proved to exist. If I were to ask how many people at this seminar and, indeed, members of the panel, who actually have copies of the Reports of the various Royal Commissions I think we would all be embarrassed by the lack of possession of those reports. In fact, the small number of people who oppose a Crimes Commission have not even read those reports, because the fact is that those reports, apart from what people like myself might say, definitely established the pattern of organised

crime of the most disturbing nature and much more serious than the headlines on the reports.

For instance, just two examples establishing the fact that we should have a Crimes Commission and not *ad hoc* Royal Commissions; if we had not had the Costigan Royal Commission we would still have all those hidden people working in conjunction with lawyers and accountants who would be ripping Australia off with tax to the order of something like \$6000 million, and if we had not had the Stewart Royal Commission there would not be a new investigation into the disappearance of Donald Mackay. But for the Stewart Royal Commission there would not be enquiries into the death of people like Mackay and others (and I can assure you there are others in all States, about two people a week die as a result of the drug trade alone in Australia).

The best example of the need for an ongoing Crimes Commission is provided for me by the Woodward Royal Commission. The Woodward Royal Commission unravelled, in response to national outrage, a marijuana trade at Griffith. In fact, I have just finished a computer exercise which took two and a half weeks tabulating information on the trade in Griffith, and it was surprising from this computer analysis how thorough Woodward was on one point and that was totting up all of the money traced to the Trimbolis, the Sergeis and the Barbaros and others identified as having been involved in the trade. Whether nominated as gifts or whatever the total traced by the Woodward Royal Commission amount to \$3,150,000. I also did a separate computer exercise on all the known plantations in Griffith and the actual tonnage per acre, the price paid to the marijuana growers at Griffith which was known, the subsequent ruling prices at the wholesale and retail level in Sydney, and it revealed that the marijuana traced to those plantations at Griffith analysed by Woodward turned over well over \$100 million on the streets of Sydney. But the intriguing part is that the amount paid to those growers for the numbers of acres of marijuana they grew actually amounted to \$3.5 million, so the Woodward Royal Commission actually traced all of the money that went to Griffith except for about \$400,000. Now, what is interesting before it reached \$100 million on the streets, is that the marijuana at \$33,000 a ton at Griffith immediately on arrival in Sydney was worth \$660,000 a ton at wholesale level which meant that the real masterminds of the drug trade made in fact more than \$60 million and there was something like another \$46 million made on the streets. What we want is an ongoing Crimes Commission, not just coming up with the odd Trimboli and so on but to go for the real Mr Bigs — and there are Mr Bigs — not just looking at 'grass castles' at Griffith but in fact at some of the mansions around Sydney Harbour.

*Dr John Braithwaite*

In my paper I attempted to put the proposition that what was needed was a more sophisticated analysis of organised crime than that provided by legalism. Let me now put aside those aspirations for a more sophisticated analysis, which has provoked no one, and try to provoke you with a simple minded appraisal of the situation.

What troubles me in particular about the position of people who opposed the Crimes Commission at the Crimes Commission Summit and at this seminar is that they are saying 'We don't want the Crimes Commission, but in reacting to that what we will do is to give more resources to existing police

forces'. Professor Harding has said that, various people at the seminar have said that, and I invite Professor Harding to reply to this in his comments. The problem is what is the justification for reaching that conclusion, and again here I speak as the simple minded consumer. I can go to the hospital system and be provided with hard evidence that what the hospital system does makes sick people better, I can go to the social welfare system and they can demonstrate to me that they will make poor people less poor, to environmental protection agencies and they can produce hard evidence that shows that rivers get cleaner in areas where they deploy environmental enforcement resources, to occupational health and safety authorities and they can show the evidence that when they crack down on a particular area of an industry that there will be fewer losses of life and serious injuries in the workplace, and similarly in my own area of activity at the moment of consumer protection. When we go to those of you who are in the criminal justice system and ask you to provide the evidence that what you do reduces crime that evidence just isn't there. Even if we are talking about a reformed criminal justice system with lateral entry to police forces and so on, all things that have happened in various places around the world and all without evidence that they have tangibly reduced crime. Then how are we as taxpayers to be persuaded that an appropriate reaction to rejecting the Crimes Commission model is to pour more resources into the criminal justice system? We should be saying that if we had fewer lawyers, fewer policemen, fewer prison officers, fewer criminologists and those resources were freed up to have better hospitals, more adequate and appropriate social welfare, better environmental protection and so on we might all be better off. I throw down the towel to Richard Harding and to others to justify just how they reach that conclusion that we must pour more into the criminal justice system.

*Professor Harding*

I have to answer John Braithwaite in two ways. First of all, I paid homage to him in my initial remarks in acknowledging that trying to concentrate merely upon a kind of detect and clear up model, whether it be a Crimes Commission model or more resources for police, is indeed an inadequate approach and that, in fact, we should be looking for a multi-element approach to this whole thing. I gave one example of the kind of law reform I think would help, the abolition of nominee companies, and Dr Woods took up that proposal and took it on in an interesting way. I made brief reference to sentencing approaches which is in itself I suppose an aspect of this, but we need obviously to clear the decks in criminal law terms as to what we ought to be concentrating on and what we ought not to be concentrating on so as to make the contrast greater. I think the information and publicity points made by John Braithwaite in his paper are very important, too. But when I have said all those things, let me come back to the question that he has asked: Why does one think that it is appropriate to try to strengthen traditional police forces as an alternative to going to the Crimes Commission model?

There are all sorts of reasons for this. One is that we are talking about not increasing powers but increasing strength. And we are talking about increasing efficiency by lateral entry and so on, but we are not talking about a disturbance of the age old relationship between the executive and the citizen. We can handle police/public relations relatively well — but we do not know how we can handle a standing Crimes Commission relationship to the general

citizenry. That is a political point, if you like. In terms of whether they would produce more convictions if one is forced back into this detection and conviction model, I think the answer is 'Yes'. It is notorious and platitudinous to say that in certain areas of crime that the clear up rate is a direct function of the amount of resources devoted to it, and undoubtedly fraud squad figures show these sorts of things. Movements in and out of fraud squads are accompanied by increases or decreases in the number of crimes cleared up. With drug offences there are some excellent studies in the early '70s in New South Wales relating to this that show the same kind of thing. There is a point of diminishing returns of course; but I have no doubt more resources properly utilised will produce more clear up of the traditional crime.

Having said that, it is only going to take us a little way along the road. I suppose, however, what one comes back to finally is this: increasing and strengthening the traditional police force has a great attraction to some extent in itself, but its main attraction is that it stops the creation of a Crimes Commission which is the kind of organisation which would disturb the relationship of ordinary citizens to the State. We should never be able to get back to the position that it should be if we create a Crimes Commission.

*John Hatton*

I would just like to finish on this point: that if you have a right to participate in the freedom of society and set up an organisation and be part of that organisation, or earn your living by being part of that organisation, then you should accept the responsibility that society has a right to know what is happening inside that organisation. The basis of what I have said on organised crime is that if you have secrecy, whether it is in the detecting agency or whether it is in the evading of detection, then you have a perfect set of circumstances for corruption to flourish. As a parliamentarian I accept that all my activities and my financial commitments and so on should be open to public scrutiny. A policeman ought to accept that his association, his union and his job are open to public scrutiny. The functions of Parliament, the functions of the bureaucracy, the functions of private enterprise should be open to scrutiny. I believe that scrutiny is one of the keys and provides answers to many of the questions posed when we consider the threat of organised crime.