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Farewell Ceremony for the Honourable Justice James Wood AO as a Judge of the Supreme Court of New South Wales

THE SUPREME COURT
OF NEW SOUTH WALES
BANCO COURT

SPIGELMAN CJ
AND THE JUDGES OF
THE SUPREME COURT
Wednesday 31 August 2005

FAREWELL CEREMONY FOR
THE HONOURABLE JUSTICE JAMES WOOD AO
AS A JUDGE OF THE SUPREME COURT OF NEW SOUTH WALES

1 **SPIGELMAN CJ**: We gather here today to mark the retirement of the Honourable James Wood AO, one of the most highly respected, and most widely respected, judges in the history of this Court. Over a period of 21 years as a judge of this Court, as a Royal Commissioner and as Chief Judge at Common Law, the contribution that your Honour has made to the administration of justice in this State represents a level of public service that few can hope to equal and none surpass.

2 Your contribution has not only been that of a judge, but that of a judicial leader. Your legal learning, intelligence, judgment, courage, humanity, keen sense of justice, fundamental decency and straight forward style have combined to enable you to show leadership by example, with the result that the role appears to be effortless. Your colleagues have instinctively accepted your leadership without question. There has never been an occasion since my own appointment as Chief Justice over seven years ago, when I was not able to rely completely on your Honour's advice, judgment and competence. I could not have wished for a better colleague.

3 There is in the law a certain snobbishness which accords higher status and significance to technical legal reasoning. Nothing could be further from the truth. The most important job done by judges is the making of findings of fact and, where a jury is the tribunal of fact, the provision of guidance to the jury. The primacy of fact finding in the course of the administration of justice is not acknowledged as widely as it ought be.

4 Your Honour's performance as a trial judge, or as a judge instructing a jury, was always impeccable. No doubt your Honour can remember occasions on which your have been overturned on appeal but none of your colleagues, to whom I have spoken in recent days, can do so.

5 Both as a trial judge, and as a judge sitting in the Court of Appeal, your Honour has made important contributions to the development of the civil law. Your work has covered the full range of diverse civil disputes that come before the Common Law Division. A number of your Honour's judgments are regarded as the leading cases on particular matters.

6 It is, however, in the area of criminal justice, both at trial and on appeal, that your Honour has made your most important contribution. You have done so across the full spectrum of the issues that arise in this fundamental area of the law: the elements of liability, the details of criminal procedure, the admissibility of evidence and the principles of sentencing. There is no area of the criminal law in which your Honour has not delivered judgments that, I have no doubt, will stand the test of time. Your judgments comprehensively analyse every issue that arose in each case and every one manifests a force and clarity of expression that ensures their utility for the long term.

7 This contribution began soon after your Honour's appointment when your Honour presided in the Ananda Marga Inquiry to determining whether the convictions in that high profile matter were safe. Your Honour's analysis has frequently been cited with approval in subsequent such inquiries. Subsequently your Honour delivered many judgments which serve as models for all those who have followed: directions with respect to relationship evidence in a sexual assault case; principles of relevance when sentencing Aboriginal offenders - principles which manifest your Honour's profound humanity; the construction and operation of the unfavourable witness provisions under the 1995 Evidence Act; the operation of new provisions concerning admissions under the same Act; determining that the mental health fitness provisions extend to persons who are developmentally or

intellectually disabled; determining what to do in the case of jury misbehaviour, such as obtaining information about an accused over the internet or undertaking private views; guidance as to the role of drug addiction as a factor relevant to sentencing for offences such as armed robbery; determining whether a sentence of life imprisonment is appropriate after the "life means life" statutory amendments. Recently your Honour conducted the first trial of an alleged terrorist under the special legislation adopted for the trial of such offenders. Your Honour also participated in all of the sentencing guideline judgments which the Court developed over recent years. Your contribution to the analysis contained in those judgments was fundamental, whether or not your Honour wrote a separate judgment.

8 No-one in this room, indeed few people in this State, is unaware of the extraordinary public service your Honour performed in conducting the Royal Commission into the NSW Police Service and the accompanying paedophile inquiry. Your Honour's intelligence, competence and courage were never on better display than during that period. At the outset your Honour had the crucial insight that you would not discover whether or not there existed systematic and entrenched corruption by reviewing files relating to past matters. You recruited police from the Australian Federal Police and from the forces of other States to conduct your own investigations. Turning one crooked policeman at an early stage enabled the covert work of the Commission to produce extraordinary results, including that celebrated and now iconic footage, recorded by a camera in the dashboard of a car, showing that person handing over a bribe to a colleague. From that moment onwards the Commission was seen to be effective and the impetus towards reform within the police force became unstoppable.

9 Your final report did not simply record the existence of widespread corruption, including process corruption such as verballing and the planting of evidence, but put forward a range of proposals for significant management change, including a new institutional structure to prevent, or at least minimise, the future occurrence of the conduct exposed. The parallel paedophile inquiry led to a range of recommendations, also adopted, with respect to the adequacy of the law and the conduct of court cases involving child complainants. For these reports alone, the people of NSW will stand in your debt for decades to come.

10 There is another contribution, perhaps not quite as public, but which is also of great significance. I refer to your Honour's role as a judicial administrator. The period of your service coincided with the transformation of the role of judges with respect to the conduct of proceedings. The judiciary now actively seeks to ensure the effective and efficient management of individual cases and of the case load of courts, a role which it did not perform at all when you became a judge over 20 years ago. Your Honour was a leader in this development.

11 There may have been in the past judges who acted on the principle that nothing must ever be done for the first time. That has long since ceased to be the case. It was never true of your Honour. There is no aspect of this Court's management of civil common law cases or criminal trials or criminal appeals that has not been initiated or expanded or reinforced by your own contribution and example. I can testify personally to the fact that until the day that you retired, you never lost your enthusiasm for new ideas and your preparedness to review past practice.

12 For all of these reasons, and others that time does not permit me to mention, it is with great regret that your colleagues gather here today to say farewell to a remarkable man.

13 **MR I G HARRISON SC PRESIDENT NEW SOUTH WALES BAR ASSOCIATION**: If the Court pleases. I was admitted to practise as a barrister on 11 March 1977. Shortly before that I went to see Captain Cook, the then Registrar of the Bar Association. I said, "I want to be a barrister." He said, "You'll have to go to university first." I said, "No, I've done that. I understand you can assist me in finding someone to read with." He pulled out a scrap of paper and wrote: "Jim Wood - 7 Wentworth" and gave it to me. Life at the bar was going to be a great adventure. I knew that because Registrar Bill Cook was the only person I ever met with a motorbike parked in his office.

14 I had never heard of Jim Wood. I went upstairs to the seventh floor and the receptionist directed me to Fred de Saxe. Fred was one of nature's gentlemen. He was also good at his job. He managed to keep everyone on the seventh of Wentworth smiling. Well, almost everyone.

15 I was taken into your Honour's room and introduced myself. I didn't get the impression that you had had any forewarning of my arrival but that didn't seem to matter. You welcomed me and after a short conversation I left. I had been in many barristers' chambers as an articled clerk and as a solicitor in the previous four years, but I had never seen anything quite like your room before. I am sure you had a brief in that room, whether you knew it or not, from almost every firm of solicitors in Sydney and

beyond. Although unimportant to you, I remember you told me that a room on the seventh of Wentworth was like a licence to print money. I regret to inform you that this is no longer true. Recently they've been leaving in droves.

16 If your Honour was not the busiest junior at the New South Wales bar in 1977, you were at the very least one of them. You seemed constantly to be under pressure. I was hopeful that I would be able to relieve you of some it.

17 I was exquisitely privileged to learn at your elbow. And you taught me well. I remember appearing as your junior in the Central Court of Petty Sessions on behalf of Darcy Dugan, who was seeking to sue The Daily Mirror for defamation. The paper defended the action, not upon the basis that it had run a true story, but under the ancient English doctrine of "attainder", Dugan, as a convicted capital felon, was of "corrupt blood" and simply had no civil rights. You did that pro bono and in due course that became Dugan v Mirror Newspapers Limited.

18 You are notoriously calm and softly spoken. I have never known you to lose your temper, anger being not one of your personal qualities. Even mild irritation comes slowly to you. To this statement there is at least one exception. I learnt very early that it annoyed you intensely if someone spoke your surname with an "S" on the end. For this reason, I always encouraged my opponents, particularly barristers from Victoria appearing in cases before you, to call you Justice Woods at every available opportunity.

19 Your commission as one of Her Majesty's counsel did not ease your strenuous workload. You practised as a silk for all too short a period. Your appointment to this Court on 1 February 1984 followed your close association with law reform through The Law Council of Australia, The Australian Law Reform Commission and the New South Wales Law Reform Commission. You had accepted appointment to the latter body as full-time commissioner in 1982.

20 You leave today as the Chief Judge at Common Law and after serving more than twenty-one and a half years as a judge of this Court. It isn't possible in the time available to list your achievements during that period. You have, however, as has been mentioned, been notably associated with streamlining the Court's procedures with a commitment to case management in the Common Law Division. Under your guidance and driven by your enthusiasm, a number of strategies evolved which remain present as keystones for effective case disposition and management today. One of these was the adoption of what you described as "a firm and consistent adjournment policy". History records that Justice Cole, one of your colleagues from the seventh floor of Wentworth, embraced this policy and refined it to its purest form: He never granted adjournments under any circumstances.

21 Your life as a judge - indeed your life - has been a quest in search of justice for all. Notwithstanding your recognition of the need for case management, you do not lose sight of the rights and needs of litigants. Writing in the Journal of Judicial Administration in 1991 you said of the new guidelines that:

"...while justice should be speedy and inexpensive, the ultimate aim is justice. A system which overlooks, in its quest for optimum disposition statistics, the need for individual parties to receive a just result, fails. The human dimension, and the unevenness of resources between litigants, cannot be overlooked, and there must be some flexibility to accommodate this. That does not that mean there should be an overall lowering of professional standards; it does mean that the Court and the profession should be anxious to set performance and time standards which reflect a proper balance between access to the courts, timely disposition of cases, and the delivery of a just result."

22 Through it all your Honour managed always to retain a sense of humour. On one occasion I remember an unrepresented litigant appeared before you. You asked him if he had a barrister. The man replied, "George W Bush is my barrister." Your Honour replied, "I've heard of him and he's very good, but if you want my opinion you would do much better using someone local."

23 Your Honour was also an enthusiastic proponent of refining - not to say revolutionising - the way in which courts receive expert evidence. So impassioned by this topic were you that you unselfishly volunteered to deliver a paper entitled "Expert Witnesses - The New Era" to the Eighth Greek Australian International Legal Conference in 2001 held on Corfu. I have read your Honour's paper with great interest. It revealed a lot about you which isn't well known. For example, your paper expressed enthusiastic support for "hot tubbing". Your Honour is a Knox Old Boy but these views seem very Cranbrook to me.

24 However, I should have known that your Honour would lend your considerable intellectual support to these reforms. I remember appearing before you in a multi-party case which you very generously listed for hearing at Katoomba in July. The case was quite technically complex and your Honour was presented with the questionable benefit of expert evidence from a very large range of experts on an issue about which ultimately you were able to secure significant agreement. However, in the course of one adjournment for morning tea, you rather showed your hand on what your thoughts about experts might be when you told us the following:

"Experts are people who know much about a little and continue to learn more about less until they know everything about nothing. Barristers know a little about a lot, learning less about more until they know nothing about almost everything. Judges begin knowing everything, but end up knowing nothing. This is caused by barristers and experts."

25 No review of your considerable achievements would be complete without mentioning again the Royal Commission into the New South Wales Police Service. The commission was established in May 1994 with broad terms of reference into the existence of corruption within the Police Service, the efficacy of its internal informant's program and of its internal affairs branch. Two interim reports recommending urgent change in the internal investigation structure and in the disciplinary/dismissal procedures, followed by a final report released in May 1997. Along the way it established a multidisciplinary task force, carried out proactive current investigations involving extensive physical and electronic surveillance, and public hearings at which suspect officers were examined on oath both in relation to their policing activities, and financial means. It is a testament to the significance of your work as the Royal Commissioner that reference to that Royal Commission never seems to be far below public consciousness. How well do we remember all the nightly news in 1995, dominated alternately by pictures of your Honour presiding over the hearings followed by anatomically less flattering views from the glovebox of unsuspecting participants in corrupt conduct. It is not well known, but the New South Wales Police Service manual now prescribes that no member of the Police Service, of or above the rank of sergeant, shall wear loose fitting shorts in the passenger seat of an official Police Service patrol car.

26 The Royal Commission was a catalyst for many changes. Not the least of which was the New South Wales Drug Summit in the success of which you played a critical role. The enlightened decision to establish the clinically supervised injecting room at Kings Cross was in no small part as a result of your Honour's work as the Royal Commissioner and; your subsequent tireless contribution to that important debate. On 14 November 1999, at the invitation of the Reverend Bill Crews, your Honour delivered an address entitled "Matters of Principle - a Reflection on the Judicial Conscience". The text of that address prompted one member of the New South Wales Legislative Council to ask the then Attorney General two days later a question without notice which was "Is it a fact that last Sunday Justice Wood encouraged judges to follow their conscience and not uphold the letter of the law?" The answer to that mischievous question should have been obvious, as a reading of your Honour's address would have revealed. Your Honour's thoughts, which should be compulsory fare for all those whose families have not been touched by the scourge of narcotic addition, concluded with the following words:

"It is my hope there will be judges into the next century who are prepared to dare, to listen to their consciences and their faith, and to take a stand against the unjust laws and policies of the secular state. At least let them not allow injustice to be committed in their names."

27 Your Honour came to this Court with a great reputation for humanity and compassion. You leave this Court with that reputation undiminished and the standing of this court enhanced. Moreover, two decades on this bench have not dulled your passion for physical exercise and fitness. In fact, the Chief Justice has informed me that as a direct result of your fine example in this regard, all but four current judges of this Court are either regularly jogging in the Domain and Hyde Park or have engaged the services of a personal trainer. The results of all this effort are clearly visible here today. I am informed as well by the Chief Justice that of the four not training, and they know who they are, one claims to have a war wound, and the other three have been granted exemptions on compassionate grounds.

28 On behalf of the bar and myself, may I wish you farewell and success in your next frenetic endeavour.

29 May it please the Court.

30 **MR J E McINTYRE PRESIDENT LAW SOCIETY OF NEW SOUTH WALES**: It gives me great

pleasure to address the Court this morning on the occasion marking the retirement of your Honour as Chief Judge at Common Law of the Supreme Court of New South Wales.

31 Your Honour's contribution has extended far beyond your duties as a judge of this Court. Indeed, your Honour's achievements and standing have been appropriately recognised at the highest level by the award of an Order of Australia.

32 Your Honour's illustrious legal career began as a solicitor in 1965 where you joined the firm of Dudley Westgarth, which is now known as Corrs. You continued your employment with that firm and were made a partner until you became a barrister in 1970.

33 In a recent interview with The Sydney Morning Herald you declared that one of your career highlights has been your involvement with the New South Wales Police Royal Commission. Much has been said about that already this morning. As Royal Commissioner you were appointed to lead one of the most arduous and widely publicised inquiries ever to have taken place in the history of this State. The commission was indeed a sizeable operation which involved approximately 200 staff and occupied seven floors of a large commercial building in Sydney. A new courtroom was built which would at the time have been one of the most advanced in the world.

34 During the inquiry's infancy, a number of people said that if anyone was going to get to the bottom of these matters, it would be your Honour. You adopted techniques that were both skilful and unique to investigate allegations of entrenched corruption in the New South Wales Police Force. You successfully used all available means at your disposal to delve into these complex issues. In the past, others had attempted to uncover similar practices but had filed. You did not.

35 The Royal Commission attracted more than its fair share of media and public attention. Regrettably at times it meant that the Commission was under criticism for not doing enough. In hindsight, a rather extraordinary claim. A lot of the work that went on behind the scenes could not be released into the public domain for reasons that it would inhibit the Commission's operation, but at all times your Honour demonstrated complete control and took a principled approach when responding to the critics. You also engendered a spirit with all the people that worked with you and that same spirit has been exemplified by your Honour's career on this Bench.

36 In the courtroom it has been repeatedly stated that your Honour has always displayed the utmost courtesy and respect to legal practitioners, litigants, witnesses and members of your staff. Your brother Judges describe you as self effacing with an exceptionally brilliant mind.

37 Your Honour has been a prodigious writer and has published a number of papers covering matters ranging from police corruption, sexual abuse of children, judicial education, crime in cyberspace, professional negligence and civil and criminal case management. These publications have been, and will continue to be, invaluable sources of reference for the legal profession.

38 But perhaps your most acclaimed publication is still to come. I am told that you are currently preparing and illustrating for your grandchildren a book detailing the life and travels of Uncle Bolger, the famous Wood family pirate, whose tales captivated you as a child. I am told it is a guaranteed best seller.

39 On another family note, I am told that although your wife and three children are extremely proud of your legal achievements, they are not encouraging you to embark on another work career as a plumber. I have been told of an incident which involved your Honour endeavouring to fix a leaking shower rose in what can only be described as a less than conventional manner. With the assistance of a garbage bag and tennis broom, your Honour tried to contain the leak. What ended in an explosion of water all over the bathroom and an emergency call to the plumber is still to this day defended by your Honour as a masterful plan based on solid science.

40 Your Honour, the number of people here today to celebrate your retirement is testimony to the admiration and respect held for you. You will be warmly remembered as one of the great Judges of this Court over the last twenty years.

41 On behalf of the solicitors of this State, may I congratulate you on your past achievements and wish you well in your new endeavours. I trust the journey you are about to embark on is accompanied by new and exciting challenges.

42 **WOOD CJ at CL**: Chief Justice, Mr Harrison, Mr McIntyre, fellow judges, ladies and gentlemen, I thank you for your very generous words of tribute. I am not at all sure that I am well placed at the moment to respond to those exceedingly kind observations, which have only added to the wrench of leaving behind twenty-one very enjoyable and rewarding years with this Court, which seem to have commenced only yesterday.

43 Thank you also to those who have been so considerate to have attended today. Among you I see so many friends and colleagues with whom I have had the pleasure of working. I deeply appreciate your attendance, as I do the best wishes of those who have written to me.

44 Mr McIntyre, I am pleased that you raised the topic of plumbing of an innovative kind with me. It is something of a taboo topic within our family but I still remain convinced that, at some point, plastic bag equilibrium can be obtained, and a leaking tap dealt with.

45 Plumbing aside, mine has been the most fortunate life. I had the privilege of being educated a time when universities were accessible to all and of then practising at the bar in its glory days, a time when it was possible to have a generalist practice in many jurisdictions and to rub shoulders on a daily basis with the giants of the bar.

46 The early experience of regular appearances in Courts of Petty Sessions called for the development of real skills in advocacy, as well as a meticulous attention to the laws of evidence, and an understanding of human behaviour in all of its usual and unusual forms.

47 It was in that last mentioned area that exposure to jury trial work, now largely confined to criminal cases, was so valuable, since it kept judges in touch with everyday values and thinking. I leave the Bench retaining the very high regard for the commonsense and responsible approach of juries which I had when I joined it.

48 There were in those earlier days the wonderful opportunities now gone of the extensive country circuits, which were of such importance to regional areas, and which opened our eyes to a wide variety of activities on rural properties, in mines, on dirt roads, in bush hotels and in other places where both lawful and unlawful activities were wont to take place. Not only was there an opportunity to fly the Court's flag, but the circuits provided a significant economic boost to local communities.

49 My own discovery had occurred somewhat earlier at the end of my schooling when I was able to work on a sheep property in the Central West. They were wonderful days and they made my later circuit work all the more understandable and enjoyable. My memories of those circuits, both as counsel and as a judge, extend not only to the cases decided, many of which were both sad and troubling, but also to the humorous moments.

50 I can recall being delivered to opening church services in mud-covered Land Rovers in the rain; of being driven frantically around town by a police officer who had forgotten where the opening service was to be held; and of circuit traditions such as the riverbed barbecue at Broken Hill, the Slattery Cup, and the Tamworth Pig.

51 There was one particularly memorable procession through the streets of Dubbo from St Brigids Church to the courthouse. As I recall it, although I readily confess that my memory may have gotten away from me to some extent, there was a very large attendance of the profession, because this was in the days of the maxi circuits. We set out from the church led by a very fit and athletic Inspector of Police. He was followed by a pipe band which materialised from somewhere (possibly by mistake), then by my tipstaff, myself, my associate, the Bishop of Dubbo, his various assistants, the St Brigids choir, and finally the profession.

52 We were all in ceremonial robes and moved off down the road at a very great pace following the Police Inspector, who was obviously determined to clear Brisbane Street of this public nuisance as quickly as he could. Before long I became concerned that some of those behind might expire from cardiac arrest, and I stepped out of line to see how far ahead was the Inspector and how far behind were the laggards. As I did so, I noticed a large hole in the road ahead and had a fit of the giggles as I foresaw the whole procession disappearing into it. As we reached this hole, a mud-covered face with an astonished look on his face emerged. I will never forget his inquiry: "Oy, what do you lot think you are doing?" This brought us all to a sudden stop with the inevitable consequence of half of the procession falling over, and one of the bagpipes exploding - at least my memory or perhaps my imagination tells me that it did. Perhaps I should return to my text.

53 I have never made any claim on the Bench to academic excellence, nor have I ever had an eye to being part of jurisprudential history. On the contrary, I have been proud to have served as a journeyman judge, trying to resolve as fairly as possible the problems of those who have had the misfortune of being physically injured or misused at the hands of others.

54 Inevitably, the primary focus of my time on the Bench has been on the Court's criminal workload. It was the intense interest which I had in this area of human activity that led to my involvement as junior counsel for the Police Service in the Moffit Royal Commission into the Mafia in the Clubs, and then as a Judge conducting an inquiry into the convictions of the Ananda Marga Three and later the Royal Commission into the New South Wales Police Service.

55 Certainly during my years at the bar and my early years on the Bench, I was aware of the concerns that were frequently expressed in relation to the possibilities of the abuse of the criminal justice system by those who were minded to do so. While I do not claim credit for what followed the Royal Commission, since it was the New South Wales Police which effected the necessary changes, I believe that one can say with confidence that the way in which law enforcement now operates is light years away from that which was the norm when I began to practise in the 1960s. The Service has on any fair assessment made very significant strides since then, most particularly in recent years, in embracing professionalism and proper standards of conduct.

56 It has had to do so in the face of two most serious challenges to law and order, each of which emerged during my time in practice or on the Bench. The first concerns the organised trade in drugs which began in the late 1960s and early 1970s. It changed forever the face of crime in this State, insofar as a different category of offender chose to enter the criminal ranks, and it has presented a real threat to the well-being of the community, particularly that of its youth. Paradoxically, it has been instrumental in bringing about a significant shift in policing to evidence-based investigations, that is, inquiries which are principally dependent upon the use of forensic science, electronic and physical surveillance and the like, which are capable of identifying the true suspect, while at the same time providing hard and incontrovertible evidence.

57 Necessarily and justifiably, this has involved some degree of erosion of private rights and civil liberties, which were once considered sacrosanct, through legislation permitting, for example, detention without charge for the purposes of questioning, the involuntary supply of forensic samples, and the electronic interception of private conversations. Without these weapons, the war against drugs could only be fought with one hand or not at all.

58 The second challenge of substance to law and order which has emerged is that of terrorism. This form of mindless, brutal and cowardly crime, for that is what it is, inevitably calls for the creation of new offences and for a further significant increase in police powers and in the incidence of public surveillance.

59 The need for absolute professionalism and genuine integrity on the part of law enforcement agencies when they come to exercise these enhanced powers in meeting global crime, where terrorism, drug dealing and cyber crime can so easily overlap is undeniable. So is the need for courts, as independent gatekeepers and protectors of human rights, to strike the necessary balance which permits their effective and lawful use, in the interests of State security, yet allows for a halt to be called where the line has been crossed.

60 There is every room for confidence in the law enforcement agencies, as they currently exist, to discharge their duties ethically and professionally in relation to these two serious and ongoing challenges to law and order. Equally, there is every room for confidence in the bar and courts of this State to exercise their independence and commonsense in the application of these laws.

61 The one thing which has in fact stood out in my years on the Bench has been the absolute absence of any occasion for a judge of this State to confront the warning of Aleksandr Solzhenitsyn in The First Circle to the following effect:

"What is the most precious thing in the world? It seems to be the consciousness of not participating in injustice. Injustice is stronger than you are, it always was and it always will be; but let it not be committed through you."

62 Those words have helped guide me through my career. Their acceptance marks the divide

between those countries where the judiciary, as an institution, is respected and those where it is regarded as a mere cipher of the government of the day.

63 Enough, however, said of my experiences as a judge since 1984. It remains for me to express my deepest gratitude for those who worked as my associates and tipstaves over the years; namely, Helen Rand, Carolyn Burton, Phillip Roberts, John Bignall, Graeme Anderson, Paul Field and Ken Atkins. I am proud to have them as friends and for their loyalty and assistance I owe an enormous debt.

64 I wish to express my gratitude for the support and friendship of all the judges, associate judges, and registrars of the court with whom I have worked over these twenty-one years, and most particularly those in the Common Law Division who work truly hard in some of the most difficult and controversial areas of the law.

65 May I next acknowledge the privilege I have had of serving under three truly great Chief Justices of this State: Sir Lawrence Street, Chief Justice Gleeson and Chief Justice Spigelman. Each has been inspiration to me and a wonderful leader of this Court.

66 It is also timely that I refer to the enormous contribution of the members of the Executive and of all those who work in the Registry. Rarely is there an opportunity to acknowledge the part which they play. May I do so now.

67 Finally, may I return to where I came in - my fortunate life. Of all the things which have been of the greatest pleasure for me has been the love and support of my wife Jenni, of my children Nicholas, Sarah and Kate, and of my grandchildren. Without them I would not have been qualified, let alone able to undertake the service of a judge, which it has been a privilege to perform. Their support, particularly during the Royal Commission years, is deeply appreciated. It is now my intention to spend a good deal more time with them and to see a little more of the life that we have.

68 In thinking about the future, I made a somewhat fruitless search in the literature for some memorable observation that would be suitable for a retirement or a farewell and by which I could end this address. All I was able to find were the heroic although misguided final words of people such as General Custer at Little Big Horn and of a certain Antarctic explorer of note. However, thanks to the suggestion of my friend and colleague Mervyn Finlay, my attention was drawn to the somewhat more positive advice from Norman Lindsay's "The Magic Pudding" as to how one should approach retirement:

"Assume an air of pleasure,
And tell the people near and far
You stroll about because you are
A gentleman of leisure."

69 That is how I hope to take my leave, with pride and pleasure at having been a judge of this Court, with a good deal of sadness at leaving it all behind, but with a commitment to make the most of the new opportunities which have opened up for me.

70 Thank you again for honouring me on this occasion.

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Keeping Justice Systems Just And Accountable: A Principled Approach In Challenging Times

THE INTERNATIONAL SOCIETY FOR THE REFORM OF CRIMINAL LAW

18TH INTERNATIONAL CONFERENCE

KEEPING JUSTICE SYSTEMS JUST AND ACCOUNTABLE: A PRINCIPLED APPROACH IN CHALLENGING TIMES

Montreal, Quebec, Canada 8-12 August 2004

In the Wake of the Royal Commission into the New South Wales Police Service

Justice James Wood

Supreme Court of New South Wales, Australia

A. THE ROYAL COMMISSION INTO THE NEW SOUTH WALES POLICE FORCE

The Royal Commission into the New South Wales Police Service was established in May 1994, with broad terms of reference into the existence of corruption and misconduct within the Service, and into the efficacy of its Internal Affairs Branch. It delivered its final report, three years later, in May 1997.

Along the way, it established a significant multi disciplinary task force, carried out proactive current investigations and held public hearings, as a result of which substantial recommendations were made for reform of the Service, and for a radical restructure of the accountability system.

The areas where problems were encountered, the reasons for their emergence and for the failure of the existing accountability arrangements are of relevance for most Police Services. Their analysis serves as a useful way for identifying key markers, which are required for any effective accountability system.

B. THE NATURE AND EXTENT OF THE CORRUPTION AND MISCONDUCT FOUND

The Commission very quickly found its way beyond the positive reassurances, which had been given by Senior Command, that the Service, with its complement, in round terms of 15,000 sworn officers, serving a State with a population of about six million citizens, was free of entrenched or systemic corruption. It did so via the “roll over” of a very experienced detective who was deployed by the Commission to work under cover for approximately six months. During that period evidence was gathered electronically of the reception of licensing fees from vice operators and drug dealers, and of the sharing of that money with other senior detectives.

> Once his role was revealed, other detectives who had worked with him, or in similar areas, progressively rolled over and admitted their own involvement in corruption, and in systemic misconduct. Some of those detectives agreed to act undercover before publicly admitting their guilt, and so the net expanded. They also carried with them a number of criminals who similarly confessed their involvement, and supplied valuable information as to the networks, and the nature and extent of corruption and misconduct which

existed.

The forms of corruption and systemic misconduct that were discovered as occurring on a regular basis, included:

· protection of drug dealers, “licensing” of criminal cartels, of “shooting galleries”, and of vice and gaming establishments;
· stealing of money, and of drugs found during the execution of search warrants, and the recycling of the latter;
· assault and robbery of civilians, and serious abuses of their civil rights;
· extortion of criminals by way of favours promised for the compromise of pending prosecutions;
· shakedowns practised in relation to serial sexual abusers of children and street drug dealers;
· leaking of confidential information to persons who were under investigation and warnings of pending gaming, licensing, and drug raids;
· compromise of prosecutions by the gutting of police briefs, and loss of material evidence;
· assistance at sentencing with favourable but false letters of comfort, and facilitation of bails;
· fraudulent misuse of allowances and of reward monies;
· recreational drug abuse and supply of drugs between police for this purpose;
· significant alcohol abuse while on duty; and
· process corruption aimed at securing unjustified convictions, involving the fabrication and planting of evidence, perjury, falsification of documents, and the procuring of confessions through serious assault and misrepresentation.

What was of particular concern was the traditional respect offered to a class of detective, (the “metro cop”) seen as a hard officer, knowledgeable in the ways of the city, fraternising closely with organised crime figures, providing protection or favours for some, maintaining a degree of order through those associations, securing a high arrest rate using information supplied by favoured criminals and by falsification of evidence and forced confessions, all the while benefiting by being awarded promotions for ostensibly meritorious (but in fact corrupt) service, and receiving bribes or license fees.

C. WHY CORRUPT PRACTICES EMERGED

Corruption and systematic misconduct do not emerge suddenly. By their nature they are spawned in stealth, and only grow in a climate in which they are comfortable. There is precedent of each being a cyclical phenomenon. They are capable of being arrested if an effective system for accountability is in place, but they are equally capable of regenerating, and sometimes in forms, and to an extent, that are even more malignant than before.

The uncovering of these kinds of activity, invites the question, “why does this occur?” The reasons are several.

(a) The Crime Control Justification

There had been long term tolerance in New South Wales, as has been the case elsewhere, of “victimless crime” in the form of gaming, vice and unlicensed sales of liquor. The traditional justification for such tolerance, and for the willingness of police to accept payments for turning a blind eye, was that by allowing a chosen few to continue, such activities could be kept within acceptable limits. It was assumed that they caused no great concern, in a city the size of Sydney, for which a reputation for a degree of raciness and character did no harm. This excuse, for that is all that it is, conveniently overlooks the compromise of individual integrity, and the cynicism it breeds at all levels of the Police Service.

(b) Preservation of the Reputation of the Service

Another important circumstance, similarly shared with many other Services, has been the institutionalised pressure to suppress, or contain, the disclosure of corruption and systemic misconduct in the belief that this is in the best interests of the Service so far as

its reputation and morale are concerned. A poor external reputation, so it is believed, will worry the public, reduce its co-operation and trust, and empower criminals. This kind of philosophy encourages:

· problem solving through transfer, or facilitated early retirement, of the corrupt officer; and
· suppression, or editing of adverse audit reports, and active discouragement of critical comment on the part of those whose task it is to identify problems.

It is an inevitable recipe for collapse of command responsibility for the maintenance of integrity, and it sends a powerful message to the ranks not only that the rhetoric of ethical policing to which they are exposed is empty, but also that the opposite is what is truly expected.

(c) The Thin Blue Line

Woven in and around these factors has been this aspect of the culture that is so much part of any Police Service.

In dealing with criminals, friendship, respect, and courtesy are not returned and it is easy to view the environment as hostile. It is also easy for police to feel that the value of their work is not appreciated, and that the public are far too ready to complain about minor matters.

Inevitably, in these circumstances police will band together, and develop an intense group loyalty. This loyalty is entirely positive if employed in the interests of legitimate policing, but it can easily be distorted, when called in aid by the corrupt.

It is a common expectation that a reputation for breaching the code of silence will never leave an officer, and that the result will be a forced departure from the Service, or permanent suspension in a meaningless job at their current rank.

Unfortunately this is an aspect of the culture that has been shared by the honest and corrupt alike, and it is one that has to be targeted vigorously because:

· the notion that loyalty to colleagues is more important than loyalty to the Service is not overlooked by the corrupt,;
· silence, or active interference with internal investigations, renders the task of those undertaking such inquiries next to impossible;
· ultimately, it taints the reputation of all and risks jeopardising the safety of an honest officer who comes into contact with a criminal who has been stood over, or let down, by a corrupt member of the Service one time too many.

Moreover, it breeds a feeling of disempowerment, and an erosion of pride, in honest police.

(d) The Nature of the Job

It cannot be gainsaid that for some the nature of the job is corrupting. The powers entrusted to police are very substantial powers. Conversely with their significance, they are most often exercised by the younger and less experienced officers working at street level, than they are by commanders with the wisdom of age and experience. Moreover, they are exercisable in circumstances where the opportunities for temptation and corruption are often very high. If those opportunities are available in an environment where initial, and on-job, training in integrity and ethics is lacking, where first line supervision is poor, and where the risks of detection and successful prosecution or severance from the Service are low, then it is little wonder that many police do succumb to temptation.

(e) Process or Noble Cause Corruption

The circumstances that have allowed process or noble cause corruption to develop are complex, and its study is complicated by the fact that often the truly corrupt rely upon the more altruistic reasons for its adoption, as an excuse or mask for their criminality. In its various forms of perjury, planting of evidence, falsification of documents, forced confessions, violence and theft of drugs or money, it tends to be explained by reference to:

· the inadequacies of the judicial system, and the frustration of honest police trying to lock up those who they know are guilty of crime;
· the need to even the odds in a fight against criminals who are not constrained by any code or rules other than those that they set for themselves;
· the need to control the streets, by a display of strength;
· the "taxation" of criminals, particularly drug dealers, who might otherwise either escape justice, or receive a penalty that is seen to be disproportionately lenient;
· the demands of political parties for zero tolerance, and for aggressive law and order campaigns, which cannot be delivered unless corners are cut; and
· the message given by Commanders that high arrest rates are expected, and that performance in this respect will attract greater recognition and reward than any display of integrity;

While the superficial attraction of some of these arguments cannot be ignored, the reality is that as often as process corruption has been the result of "honourable" motives, it has also been engendered by black motives.

Whatever the motivation, experience shows that there is even greater reluctance to reveal this form of corruption because of its acceptance as a reality of policing.

The problems that have emerged from this form of corruption are manifold:

· any officer who has become involved in any form of process corruption, is permanently compromised;
· unlawful short cuts and perjury are transparent to juries, and lead to a lack of respect for the Service as a whole;
· the "taxation" of drugs or money from criminals can soon become a more general practice once the taste for extra "earnings" is obtained, and once it is appreciated that few if any criminals are likely to complain, and that even fewer members of the Service are likely to bring the matter to notice;

(f) Failure of Supervision and Command Accountability

Absent real supervision, and accountability by Commanders for identifying and dealing with misconduct and corrupt practices, and action from Senior Command that matches rhetoric, the development of entrenched corruption and systematic misconduct is inevitable. Part of the problem in this regard is the lack of any real sense of responsibility by local supervisors who prefer to take the view that corruption control should be left to Internal Affairs.

The problem is compounded when this is associated with a lack of willingness, on the part of Internal Affairs, to share the burden, and to pass on relevant information to local commanders. While this can be attributed in part to the need for operational security, it does mean that a valuable resource is frozen out of the circuit. After all, it is the local Commander who should be best placed to know what is going on, and to observe, and to report, tell tale signs of corruption and of systematic misconduct.

If wilfully blind to their duty, Commanders should be held accountable. If effective in detecting corrupt practices and misconduct they should be recognised. Yet their performance in this area is rarely the subject of critical assessment.

D. WHY DID THE ACCOUNTABILITY SYSTEMS FAIL?

This was a critical question for the Commission, since there was an elaborate structure in place, which was designed to detect and punish corruption, and to deal with police misconduct.

That structure involved a combination of internal investigation by the Police Service, and civilian oversight through the Independent Commission Against Corruption (the ICAC) and the Office of the Ombudsman.

(a) Internal Investigations

A number of factors contributing to the limited success of internal investigations were identified which, it may be confidently predicted, are common to all systems which depend either wholly or substantially, upon internal accountability. They include:

· the difficulty of police investigating police - a concept which inevitably runs headlong into the problem of the thin blue line;
· the reactive focus of the complaints system on single instances of misconduct, and their fragmentation within a rigid formula, which does not allow for a classification of complaints in a way reflecting their different levels of seriousness. This tends to conceal the discovery of links and patterns indicative of organised corruption or systemic misconduct, and overlooks the intelligence opportunities for early remedial intervention;
· the concentration on an adversarial complaint and investigative system in which punitive rather than remedial action inhibits police from admitting to mistakes, and encourages a culture of group cover-up and denial;
· the limited resources given to the Professional Responsibility Command, and the unpopular status of office within that **c**ommand, which in some quarters in the NSW Service was regarded as a 'retirement haven' for those who did not otherwise fit the mould, or, alternatively, as a mere stepping stone to promotion (without any real commitment to the job);
· the failure to successfully utilise intelligence and covert techniques, or to attempt the rollover of individual officers able to expose a wider net of corruption;
· the failure to use broad-based financial and intelligence analysis;
· the lack of communication between Internal Affairs and Area Commanders, and the failure to involve the latter in the management of misconduct within their command;
· an inherent bias in investigations which leads to a failure to carry out impartial investigations, or to pursue allegations with the vigour which is seen in ordinary criminal inquiries;
· the lack of security in relation to current investigations, with information and warnings (sufficiently well established to earn the title of "whale in the bay calls") being promptly passed on, leading to the compromise of those investigations, and to a lack of trust on the part of potential informants;
· the use of ineffective investigative techniques, for example, the issue of directive memoranda calling for an explanation in writing which allows groups of police under investigation to be forewarned, and to collaborate in developing a defence;
· the use of an investigation methodology which begins and ends with the officer's denial of the allegations, on the basis that faced with such a response the facts cannot be determined;
· the imposition of penalties which are not always commensurate with the misconduct found, including 'penalty transfers'.

(b) The Ombudsman and the ICAC

The ICAC and Ombudsman had been entrusted with responding to corruption and misconduct issues occurring within public and governmental agencies, although within the confines of their charters. Each had undertaken inquiries leading to significant reports on specific matters of concern, and on corruption prevention and education measures. It became clear however that the ability of these agencies to contribute significantly to any fight against corruption was limited by:

· their charters which, in each case, extended to the supervision of many other public agencies and officials;
· their limited staff and resources;
· their substantial dependence upon investigators seconded from the NSW Police Service who were too closely linked to the Home Service, and who eventually expected to return to it;
· the inability on the part of the Ombudsman to deploy coercive powers or to undertake proactive investigations, and the reluctance, in the case of the ICAC, to employ electronic surveillance;
· the lack of a specific Division, in the case of the ICAC, focused on police corruption; and
· the emphasis of the ICAC on corruption prevention and education at the expense of its investigative role.

E. THE ADVANTAGES OF A DEDICATED EXTERNAL AGENCY

Such greater success that the royal Commission enjoyed, can be attributed to a number of factors, including:

· its extensive use of coercive powers to compel witnesses to give evidence and produce documents, and to enter relevant premises to inspect and copy documents;
· its heavy reliance on wide-based proactive inquiries, and electronic and physical surveillance;
· its willingness to turn witnesses (both police and criminals) and to use them covertly;
· its heavy reliance on intelligence analysis for patterns of associations, complaints, and compromised internal investigations;
· its use of financial profiling to demonstrate lifestyles that could not be sourced from a police salary;
· the deployment of multi-disciplinary task forces in which the skills of investigators, lawyers and analysts could be combined;
· the use of investigators drawn from law enforcement agencies other than the NSW Police Service, who lacked any connection to hostile and corrupt elements within that Service, and who had no fears about their career prospects;
· its direct encouragement of the public, and of victims of police corruption and misconduct, to come forward and to assist, under conditions in which they could be assured of confidentiality, and where appropriate spared from criminal liability;
· the active co-operation of other law enforcement agencies and financial institutions;
· its declared commitment to actively pursue corruption and systemic misconduct in all their facets, without any agenda to protect reputations; and
· its use of state of the art technology in investigations, in the storage and use of intelligence, and in the presentation of evidence.

Additionally, it had the advantage of being able to conduct investigations and hearings on an inquisitorial basis, unconfined by the rules of the adversarial system, and in situations where witnesses could be compelled to answer questions put to them.

F. THE KEY RECOMMENDATIONS

A range of strategies were developed. They included:

· the creation of the Police Integrity Commission, an external agency with the status of a standing Royal Commission, which inherited the intelligence holdings, the premises and much of the staff of the Royal Commission, and which has similar coercive powers.

· the adoption by the Service of a number of specific integrity and anti-corruption measures, including:
§ the use of independent observers (from other sections of the Police Service) to supervise arrests and searches, in operations where significant seizures of drugs, money, or other property are expected;
§ the video taping of such operations, and the audio recording of all conversations at the place of arrest, or other dealings, prior to the time at which formal electronically recorded records of interview are conducted;
§ greater field involvement of supervisors in operations, and education of supervisors and commanders, in the identification of the typical signs of misconduct, and of corruption hazards;
§ more rigid attention to informant registration and management, including the use of co-handlers, and close supervisor involvement;
§ the introduction of random drug and alcohol testing, in conjunction with rehabilitation programmes;
§ the introduction of targeted integrity testing;
§ the supply of financial statements and integrity declarations;
§ greater protection and encouragement of internal witnesses;
§ post conviction review of failed prosecutions;
§ restructuring of the supervisory arrangements, by rostering of a Duty Officer at each local area and by establishing Complaint Investigation Teams at each command;
§ the adoption of a code of conduct that would go beyond the statement of the obvious and provide clear and practical guidance in areas of potential compromise or ethical dilemma; and
§ the formation of local ethics committees to provide advice.

· structural and management reform, involving a flattening in the management structure and the return of a good deal of responsibility and accountability to Local Area Commanders.

· Changes in the procedures for the selection of officers for promotion, employing Assessment Centres, in which proven merit was to have a greater role, and the factor of seniority was to have less significance; as well as changes in the educational requirements and qualifications for recruit entry;
· the introduction of a procedure for dismissal upon the grounds of loss of Commissioner's confidence, subject to judicial review on administrative law grounds;
· greater attention being given to ethics and integrity in recruit and continuing in-service training;
· the introduction of a managerial/remedial model for the handling of misconduct in which career enhancement was to have a greater importance than punitive discipline;
· the enactment of legislation designed to authorise and regulate controlled operations so that undercover operatives can engage in conduct under proper controls that might otherwise be seen as involvement in, or encouragement of, activities that would constitute an offence, while gathering evidence against an approved target;
· the introduction of legislation that would permit an appropriate period of detention for questioning while providing adequate safeguards including access to third parties and supervision by a Custody Manager;
· the transfer of the responsibility for prosecutions to the Director of Public Prosecutions; and
· The breaking up of the special squads, where corruption had become endemic, in favour of the formation of task forces for specific areas of investigation.

G. THE POLICE INTEGRITY COMMISSION (THE PIC)

The investigative model which was recommended, and which was adopted, was the creation of an external, and highly focussed agency, which would build on the work of the Royal Commission, take the lead in all matters requiring the investigation of serious corruption and misconduct, and possess a discretion to share that work with the Internal Affairs command of the Service, under its general direction, and with the Office of the Ombudsman.

This model permits direct involvement of the external agency at the coalface, facilitates the assembly of intelligence, and allows greater awareness of problem areas, and trends in corrupt practices. It is one in which the external agency combines direct and aggressive investigation of the most serious matters, with oversight and review of internal police investigations. It preserves for the Service a real role in self-regulation, through its Internal Affairs command, and it is the one that was assessed as most likely to promote public confidence. Further, this model recognises the different approach required for the management of complaints, and the detection and investigation of serious corruption.

The structure and powers of the PIC are prescribed in the Police Integrity Commission Act 1996, as are its relations with the Office of the Ombudsman and the Service. In general terms, it has similar powers to the Royal Commission, as well as powers to freeze and confiscate assets. It also has a power to apply to the Supreme Court for an injunction to restrain conduct which is the subject of, or may affect, an investigation.

It is not limited to reactive inquiries in response to complaints and both former and serving police fall within its jurisdiction. Proactive inquiries, integrity testing, audits of areas of operation which by nature carry high risks of corruption have become its principal focus. Additionally, it has a role to play in relation to integrity assessments for the purposes of promotions; as well as powers to monitor the quality of internal investigations, to make recommendations concerning police corruption, education and prevention programmes, and to advise on ways in which police misconduct may be eliminated.

The PIC has adopted a similar structure to the Royal Commission and follows similar investigative strategies. It has a specific duty to assemble evidence for criminal prosecutions and disciplinary hearings, functions which were of less relevance for the Royal Commission whose principal purpose was to inform itself (and the community) as to the nature and extent of corruption and misconduct within the Service.

In this regard, the PIC is entitled to make *recommendations* as to whether consideration should be given to the taking of prosecution or disciplinary action against particular persons, although it cannot make a specific *finding* or form an *opinion*, that such a

person has committed a criminal or disciplinary offence, or recommend his or her prosecution.

The PIC is not bound by the rules of evidence, and it can inform itself in such manner as it thinks appropriate. It is instructed to conduct its proceedings with as little formality and technicality, and with as little emphasis on an adversarial approach, as are possible.

Where hearings are held, any person summonsed to appear is entitled to legal representation, and to be informed of the general scope and purpose of the hearing, unless this would seriously jeopardise the investigation. Answers given and documents produced by a witness at hearings are not admissible in evidence against that person in civil or criminal proceedings (unless given without objection), but are admissible in disciplinary proceedings, and in proceedings for contempt, or for an offence under the legislation governing the PIC.

It has statutory powers to make arrangements for the protection of persons assisting it, and of any other person whose safety may be threatened as a result of such assistance, and the power to make any necessary orders or directions to secure such arrangements. It may also suppress publication of evidence and of information tending to identify particular witnesses, where necessary or desirable in the public interest. Further, it may make recommendations to the Attorney General for the grant of indemnities from prosecution, or undertakings that information provided will not be used in evidence against any person, where assistance has been provided.

The PIC is subject to supervision by an independent Inspector who has a duty to investigate complaints made against its staff; to audit its operations, effectiveness, and compliance with the law; and to report to a Parliamentary Joint Committee annually, and as required. The PIC is directly answerable to a Parliamentary Committee, and is required to issue an annual report on its operations. The Police Integrity Commisson Inspector has investigative powers of his own motion, at the request of the Minister, or in response to a formal reference.

The PIC is subject to a specific restriction not to employ serving or former members of the Service, although it is empowered to make arrangements with it for the establishment of joint task forces, and to co-operate with, and to co-ordinate, their activities. It is also empowered to work in co-operation with other investigative and law enforcement agencies, and to disseminate intelligence and information to those agencies as it thinks appropriate.

To reinforce the powers of the PIC, and its capacity to carry out effective investigations, a series of statutory offences have been created relating to any obstruction with the exercise of its functions, failure to comply with a summons or notice, interference with evidence, and bribery or attempted bribery of its staff, and of those whom it seeks to call before it.

In addition, substantial powers exist to deal with contempt, consequent upon disobedience to its process, disruption of its proceedings, obstruction of the Commission and its staff in the execution of their lawful functions, or breach of its orders and directions. Such contempt is punishable by fine or imprisonment, upon referral to the Supreme Court, and for that purpose the PIC may issue a warrant for the arrest of the contemnor.

Critical to the classification system for the investigation of complaints has been the decision to retain a significant responsibility within the Service, in order to foster high standards of professionalism and integrity, and to make it primarily responsible for its own discipline. The role of the Ombudsman is to oversee its performance of that task, and to respond to complaints where it has failed to do so, or to implement effective conciliation of minor matters. The role of the PIC is to address more serious matters of corruption and misconduct, particularly those of an entrenched or systemic kind, to monitor the investigation of any serious matters which are assigned to the Service for investigation, and to establish joint inquiries, where, in the special circumstances, that is seen to be a more appropriate approach.

A comprehensive structure for the management of complaints against police, and of allegations of corruption and misconduct, has thus been established, in which each of the PIC, the Police Service and the Office of the Ombudsman play a part.

H. THE OFFICE OF THE OMBUDSMAN

The Office of the Ombudsman has a significant role in relation to the way that the Service and its commanders handle and investigate the vast bulk of complaints which are of a customer service nature, or of a less serious kind, that is, of a kind falling short of serious criminality or misconduct.

It also has an important role in identifying and addressing broader issues of police management and operating practices, and in maintaining liaison and coordination of effort with the PIC. It has consistently encouraged acceptance of the view that good complaint handling provides an opportunity to identify and to rectify problems, and to maintain the confidence of the public and individual police alike.

The Office has a number of strategies for dealing with complaints, which include having them dealt with directly by local Commanders, arranging conciliation and alternative dispute resolution, and referring appropriate cases of misconduct for prosecution. It also carries out an audit, on a sample basis, of the handling of the complaints that are referred to the local Commanders and their Complaint Investigation Teams.

In some instances, its officers carry out the monitoring function by sitting in on interviews with complainants, and with police who are the subject of investigations, in order to ensure that they are thorough and fair. The Office has its own investigative powers to make investigators and Commanders accountable for inadequate internal investigations, and it has the capacity to make recommendations for the change of ineffective or inappropriate complaint investigation procedures. These powers have been exercised in the case of dilatory and badly conducted police investigations, particularly where the investigators have appeared disinterested or biased.

What is important, so far as the work of the Ombudsman is concerned, is that the complaints which it investigates, and manages, come not only from the public, but also from police who consider that they have been unfairly treated by the Service. In this respect it has an occupational health and welfare role to perform, in which conciliation and alternative dispute resolution are used beneficially, and where the appropriateness of internal management can be reviewed.

In a similar vein it has, on a number of occasions, intervened in areas of conflict between local communities (particularly indigenous communities) and police, acting as an honest broker to arrange joint meetings, and through discussion and conciliation to arrive at mutually satisfactory arrangements.

Valuable work has also been performed by the Office in relation to systemic issues, including, for example, the use of CCTV in police stations; unauthorised access to the police computer data base; techniques for profiling problem officers, and commands which are deploying oppressive or inadequate law enforcement practices; the recording of criminal statistics such as knife searches; and the use of radar to police speeding.

Finally, the Ombudsman has worked cooperatively with the Service and with the PIC in their work in developing two corruption systems: the Customer Assistance Tracking System of the Service; and the Police Oversight Data Store of the PIC, which together hold and permit access to information about complaints, and intelligence on individual officers and local area and specialised commands, as well as other information on significant issues, which should enhance the capability of each agency.

I. TEN YEARS ON

As was predicted, the transformation of the Service and the reaction of police to the key recommendations, and to the new system of accountability, has not been an entirely smooth road.

From the top of the Service, down through the middle ranks, there have been significant changes, with many officers either having had their contracts of service terminated or not renewed, or having been dismissed, or having found it more comfortable to resign. The result has been to produce a Service with a younger and more professional band of commanders.

From a Judicial perspective, investigations appear to have been more thorough with a significantly greater emphasis being placed upon evidence based inquiries, which have used electronic surveillance, and the gathering and analysis, of crime scene exhibits, to a far greater extent than previously. Drug seizures and coordinated activities with other law enforcement agencies, seem also to have become considerably more effective, even though the drug trade still proliferates in a significant way.

The incidence of allegations of process or noble cause corruption in the course of criminal trials appears to have decreased significantly. In this respect the safeguards for the detention and interview of suspects have worked extremely well. Under those safeguards time limits have been established; the rights of the accused to have access to a lawyer and contact with a family member, have been formalised; special arrangements have been secured for juvenile and indigenous suspects; and overall supervision is provided by a custody manager.

A working relationship has been established between the Service, the PIC and the Ombudsman, and between the PIC and the Crime Commission of New South Wales, even though the latter (unlike the Service) is still under no statutory obligation to bring corrupt conduct or serious misconduct to its notice.

Such tension as exists between the PIC and the Service seems to be principally directed towards competing claims as to whether the Service or the PIC was the first to detect, and then to respond to, a problem, and as to the appropriate outcome for those officers who are shown by the PIC to have been involved in corrupt activity or misconduct.

Regrettably, the Service still displays something of a reluctance to embrace wholesale change, or to establish the kind or degree of supervision which is necessary to control the emergence of misconduct or corruption. In this respect it seems to have continued the policy, which predated the Royal Commission, of developing plans and strategies to deal with problems, but then not effectively implementing them. It remains, in that sense, an institution which is resistant to radical change, although as I have indicated, the rates of arrest and of successful prosecutions are more than satisfactory.

There have been two areas of particular concern. The first was probably predictable. It relates to the fact that the attempts to restructure the Service, and to create a new command structure, led to a number of bitter internal battles, which became significantly politicised, and which also became the subject of external interference from some quarters which were less than informed. These problems have been compounded, to a degree by the unwillingness of government properly to reflect the independence, that needs to be preserved, to the Commissioner of Police, or to enact the legislation which was recommended as necessary, to formalise the boundaries between the Minister and the Commissioner, as to the exercise of Police powers, and as to the management of the Service.

Secondly, it is the fact that not all police have learned from the lessons of the Royal Commission. Some have elected to continue to engage in precisely the same areas of corrupt activity that were identified by the Royal Commission.

It is in this respect that the value of the PIC has been demonstrated. It has conducted a series of very successful operations, in the nature of direct investigations, audits and research projects. In the course of that work it has reported on a variety of inquiries, some of which followed up investigations commenced by the Royal Commission. They have included the following:

§ An inquiry into the work of the former Special Branch which was found by the Royal Commission to have been unaccountable, and which confirmed the Commission's assessment that the Branch had become a closed shop, had established inappropriate relationships with VIPs, had inappropriate

systems for record-keeping, had collected and stored unnecessary and inappropriate intelligence and, in the end, had performed no useful function; leading to its disbandment and replacement by the Protective Security Group with a more specific and appropriate charter;

§ the investigation of the activities of a Task Force which was created by the Service to investigate criminal activity in the King's Cross area, which led to a report by the PIC concerning the existence of corrupt conduct by certain members of that Task Force as well as shortcomings in its management, and which resulted in recommendations concerning the procedures which needed to be followed by Task Forces of this kind, as well as a need for the Service to conduct proactive efficiency audits, and to give greater attention to informant management;

§ audits (in 2000 and 2003) as to the current quality of internal investigations conducted by the Service which led to reports that were critical of aspects of those investigations and of the procedures of the Internal Affairs command, particularly the continuation of some techniques and methods that the Royal Commission had criticised, and which led to a number of recommendations designed to secure a better performance;

§ the investigation of a group of complaints concerning the falsification of documents intended for court proceedings, including witness statements, which led to recommendations as to the tightening up of procedures in this area, and for an increased responsibility of managers for ensuring the integrity of documents prepared for court proceedings;

§ an investigation into concerns as to the possible existence of an inappropriate financial interest and secondary employment of an officer in relation to licensed premises, and which led to recommendations, concerning the kinds of conduct that are unacceptable in this respect;

§ a research project into the incidence of assaults by police on civilians, that was motivated by concerns as to the large number of complaints of this kind that were coming to attention, which became the occasion for alerting the Service to the existence of a problem and for providing information to assist it in the development of appropriate strategies, including the training of officers who were most likely to be exposed to situations where assaults could occur; and which also proposed measures to ensure that future incidents were appropriately investigated and managed by the Internal Affairs command;

§ an investigation into a murder investigation, which focused upon the manner in which certain suspects, including a juvenile, had been questioned by police, and which found that, in a number of respects, a suspect had been treated unfairly and contrary to law, and which led to recommendations for amendments to the Code of Practice and to current police procedures in such cases;

§ an investigation into concerns as to the existence of inappropriate dealings between an officer and a private inquiry agent, concerning the provision of confidential information stored on the Service database, which led to recommendations that certain persons be prosecuted and underlined the need for an effective audit system;

§ a multiphased investigation, which focused initially upon allegations that some members of the Service were using and supplying prohibited drugs, were associating with drug dealers, and were inappropriately engaged in secondary employment in security work at nightclubs which were "off limits" as known places of high drug activity; and then focussed upon allegations that certain of the officers, who had been caught up in the first stage of the inquiry, had been affected by drugs at the time of a fatal police shooting. The report which followed the inquiry contained important recommendations concerning the expanded use of alcohol and drug testing; the development of a policy for dealing with police who have a substance abuse problem; the need for zero tolerance in relation to any form of substance abuse and in relation to social associations with drug dealers; and enhancement of training in relation to these matters as well as in relation to secondary employment in high risk industries. It also resulted in recommendations for the adoption of a clear and succinct procedure for the investigation of critical incidents involving police, which lead to deaths or serious injuries;

§ two investigations into the Service’s procurement practices which led to recommendations for the reform of tendering and procurement procedures in order to bring the bring them into line with those of the New South Wales Government;

§ an investigation into allegations that a group of police officers were manipulating the police promotional system, for personal benefit, in a way which involved blatant "cheating", which revealed shortcomings in the system, and which led to a number of recommendations for improvements to the process;

§ an investigation into the association between serving and former police and criminals involved in the operation of an illegal brothel and the supply of drugs, in conjunction with the Service, which led to a number of persons being charged and also provided the basis for further investigations into child prostitution offences and a murder;

There have also been more recent, and in some cases current, inquiries, into illicit drug use and supply by police, which it is intended will lead to recommendations for a best practice approach to this problem, as well as investigations into allegations of particularly serious ongoing drug dealing and a wide range of criminal and corrupt activity by a group of officers. This last operation built upon an investigation which was commenced by the Service and was thereafter conducted by the PIC in conjunction with the Crime Commission and has already resulted in a number of police and others are being placed before the courts.

Apart from these inquiries and reports, the Commission has overseen, and participated, in the qualitative and strategic audits of the reform process, which has now been conducted on an annual basis over a 3 year period; has continued to monitor individual investigations by the Service itself, and where appropriate has made recommendations for improvements in the conduct of those investigations.

An additional role, which the PIC has accepted, is to monitor investigations into deaths in custody, and where it is appropriate, to involve itself in any relevant investigations.

Finally, it maintains a significant role in police education and corruption prevention programs, which includes making recommendations, speaking at seminars and training programs, and participating in panel discussions.

The PIC has now referred a large number of matters to the Office of the Director of Public Prosecutions for consideration for prosecution, and has also referred a number of matters for internal disciplinary action, including consideration of possible dismissal. In addition, it has been in a position where, through its sources and access to the public, it has been able to receive intelligence as to wider aspects of criminal activity, and to pass that intelligence on to the Service for conventional investigation.

It has adopted the strategy of submitting selected reports, which it has prepared and issued, for independent quality assessment by an external panel, which, in a typical case, has included chief executives of the Independent Commission Against Corruption, the Crime Commission, the Community Relations Commission, the Administrative Appeals Tribunal, the New South Wales Auditor and the St James Ethics Centre.

The presence of the PIC has, on any view, provided a much more effective mechanism of accountability than anything which existed in the past. Not only has it been capable of sophisticated and intensive investigations, but it has combined those activities with supervision of the reform process, with overseeing the quality of police investigations, with the making of recommendations for improvements in policing practices, and with direct involvement in training and anticorruption strategies. It has also been able to provide a positive contribution in human resources and occupational health issues.

It is well placed through its sources, its intelligence database, and its operational experience to pinpoint and target serious misconduct and corruption, and to coordinate the activities of the Service and of the Ombudsman in dealing with these activities. The threat of public disclosure and the known capacity of the PIC should by now be enough to deter those who are minded to engage in inappropriate practices. Those who give way to temptation will inevitably be caught.

J. A ROAD MAP

A number of issues arose during the Royal Commission, as they have in similar Commissions of inquiry, which have an ongoing relevance for any system for police accountability.

1. Forces of Resistance

For different reasons, and in similar, although not identical directions, it needs to be understood that resistance and lack of co-operation, may be expected from:

· The Police Service itself;
· The Police Association;
· Individual Police;
· Organised Crime;
· The Media; and
· The Government of the Day.

Any system of accountability needs to take their existence into account.

(a) The Police Service

Although professing support for anti-corruption strategies, the instinctive reaction of most, if not all, Police Services is to prefer the non-disclosure of corruption or misconduct because of the perceived threat to its reputation and morale, and the inevitable public and political criticism of senior management which follows its disclosure.

If there is to be any concerted anti-corruption drive, most Services would prefer that it be conducted internally and preferably on a managerial basis.

Sometimes the piqued response of Senior Command to the introduction of an external agency is to shed responsibility upon the basis that, unless we own or at least share the problem, there is no need for us to apply any effort in anti-corruption measures.

However, for an external agency to be fully effective, it will require the complete co-operation and support of the Service, which goes beyond a pious public expression of support. In these respects two conditions need to be met:

· A willingness, supported by statutory requirements, for members of the Service to report instances of suspect misconduct to the external agency; and
· An unrestricted right of the agency to have access to individual officers, and to the Service's database, subject only to that level of security which is essential for any ongoing major investigation.

In practice, this will almost invariably require a trusted liaison officer who has the confidence of the Police Commissioner as well as that of the external agency, and who has sufficient knowledge and authority to obtain quick and secure access to relevant files and information, before they can be destroyed or concealed.

(b) The Police Associations

The intuitive reaction of Police Associations to any allegation of corruption, or prosecution of individual officers, has similarly been one of denial and defence. In part this has reflected a concern for the reputation of their members, and of the Service as a whole, as well as being an extension of the thin blue line, which calls for mutual support, in all circumstances. It has also been the response of a body which sees its primary role as one of responsibility for the rights of its members.

Each of these explanations is understandable, but neither is conducive to accountability or to the control of corruption or misconduct. What is required is a change of philosophy

that will move on, from the offering of bare platitudes in relation to police integrity, to acceptance of the fact that the greater interest of the general body of their members lies in having a corruption free Service.

This is not to ignore the need for these bodies to retain their important industrial function, or the need for police, who are caught up in investigations and prosecutions, to have access to proper legal representation. That is best achieved through an independent legal service such as the Legal Representation Office, which was established for the Royal Commission, and which is now available to represent public officials in a wider class of inquiries. Such an agency has the advantage of being free of the conflict of interest faced by Police Associations between protecting their members and upholding the integrity of the Service.

If it is not possible to establish such an office, then the Associations do need to act with a greater degree of responsibility than has been the past experience, which has seen them resisting, at all costs, the proper pursuit of any corruption probe.

(c) Individual Police

The threat which a corrupt officer poses to the integrity of individual operations, and to the integrity of the Service as a whole, is obvious. The potential for engaging in corrupt activity either in the form of direct criminality, or in the form of noble cause corruption, commences on the first day of service and continues until retirement.

Unlike any other activity, the opportunities for corrupt behaviour which will come the way of every officer, are compounded by the command structure, which paradoxically means that discretion increases as one moves down the rank, and by the code which favours collegiate support at all costs.

It means that soon into their first posting, junior officers are likely to be tested by more senior police and invited, or pressured, to participate in an individual theft or acceptance of a bribe, or to ignore, or even to support, false testimony given by other officers. At an early stage, when they are inexperienced, and unprepared because of the reluctance of Police Academies to confront, in any frank or detailed way, the problem of corruption, they need to make an election which could set the direction for the remainder of their careers.

The effect is insidious and does not dissipate with promotion and elevation into a command position which is removed from direct street policing or hands on investigations. This may limit the more direct opportunities for shake downs or theft, but at this level it is likely to have two facets: first, continued sharing in any systemic corruption of the group with which the officer has worked, and secondly, a desire to avoid adverse attention being drawn to the Command, of which the officer now has an executive role. By that stage the officer may well have acquired a public reputation as a skilled and tough investigator, and have a Commissioners' baton in his knapsack, such that the last thing that is welcome is any public exposure of corruption within his command.

In that context an anticorruption strategy that guarantees eventual disclosure, in which the only question is not if, but when, that will occur, is the only answer.

(d) Organised Crime

It is very difficult for organised crime to prosper without a measure of police protection, and those who control it will always be ready and willing to encourage any glimmer of its emergence, and to resist any anticorruption strategies.

The techniques are well tried. Principally they involve the group seeking a green light, and the elimination of rivals through the provision of selective information, and the payment of licensing fees. More insidious, and often less well appreciated, is the instigation of complaints against officers of integrity, and the encouragement, often with the assistance of the media, of a divisive battle between the white knights and the black knights of any Police Service.

Again, the reality of policing requires the use of undercover activities and of information in a way which places detectives very close to key players in organised crime who will expect charges to be watered down, or to have a blind eye turned to their activities. Individual police see advantages in these connections, since the Service is almost inevitably driven by arrest rates. Drug dealers also see an advantage insofar as the association with individual police gives them street credibility and a means of removing their opposition. It may also encourage them to divide up areas of operation, either geographically or by drug type. These relationships are symbiotic, and are conducive to the flourishing of organised crime syndicates.

Absent an effective system for registration, close supervision of informants and of covert operations, and dedicated anticorruption strategies, the potential for organised crime to infiltrate and influence key elements of a Service is considerable.

(e) The Media

The attractions of investigative journalism, combined with a degree of naivete as to the potential capacity of corrupt elements, and of Police Associations, to influence crime coverage, means that the media can be a potentially negative factor.

Crime reporters have always found it beneficial to have sources within a Service, and within criminal factions, but those sources very often have an agenda which is not always understood or recognised. It is also not unknown for the hype surrounding the larger than life law-enforcement official to be proved a mirage when that officer's past is properly investigated, yet very often he is a product of the media.

There is an ever present a risk of the enthusiastic journalist, the current affairs commentator, or the call back personality, spurred on by ambitious academics, treading all over investigations in their critical stage, without considering, or perhaps being aware of, the consequences, and of fostering factional conflicts which result in police of integrity being burned.

Moreover the media often seem often to favour a conviction at all costs policy for certain kinds of offence, which can send a message to police, to prosecutors, and to the public, that noble cause corruption, and a relaxation of the normal safeguards or requirements of the criminal justice system should be tolerated in such cases.

The Media does have a role insofar as it is able to provide public exposure of corruption and serious misconduct, since the bare fact of disclosure, and the public confirmation that accountability strategies are working, do operate as a deterrent.

However the dangers of the misuse of the media are real, and any anticorruption agency would be well advised to have an officer dedicated to media liaison, and to encourage a relationship of trust.

(f) The government

While no government would see itself, or wish to have it suggested, that it was soft on corruption and misconduct within its Police Service, there are at least two ways in which it faces a conflict of interest.

First, there is the reality that the emergence of allegations of systemic corruption or of serious misconduct will reflect badly on an agency for which a Minister, and ultimately the government are seen to be responsible by the media, the public, and also by any Opposition keen to make the most of it. Silence and an appearance that all is well is often more comfortable than exposure, particularly in an election year.

Secondly, the competing demands of the various aspects of government inevitably give rise to budget pressures, and to a temptation to either close down an external agency, or to reduce its resources, if it appears that corruption is under control. This is a short sighted approach but it is one which is attractive to bureaucrats, who often resent the

greater freedom of an independent agency, and of an Executive government which would prefer to divert resources into areas where there is a benefit to be perceived by those who are users of services in health, transport, and so on.

It is a short term and disastrous response, since the moment an effective agency of this kind ceases to exist is the time that the forces of corruption re-emerge. Disclosures and prosecutions are an indication that anticorruption strategies are working, but so is their absence, if it can be shown that the operations and procedures of the Service are being effectively monitored and audited.

It is for these reasons that it is desirable to establish a sufficiently resourced and capable independent agency, which is not directly subject to government direction, or susceptible to having its legs cut off when that is seen to be convenient.

It has been tempting for governments to align themselves with Police Associations whose members are understood to have cohesive, although largely conservative views, but who, more importantly are recognised as being able to influence a much wider range of electors within the community in which they work.

Accountability risks being compromised where these Associations are resistant to the introduction of anticorruption strategies, as was the case in New South Wales with issues such as integrity and drug testing, and the introduction of Commissioner's confidence provisions, and where they are also able to carry political parties with them.

2. An External Civilian Agency Dedicated to Police Accountability or a Multipurpose Agency?

In my view the optimal solution is for the agency to be an external specialised agency.

There are several reasons:

§ such a body will develop the particular expertise which is needed to investigate and deal with police corruption;
§ its focus will not risk being diverted into other areas, which may often be easier to crack;
§ greater security of intelligence and of operations can be maintained in a close-knit agency;
§ a single focus is more likely to foster a positive agency ethos and morale;
§ enlargement of operations to other fields of activity is likely to lessen the scope for effective intelligence gathering, and to result in critical patterns of activity being missed.

Where the size of the relevant State does not justify a single agency, then any multifaceted agency would, in my view, be well served by creating a Division which is solely dedicated to police corruption.

For the reasons previously mentioned, I would not support any system that removed all responsibility for identifying and targeting police misconduct and corruption from the Service itself. It is the key stakeholder, it must continue to acknowledge responsibility for its officers and adopt effective training and anticorruption strategies, but it must also be prepared to work closely with the independent agency.

Similarly, for the reasons already identified, there is merit in preserving minor misconduct and customer service complaints for a managerial and/or disciplinary response within the Service itself, subject to oversight. Unless there is this is done, the Service will be cut out of the loop, and the independent agency will be swamped with minor matters, at the expense of its more important investigations. It does need to be apprised of these complaints, and of their resolution, since very often they are indicators of a pattern underlying, or preceding, the emergence of something very much more serious.

Critical for the sharing of responsibility between the Service and the external agency is a carefully structured system which deals with the classification of matters that can properly be dealt with on a managerial or disciplinary basis by the Service and by the

Ombudsman, and those that must be reserved for the independent agency for a more extensive inquiry.

Preferably there should be a regime for regular interagency meetings to ensure continuing cooperation, and to prevent duplication of effort, or unintentional intrusion into a critical investigation.

I also see a need for the creation of an oversight capacity, along the lines of that provided by the Inspector of the Police Integrity Commission.

Existence of such an office enhances the independence of the agency, and ensures that it does not exceed or abuse its powers. It also assists in ensuring the continuation of a proper relationship between the Service and the agency.

3. Objective – Exposure of corruption or prosecution?

A critical question relates to the balance to be achieved between intelligence directed operations which are designed to detect and bring to an end corrupt activity, and operations which are designed to secure prosecutions.

It is a given that any effective policy for police accountability will require covert operations, and the use of corrupt officers who have been "turned", but who are prepared to continue their dealings with criminals and other police, who are unaware of that fact. The benefits which attach to their deployment, including the opportunity of using their connections, knowledge and policing skills, is substantial. So are the dangers.

Crucial questions arise as to when to bring controlled operations of this kind to an end, so as to avoid entrapment issues, to limit harm to the public and so as not to lose the officer who is being used.

In order to recruit such officers to the cause, and in order to use their information, consideration needs to be given, and support obtained, to strategies such as:

§ offering letters of comfort, detailing their assistance, when they plead guilty to prior offences;
§ reducing any charges which are ultimately pursued against them;
§ offering indemnities or immunities freeing them from prosecution for disclosed offences, in return for their resignation from the Service;
§ in extreme circumstances, the offer of a general amnesty in return for resignation and full disclosure.

The Royal Commission elected to place its primary focus on uncovering the nature and extent of corruption within the Service, with the consequence that prosecution orientated investigations were principally confined to those officers who refused to assist. Its successor, and any similar agency, needs to strike an appropriate balance between the two objectives, although that of prosecution will normally be paramount.

Immunity from prosecution, in return for assistance and resignation, is not quite as simple as first impressions might suggest. Attention also needs to be given to the fiscal consequences of discovery, since it will attract the attention of taxation authorities, and give rise to questions whether the officer should be able to call on any accrued superannuation or pension benefits. A policy needs to be developed and an understanding established with the Service and with other agencies, to deal with these issues.

4. An Agency Acting in Public or Behind Closed Doors?

Police Internal Affairs have never been accustomed to conducting inquiries other than as conventional police investigations, without any public element, save for that which may arise in the event of a prosecution. The same applies to matters of discipline and conduct that are dealt with managerially.

Election between the external agency acting in camera, or in public, is critical. The former approach enhances privacy and security issues. The latter favours openness, attracts the kind of public attention which can act as a deterrent, satisfies the community that corruption and misconduct are being effectively targeted, gives courage to potential informants and to those who have been at the wrong end of police misconduct to come forward, and leaves the Service with little option other than to respond to the problem that is identified. In this respect it has been become obvious that the impact of electronic surveillance is considerable, and that the public cross-examination of an officer, who is caught on audio or videotape and who maintains a claim of innocence when first questioned, attracts great attention.

While privacy interests give way to the public interest, if the open forum option is selected, that does not mean that a good deal of the investigation cannot be conducted in private, or that for certain inquiries in camera hearings cannot be used. Moreover some protection can be given by allowing witnesses, or targets, to be identified by code names.

5. Removal of Corrupt Police at any Cost

A question which also calls for a delicate balance is whether the system for oversight should encourage the use of Executive action for the removal of officers who are strongly suspected of corruption, but in respect of whom evidence sufficient to mount a prosecution is lacking.

The desirability of having such officers removed, at any cost, has been recognised in many Police Services, including the New South Wales Service, which traditionally had allowed an easy exit through a hurt on duty claim, leading to pensionability or access to retirement, or superannuation, benefits. Sometimes this has required a deal of complicity on the part of the Service or its medical officers, or the Tribunals responsible for the administration of the relevant schemes, although with very little being demonstrated in the way of accountability, and even less in the way of discouragement of other officers engaged in corrupt activities or misconduct.

It was for this reason that the Royal Commission recommended, over strong Police Association resistance, the introduction of a scheme permitting dismissal, based upon the Police Commissioner having reached a position, where for sufficient cause, confidence in the officer has been lost. Necessarily there needs to be some opportunity for review which ensures due process, and an opportunity to be heard, along with the demonstration of a sufficient case to warrant an exercise of the discretion reserved to the Commissioner.

Whichever approach is taken, there needs to be some understanding, or protocol, as to whether an encouraged retirement (which might be viewed in other circumstances as a constructive dismissal) should attract retirement benefits.

6. Adequacy of Resources and Powers

Several issues need to be addressed.

(a) Resources

If an external agency is established it will need extensive coercive powers of the kind employed by the Royal Commission, which would include powers to:

§ use listening devices, telephone intercepts and tracking devices;
§ conduct searches;
§ access information held by a wide variety of governmental agencies and financial institutions;
§ summons witnesses (and institutions) to produce documents or to give evidence;
§ conduct hearings at which witnesses are under a statutory compulsion to give evidence (subject to appropriate restrictions on the use of self-incriminating evidence),
§ receive and use the product of telephone intercept and listening devices, obtained by other law-enforcement agencies;

§ institute prosecutions for contempt;
§ disseminate relevant information to other law enforcement and regulatory and fiscal agencies; and to
§ deploy integrity testing and drug testing, either on a random or targeted basis.

In some areas this will require the amendment of legislation relating to those governmental agencies which are subject to secrecy provisions; in other areas, memoranda of understanding will be required in order to establish a suitable protocol for the provision of information.

Electronic surveillance is the principal ally which any such agency has, along with sophisticated intelligence and financial analysis. It does however come at a high capital cost, and to be effective it needs to keep up with current developments. It is capable of being deployed by a small number of investigators and technical experts, but it has substantial demands which need to be met in terms of monitoring, enhancement, analysis, and production of transcripts. It has a special value insofar as it promotes a mindset that places an emphasis upon evidence based inquiries, and in so far as it allows no let-out for those who are caught on audio or video tape. In this respect it is an essential tool for integrity testing, but it is also a means of encouraging the practice of building cases upon hard evidence instead of upon suspicion of guilt.

The resources required do not cease with the conferral of investigative powers of the provision of technical equipment. They are of no value unless sufficient human resources are also provided. For any such agency to be effective it will require experienced investigators, lawyers, surveillance operatives, technical experts, intelligence and financial analysts, and general support staff. Of critical importance will be the establishment of a registry, and an IT system that can record and permit ready access to the intelligence and documents which are received and stored, that can be secured against external access, and that can provide an audit trail.

Equally of importance is the establishment of a system for counter intelligence, and for the security of all records, as well as that of the premises themselves. No less important is the need for accountability within the agency for confidentiality, security, and respect for fundamental privacy rights which can only be infringed where the need for a proper investigation warrants.

Moreover there needs to be a command structure of the kind that was adopted by the Royal Commission, which had at the head of the pyramid a Commissioner and a senior officer who could perform a coordinating and directing roll over the individual operations which were entrusted to the separate investigating teams, in a way that prevented inappropriate overlap and that allocated surveillance and similar resources on a needs basis.

The recruitment of staff with proven integrity is obviously essential. In order to avoid potential conflicts it will generally be desirable to recruit or to accept secondments from outside the local Service. While it is not always easy to pry competent staff from other Services there are in fact benefits for them in relation to the improved professionalism of those officers when they return to their home Service, and also in relation to their capacity to attack cross-border or national crime syndicates.

(b) Support for Whistle Blowers and Protected Witnesses

One of the greatest obstacles for the discovery of police corruption and misconduct has been the poor treatment, and limited support for internal informants. Unless their information is properly received and investigated, and unless they are fully supported and encouraged in that role by senior officers, and ensured of job continuity and career advancement, then a formidable obstacle is placed in the way of police accountability. In particular a practice, of the kind which had become somewhat entrenched in New South Wales, of repaying whistleblowers with investigations into claims as to their own misconduct, which were often generated by police affected by their disclosures, or by their associates, must be avoided.

The support which is needed involves much more than mere declarations of support and promises of job security. Any effective system will call for a dedicated unit within the Service of officers of some experience and rank who are committed to the cause, who are independent of the Internal Affairs Command, and who are able to call on external assistance in the form of counsellors and the like. They need to be familiar with the stresses and pressures that can be applied to whistleblowers, and to be able to stamp on any interference with, or undermining of, the necessary strategies.

Similarly, there needs to be access to an effective witness protection program, which is sufficiently flexible to meet the needs of the case, which is not itself judgmental or punitive in its approach to the witness, which is prepared to support the witness as long as is needed, and which is able to facilitate a staged return to the community.

The resources need to be available, and used where appropriate in extreme cases, to secure an identity change, and there is a need to establish memoranda of understanding with other relevant governmental agencies in order to create a new identity, and to prevent future cross reference and tracing.

Witness protection is expensive, and is stressful for those who need its services, as well as for their families. The external agency and the Service must be prepared to provide such facilities, and to be accommodating, understanding and supportive of the measures that are needed. It cannot be the price of being a whistleblower or a protected witness that such a person ends up being burned. Any external agency or Service which takes any different view is failing in its duty to the community, as well as to the members of that Service.

7. Reserve Role for the Judiciary and Prosecution Services

The prosecution services and the Judiciary need to be understood as playing a very significant, although independent role in relation to police accountability. Very often in the past, insufficient regard has been paid to the extent to which police have manipulated the justice system, either by protecting favoured groups or individuals, or by falsifying evidence, or by paying, at best, lip service to procedural safeguards for ethical and lawful investigations.

It is the fact that police operate within the shadow of the courts. Once it becomes apparent that breaches of the rules which are in place for the proper use of investigative powers, for the conduct of interviews, or for identification procedures, and the like, are being tolerated or excused, some police will see their way clear for the continuation, and even expansion, of improper practices.

Perhaps the best example of this was the somewhat naive and trusting acceptance by the courts of police evidence in relation to “oral confessions”, and unsigned records of interview, in which admissions were attributed to an accused, prior to the introduction of compulsory electronically recorded interviews. This kind of evidence was almost invariably accepted, notwithstanding the barrage of complaints from prisoners, and from defence lawyers, as to the practice of certain police to manipulate confessions, and to plant weapons or other inculpatory exhibits on suspects. In some cases this was done in the honest belief that the suspect was guilty; in other cases it was a technique used to deal with those who did not cooperate in corrupt arrangements, or who presented a threat to those criminals who were subject to the umbrella of protection.

Prosecutors and Judges should not overlook the potential for these nefarious practices, in that much can be said, or done, by police outside the period for official questioning, to "persuade" a suspect to confess when he or she subsequently participates in a formal recorded interview. Similarly there is a good deal of potential for fingerprints and DNA to be lifted and subsequently introduced into a crime scene, just as there is potential for a witness to be "assisted", in advance of an identification parade. In none of these instances will the convincing appearance of a crime scene video, forensic testing, or the recording of an interview or identification parade, guarantee their veracity or reliability.

As a consequence, both Judges and Prosecutors have an independent role to play in keeping an open mind, and being astute to ensure that any apparent irregularity in

these, or in other similar investigative steps, are properly considered and, if found wanting, reported to the appropriate authority.

Similarly, the exercise of the available powers to issue warrants for searches, for the use of listening devices and telephone intercepts, for the taking of forensic samples, for the conducting of intimate searches, and for the extension of interview detention periods, should not be a mere matter of form. Careful consideration as to the existence of reasonable cause is required.

Care is similarly required where what is in issue is the discretionary admission of evidence which had been obtained unlawfully, but whose tender is pressed by reference to the public interest in securing a conviction for a serious offence. More than lip service to the relevant discretionary considerations is required; otherwise the sanctions for non-compliance with the law will be progressively and significantly watered down.

These obligations apply to Prosecutors as much as they do to Judges, since it is not the task of the former to secure convictions at any cost. Apart from the need to consider carefully the matters identified, they also have an obligation to ensure that police are not holding back evidence which is inconvenient to their case, or which might affect the lawfulness with which tendered evidence was obtained. They also have a role, in this respect, which is truly independent of the Service, as well as ethical obligations as members of the legal profession, not to permit prosecutions to become the occasion for a miscarriage of justice, where they are on notice of circumstances that might cause that to be the case. That extends to ensuring that there has been proper police disclosure of all relevant documents, and information concerning the case.

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Child Witnesses: The New South Wales Experience

CHILD WITNESSES: THE NEW SOUTH WALES EXPERIENCE

Justice James Wood AO
Chief Judge at Common Law
Supreme Court of New South Wales

A paper presented at
The Australian Institute of Judicial Administration:
CHILD WITNESSES – BEST PRACTICE FOR COURTS,
District Court of New South Wales, Parramatta,
Friday 30 July 2004

I am not at all sure that I can speak of the New South Wales experience as representing best practice at this stage.

Almost inevitably, and sadly, when we come to this topic we are principally concerned with children who are required to give evidence in criminal cases, particularly sexual assault cases. Obviously this is an area that arose for consideration during the paedophile segment of the Royal Commission into the NSW Police Service. More recently it became the subject of examination in NSW by the Legislative Council's Standing Committee on Law and Justice.

So far as he will deal with the Specialist Child Sexual Assault Jurisdictional Pilot Project, which was introduced in 2003, I do not want to cover the same ground as that which is the subject of Lloyd Babb's presentation. Rather I thought it more relevant to articulate, at the beginning of this seminar, those areas where particular difficulties exist in relation to child witnesses, and to identify briefly the steps that have already been taken, independently of the pilot project, or which it seems to me still need to be addressed.

In no particular order the areas for interest include the following:

1. The obtaining of an accurate and prompt account by a child witness, free of external influence, and before the memory becomes faded, or embellished, or affected by subsequent influences.

The key to the presentation of reliable evidence from children lies in its initial collection, and preservation. This has not always been appreciated by police, or by social workers who have been called in to investigate complaints.

The Royal Commission turned up numerous cases where lack of attention to detail, or over zealous encouragement, or a simple inability to understand how to speak to, and to obtain information from a child, hopelessly compromised the collection of the evidence.

Specialisation and training in the difference between eliciting facts, and in using a form of questioning that suggests a desired answer, or involves an embellishment is critical. In NSW that has, to some degree, been met, at least in the child sexual assault field, by the establishment of the Child Protection Enforcement Agency, whose members are specially trained.

The problem continues since insufficient attention has been given to the circumstance that, ideally, there should be one comprehensive debriefing, and not multiple interviews by different agencies. Sometimes this is inevitable where a medical practitioner, or social worker, or other person associated with care or Family Court proceedings, may need to intervene in a case of urgency.

What seems to me to be important for the debriefing, is that those responsible be in

possession of as many background and surrounding circumstances as can possibly be independently gathered. Otherwise, there is a terrible risk of the child being misled by questions for which the factual basis is incorrect, but which the child might accept and then modify an account, out of respect for the position of the interviewer. How often is it that a child gets forced into a precise time frame, or place, by a zealous interviewer who has not checked the facts or understood that, for children, times and dates are of little moment?

I strongly favour the use of a video recorded interview for the initial debriefing, and I similarly favour its use at trial, that is, provided the interviewer is in command of the case, does not seek to push a particular line or prejudice, and is sufficiently trained to deal with the child in a way which is comfortable and age appropriate.

Accordingly, I support legislation that permits the initial interview to be recorded and used as the evidence in chief of the child. This can now be done in NSW pursuant to ss 9 and 11 of the *Evidence (Children) Act* 1997, subject to compliance with the Regulations made under the Act, which require the Prosecution to give notice of its intention to tender the recorded interview, and to allow suitable access so that the accused and his or her lawyer can listen to, or view, the recording in advance of the trial.

The Act also allows the evidence of children (persons under the age of 16 years) to be given orally in the courtroom, or by closed circuit television in the case of the proceedings to which the relevant part (Part 4) applies, that is, proceedings concerned with personal assault offences or apprehended violence orders.

Suggestions have been made as to the desirability of the accused or opposing party being able to participate in the initial interview. I would oppose any such entitlement, as it would convert the initial debriefing into an adversarial event, and hinder full and fair closure.

The right to cross-examination at trial, and the required jury warning (s 14) not to use the fact of pre recording, as giving rise to any inference adverse to the accused, or as either elevating or decreasing the weight of the evidence, provides a suitable safeguard.

I am not entirely convinced by recommendations that would require the entirety of the child's evidence to be taken pre-trial and recorded, so as to avoid the potential stress of being confronted at trial by the accused, and a jury, although I would defer to the evaluation of those who have experience of trials being conducted in this fashion. I can appreciate the advantages in taking the evidence while it is fresh, and bringing the complainant's participation in the proceedings to finality as soon as possible in order to allow the child to move on, and also to receive prompt therapy and counselling, without the risk of it tainting the evidence. Nevertheless there is a potential for unfairness in the event of new evidence emerging, which may assist an accused, but could not be used at trial to challenge the child's evidence unless leave was given. Any such scheme would seem to depend upon full and timely disclosure of the Prosecution case.

I would, however, strongly support the video recording of any evidence which is given at trial, plus the pre-recorded evidence in chief being tendered at a retrial, without the need for the child to be recalled. In such a case any portion of the evidence that was held inadmissible on appeal could be edited.

2. The use of CCTV, screens and other alternatives

In New South Wales, as I have observed, children are entitled in the case of proceedings to which Part 4 of the *Evidence (Children) Act* applies, to give the evidence by CCTV or similar technology (section 18 of the Act), either from a location within or external to the court (section 20) if they so wish.

The court can order that evidence not be given in this way but only if it is satisfied that it is not in the interests of justice for it to be done, or if the urgency of the matter makes it inappropriate.

Identification evidence cannot be given by CCTV or similar technology (s 21), although the consequent potential stress thereby arising is ameliorated by the requirement that the court ensure that the child is not in the presence of the accused for any longer than is necessary, when giving the identification evidence.

There is a requirement, where evidence is given by CCTV, or by similar technology, that the persons who have an interest in the proceedings be able to see the child (and any person present with the child) on the same or another TV monitor.

Where CCTV or similar technology is not available, or where the child does not wish to use that medium, or where the court orders that it should not be used, then the court is required to make alternative arrangements in order to restrict contact (including visual contact) by the use of screens or planned seating arrangements (s 24). Again the child may elect not to use these alternatives.

Where CCTV or alternative arrangements are used, a similar warning for pre-recorded evidence needs to be given, along with an explanation that the procedure followed is standard practice (s 25).

3. Support persons

In proceedings to which Part 3 of the *Evidence (Children) Act* applies, the child is entitled to choose a support person to be nearby while giving evidence. Such person may include, but is not necessarily confined to, a parent, guardian, relative, or friend, and that person may sit with the child as an interpreter, for the purpose of providing assistance where difficulty in giving evidence might arise which is associated with a disability, or for the purpose of giving other support.

This kind of provision is helpful, although there is a nice line to be drawn between the support person prompting and correcting the witness, and intervening where there is a genuine difficulty in understanding or in expression. The advantage of a parent or close relative having sufficient familiarity with the child to recognise that the witness is out of his or her depth, or that the words used are not words that the witness will understand, can outweigh the personal interest of the support person, depending upon that person's sense of responsibility and acceptance of the obligations attaching to the role.

Proposals have also been developed for ongoing legal representation for child complainant/witnesses during trials, although precisely what that role should be, that is, if it extends beyond ensuring that they have access to appropriate information as to their rights, and the course of the proceedings, is unclear.

4. Cross-examination where the accused is Unrepresented

Where the accused or a defendant is charged with a personal assault offence, and is unrepresented, then that person is unable personally to examine, cross-examine or re-examine, any child witness called in the case, but may have that done through a person appointed by the Court (s 28 *Evidence (Children) Act*). The person so appointed can only ask the questions that the accused or defendant requests, and cannot give any legal or other advice.

A similar provision now applies to other serious sexual assaults by reason of section 294A of the *Criminal Procedure Act*, and it became somewhat contentious in a recent trial, where the accused refused point-blank to allow the court to appoint a person to conduct the cross-examination of the complainant.

This form of provision raises difficult questions as to:
(i) the selection of an appropriate person, who need not be a qualified legal practitioner;
(ii) whether the court can decline to appoint an inappropriate intermediary, such as a convicted criminal or a close friend or relative of the accused;
(iii) whether the person can decline to ask questions that would be offensive, irrelevant or otherwise objectionable;
(iv) how the accused can be prevented from exploiting the provision and attracting jury sympathy by way of assertions as to unfairness or racial prejudice.

5. Committal

The potential for the emergence of inconsistency in detail, the potential significance of which may be overrated by jury, and the trauma of being exposed to more than one cross-examination, without much value being added, which formerly existed where lengthy committal hearings were held, has fortunately passed. In New South Wales, paper committals are now the norm, and child sexual assault complainants are exempted from having to attend committal proceedings (s 91 *Criminal Procedure Act*).

6. Court intervention

Under the *Evidence Act*, the court has the power to disallow a question, or to inform a witness that it need not be answered, if the question is misleading, or unduly annoying, harassing, intimidatory, offensive, oppressive or repetitive (s 41). In exercising that power, the court can take into account any relevant conditions or characteristics of the witness, including age, personality, education, or mental, intellectual or physical disability. Recommendations have been made that would require courts to take special care to protect child witness from harassment or embarrassment, to make certain that the questions are age appropriate and not to allow unnecessary repetition.

The careful exercise of this power, and proper control of the cross-examination of child witnesses, has not always been well managed by judges, who very often have felt reluctant to interfere, particularly in the absence of an objection. This may well have arisen from lack of experience, or training, or even attention, on the part of trial judges to the inherent disadvantages of child witnesses. It is a matter which requires careful consideration, and vigilance to intervene when questions are put that are age inappropriate, or overly complex (involving for example double negatives), or unduly offensive or aggressive.

For similar reasons, related to the reduced attention span of children, and the respect that they are accustomed to extending to their elders, judges need to be astute to step in and provide breaks, when attention seems to wander, or where the child seems too ready to acquiesce in anything that is put. Particularly is this so if it appears that the child is willing to give any answer in order to end the ordeal.

A related area where the court has a role to perform is for it to provide suitable child friendly facilities, which can ensure separation from the accused, and to adopt hearing practices that can minimise the stress of waiting to give evidence.

Similarly of importance is the need for the establishment of a witness liaison service of the kind that was created in the United Kingdom and Scotland, in recent years, and for prosecution authorities to ensure close communication and consultation with complainants and their families in relation to important decisions concerning the abandonment of charges, or the acceptance of pleas to lesser charges and so on.

7. Competency to give sworn evidence

Competency has raised its head in New South Wales, in that judges have sometimes failed to give sufficient attention to the circumstances which determine respectively whether the child is competent on the one hand to give sworn evidence, or on the other hand, competent to give unsworn evidence.

The question is not one to be decided on the basis of age alone, there being no presumption either way under the New South Wales law that is dependent on that factor. Rather, there has to be a careful inquiry before the witness gives evidence as to whether:

(i) the child is capable of understanding that, in giving evidence, he or she is under an obligation to give truthful evidence (sworn) or;
(ii) the child understands the difference between the truth and a lie, and, when asked, indicates by an appropriate response that he or she will not tell lies (unsworn).

Interesting questions arise as to the manner in which a judge should determine these questions, and as to whether reference to external testing or to expert opinion should be admissible. The reaching of a correct decision is important since permission to allow a witness to give unsworn evidence where he or she should have been sworn, will give rise to a fundamental, and fatal defect in the trial: *R v JTB* [2003] NSWCCA 295 and *R v Brooks* (1998) 44 NSWLR 121.

8. The silent accused

Without suggesting that the right to silence should be abrogated in any general sense, I retain a considerable sense of unease that, in cases involving child victims, the accused can cross-examine them vigorously as to the truth of the allegations, and their credibility, yet remain silent.

Two options are worthy of legislative consideration, either to:
(i) make it a condition of cross-examination of the child witness, that the accused give evidence, or at least to limit the kind of questions that can be put so as to exclude, for example, unsupported allegations;
(ii) permit a qualified comment to the effect that, where the Crown case depends upon the version of the child witness, whose veracity has been challenged, then the jury can properly take into account when judging that witness's evidence, the fact that they have not heard the version of the accused, nor seen it tested.

In this context I retain a concern as to the impermissible raising before a jury of the question "why would the complainant lie" (that is unless it has been ventilated in the cross-examination or defence case, as a matter going to motive). The legal basis for it, which relates to the fact that the onus of proof rests upon the Prosecution, can be readily understood. Nevertheless, the reality is that it is the very question which, arising out of their own exprience of life, the jury will inevitably ask of themselves.

This is particularly cogent where the accused has not entered the witness box, yet has vigorously challenged the complainant, although without venturing into motive.

9. Expert evidence concerning child witnesses

This has become relevant in two possible areas because of the limited knowledge, of at least some segments of the population, concerning children. First, there is the circumstance that very often children will truthfully describe a penetrative assault without any medical injury having been observed. An understanding of why this may be the case depends upon an informed understanding of the physical aspects of sexual assault, including matters of anatomy and healing processes which can be very rapid in the case of children.

Secondly there is the circumstance that, by reason of their restricted vocabulary, or embarrassment, or parental instructions, children will often use play words to describe the human genitals and may be somewhat ignorant of the relevant anatomical structures, as well as sexual activities involving them. Without care, and an appreciation of the problems that children can have in these respects, there is always a risk of the evidence being misunderstood. This does, however, have a wider dynamic in that there is accumulated knowledge and expertise available in relation to the diagnosis of child sexual assault, and of human sexual behaviour, and also in relation to the circumstances in which complaints may be made or alternatively withheld (that is, victim response) which is not apparent to most lay persons.

The possible admissibility of general expert evidence of this kind, which has normally been excluded, is worthy of closer consideration for cases involving child sexual assault. Otherwise there is always a danger of insufficiently informed juries bringing to their determination of these cases, their own prejudices, sexual orientation and experiences, or beliefs founded in the myths, which do surround conduct of this kind.

10. Jury directions with a particular impact for the evidence of children

Existing case law places a number of constraints in the way of trials that depend upon

the evidence of child witnesses, which are worthy of review, and possibly of legislative intervention. In particular the multiplicity of the directions which are required, as summarised in *R v BWT* [2002] 54 NSWLR 241, and the fact that they are framed in terms which could only have been devised by lawyers, and which are potentially puzzling for a lay fact finder, are of concern.

(a) The *Murray* warning

The effect of the *Murray* direction (*R v Murray* (1987) 11 NSWLR 12) is that where there is only one witness asserting the commission of the crime, the evidence of that witness is to be scrutinized by the jury with great care before returning a verdict of guilty – whatever that might signify to a jury which has already been instructed not to convict unless satisfied beyond reasonable doubt.

(b) The Proper Separation of Relationship and Tendency/Coincidence/Guilty Passion Evidence

The authorities in this area are neither consistent nor easily capable of being reconciled, since the evidence of a wider range of sexual assaults concerning a child witness, or other children, may become admissible as:

(i) Coincidence evidence, that is, evidence of the occurrence of two or more related events which is tendered to show, because of the improbability of their occurrence being coincidental, that the accused did a particular act, or had a particular state of mind - in which case, subject to passing the various threshold tests under the *Evidence Act*, it can be received as evidence going towards the truth of the acts charged;

(ii) evidence going to explain the nature of the relationship between the accused and the complainant, so that the jury can better understand the context of the incidents charged, but not as proof of the truth;

(iii) tendency Evidence, that is, evidence designed to show that an accused has or had a tendency to act in a particular way, or to have a particular state of mind, which again subject to the *Evidence Act* threshold tests, can be received as proof of the truth of the acts charged;

(iv) evidence in rebuttal of good character.

See *Gipp v The Queen* (1998) 194 CLR 106 and *R v BWT.*

The capacity of a child witness to understand these distinctions, or of a jury for that matter, is doubtful in the extreme, and a question arises as to whether they should properly be drawn in this area of human behaviour, or are unduly artificial. Commonly trial counsel and judges fail to exercise sufficient care in determining the basis upon which evidence of this kind is tendered and admitted, and in explaining their limitations to the jury.

Proposals have been developed in relation to the admissibility of tendency and relationship evidence where it is relevant to the facts in issue, which would extend the range of matters relevant for consideration to include not only considerations of unfair prejudice, but also public interest considerations. There may be merit in their extension.

For a recent illustration of the problem that arises see *R v Barton* [2004] NSWCCA 229.

(c) The Longman/Crampton Direction

The *Longman/Crampton* (*Longman v The* Queen (1989) 168 CLR 79 and *Crampton v The* Queen (2000) 75 ALJR 133) directions to the effect that it would be unsafe or dangerous to convict on the uncorroborated evidence of the complainant where there has been delay in complaint, unless after careful scrutiny the jury was satisfied of its credibility, and that such delay has meant that the accused was unable adequately to test and meet the evidence, are problematic.

I adhere to the concern that I expressed in *R v BWT* that the irrebuttable assumption,

which underlies *Longman*, has an area of illogicality. The assumption that the delay in making a complaint means that the accused *was* unable adequately to test and meet the evidence, may be correct where the accused has lost the opportunity to establish an alibi, or to find witnesses or records that may have assisted the defence. It may even have that effect where the complainant's evidence lacks specificity, such that it cannot be tested.

However, it does not inevitably have that effect, and clearly it does not disadvantage the accused, where he was in fact guilty, or where there never was any evidence available that may have assisted the defence. In such an instance the direction is in fact misleading if not erroneous.

I would prefer that the direction be given in terms of a *possibility* of forensic difficulties having been occasioned, or that it be confined to cases where there is some positive evidence of disadvantage.

(d) The *Crofts* Direction

I also consider problematic the requirement that judges balance the explanation that evidence of failure to complain of an assault at the earliest reasonable opportunity was untrue, with the *Kilby* direction that the jury can take the delay into account, as reducing the witness's credibility (*Crofts v The Queen* (1996) 186 CLR 427).

Experience shows that the assumption that victims of sexual assault will complain at the earliest possible opportunity is at least questionable in the case of children. There are many reasons why this is so, and there is room for the view that the balancing direction entirely negates the instruction which was intended to reform the law, and may even convert the dilatory child complainant in sexual assault cases into an especially untrustworthy class of witness. For a recent illustration see *R v LTP* [2004] NSWCCA 109.

I would prefer to see the balancing direction confined to those cases where there is at least a prima facie basis for suggesting that the delay was a sign of a want of credibility, for example where there is an absence of any evidence suggesting a reason for it.

(e) The *KRM Direction*

This requires the jury to be instructed that except where the evidence relating to one count charging sexual assault is admissible in relation to another count alleging a separate assault, the jury must not take it into account in relation to the other count as evidence going to the fact of its commission (*KRM v The Queen* (2001) 75 ALJR 550). However where they have a doubt concerning the credibility of the witness's evidence on one count, they can take that doubt into account when they consider that person's evidence on the other count, a direction which surely is designed to confuse, and is barely understandable by a lay person.

(f) The *Mitchell Direction*

This requires the judge to direct the jury that they cannot use the evidence of one complainant to assist in the determination of a charge that relates to another complainant (unless permitted as tendency/coincidence evidence), even though the accused can seek to use the evidence globally in trying to establish inconsistencies, between the witnesses, in areas where otherwise one might expect to see common features, or in suggesting collaboration (*R v Mitchell* NSWCCA 5 April 1995).

In this respect recent proposals have raised the possibility of a presumption for multiple complaints to be tried together, without any such limitation.

(g) Neutral Medical Examination

It is recognised that a medical examination of a child who claims to be a victim of sexual assault may turn out to be neutral. The tendency of medical examiners to give evidence to the effect that the finding was "consistent" with the complaint is problematic and

involves a degree of looseness of expression, even if it is literally correct. Cross-examination to secure a concession that nothing was observed of an incriminating nature is also likely to leave the jury with a false impression, unless they have some experience in the field.

It seems to me that the proper course in the case of a neutral examination which can neither exclude or include an allegation of assault is better not called. One of two courses may be taken: the parties may consent to the trial judge directing the jury not to attach any attention to the absence of the evidence, or the defence might undertake not to comment on its absence.

(h) The ways in which complaint evidence can be put and the hearsay rule

Questions do arise as to the appropriateness of maintaining the test, as to recency or freshness of complaint, which has been developed as determinative of whether the complaint goes to the truth of the matter asserted or as to consistency and credibility, in the case of child witnesses where there are well recognised factors that can cause children to delay making a complaint. Moreover the current law is fraught with potential difficulties related to the difference between evidence of complaint admitted under s 66 of the *Evidence Act* and evidence of prior consistent representations admitted under s 108(3), and to the possibility of jury confusion where both kinds of evidence are led in a particular case.

(i) The *Jones v Dunkel* direction

Concern must exist as to the inability, or at least reluctance, of courts giving a *Jones v Dunkel* direction in a case involving children as witnesses, where the accused has suggested that there are witnesses who could support his case, yet has not called them and has provided no reason for not doing so (*Dyers v The Queen* (2002) 76 ALJR 1552 and *R v Zreika* [2001] NSWCCA 57.

11. Pre-Trial Defence Disclosure

Cases involving the sexual assault of children, which depend heavily on the word of the complainant, lend themselves particularly well to the defence approach of pre trial silence and even of trial by ambush. Rarely does the Crown know in advance whether the issue for trial is whether the act occurred at all, identification, or otherwise. The time may be ripe for re-examination in this area.

12. The Specialist Child Sexual Assault Jurisdictional Pilot

In essence the pilot envisages the following:

(i) child complainants giving evidence via CCTV from a secure remote witness facility;

(ii) the provision of specialist training for judicial officers;

(iii) the provision of child friendly facilities;

(iv) the admission of pre-recorded statements;

(v) pre-trial hearings to ensure readiness and to resolve admissibility questions.

While many of these initiatives were already available and supported by legislation, there was a lack of sufficient facilities or equipment in many courthouses, as well as a degree of judicial and practitioner reluctance to use them. In many instances the quality of the equipment provided was poor, and technical glitches were common, which in turn led to its disuse.

Left unaddressed, at this stage, has been the wider use of judge only trials, which might make more acceptable any relaxation of the rules and requirements for warnings of the kind previously mentioned, and might also be more attractive in the case of a specialist

tribunal.

Evaluation of the NSW pilot will be important since overseas experience with specialist tribunals has tended to suggest that they can reduce disposition times, and stay rates (a matter of some importance for high profile cases or those that have attracted a great deal of publicity), can lead to an increase in pleas and conviction rates, and can also reduce child witness trauma.

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Overview of Australian Justice and Prison Systems

CHINA – AUSTRALIA HUMAN RIGHTS TECHNICAL COOPERATION PROGRAMME: WORKSHOP ON PRISONERS AND DETAINEES: XIAN MAY 2004

OVERVIEW OF AUSTRALIAN JUSTICE AND PRISON SYSTEMS

JUSTICE WOOD
CHIEF JUDGE
COMMON LAW DIVISION
SUPREME COURT OF NEW SOUTH WALES

1. The Australian Justice and Prison System – An Overview

Australia consists of a federation of states and territories, with a central national government, and separate state and territory governments. The justice system is shared between the central government, and the state and territory governments, in relation to the enactment of penal laws and their enforcement by police, or by individual specialised law enforcement agencies.

The prosecution of criminal offenders is, in the main, entrusted to the Directors of Public Prosecutions, and their staff, again organised on a national, state or territory basis. However, the pursuit of criminal prosecutions, whether state or federal, takes place in the state or territory courts, since the federal courts have no criminal jurisdiction.

Similarly, offenders who are sentenced to any form of detention ("prisoners") or who are held in detention pending trial ("detainees") come within the responsibility of the state and territory justice system, and the state or territory corrective services. There are no federal prisons and, subject to some differences in practice, federal and state offenders have similar rights and entitlements.

2. The Westminster System and Independence

Critical for an understanding of the Australian justice and penal system is an understanding that each of the several agencies, that is, the law enforcement agencies, the Directors of Public Prosecutions, the courts, the corrections services, and the oversight agencies, is independent of one another. Within the limitations of the proper exercise of their powers and functions, none can be directed as to the manner of their performance, by either central or state or territory governments, or by any of the other agencies.

The presentation, which will be made today, will examine the role of each of these arms of the justice and prison systems, in so far as they may have a separate role in the protection of the human rights of prisoners and detainees, either directly or by way of oversight. While there are differences in detail between the arrangements in place in each state and territory, the presentation will, in the main, confine itself to the system in place in New South Wales, which is the state with the largest population.

3. The Law Enforcement Agencies

(a) Federal

At a federal or central level there are several law enforcement agencies, each with a jurisdiction in the specific area or areas entrusted to it under federal statutory law. In summary, they include the following:

(i) The Australian Federal Police (AFP)

This agency investigates and presents for prosecution, cases arising under specific federal laws, including for example, narcotics importations, immigration offences, money laundering, and offences arising under maritime and aviation laws.

(ii) The Australian Security Intelligence Organisation (ASIO)

This agency has a responsibility for investigation, usually in conjunction with the Australian Federal Police, of activities concerned with espionage and terrorism.

(iii) The Australian Crime Commission (ACC)

This agency is a specialised agency with responsibility to investigate certain areas of organised crime or national crime syndicates, in some cases under reference, or with the agreement of the states and territories.

(iv) The Australian Securities and Investments Commission (ASIC)

This is an agency with power to investigate, often in conjunction with the Australian Federal Police, certain areas of corporate crime. It also has regulatory and supervisory powers concerning securities and investments.

(v) Other Agencies

There are several other government agencies with power to investigate offences under specific acts, for example taxation, although again they tend to work in conjunction with the Australian Federal Police.

At the initial arrest and charging phase of a criminal investigation, these agencies place suspected offenders before a court, and either seek their detention pending trial or consent to their conditional release. In the investigative phase they have limited powers of detention of suspected offenders (detainees), for the purpose of interrogation or investigation.

(b) States

Taking New South Wales as an example, there are again several different law enforcement agencies with powers to investigate offences, and to arrest and place offenders before a court. They include:

(i) The New South Wales Police Force

This is a police force with a general power to investigate and prosecute offences arising under New South Wales law.

(ii) The New South Wales Crime Commission

This is a specialised agency, in the main staffed by investigators on

secondment from the New South Wales Police Force, but with a permanent support staff, which is tasked with investigating major and organised crime.

(iii) Other Agencies

In common with the Commonwealth, there are a large number of other government departments with power to investigate, and to prepare for prosecution, offences in relation to specific areas falling within their area of responsibility. They include, for example, offences under laws concerning the regulation of fisheries, state parks and forests, the waterways, local transport, the environment, and so on. For the most part they are concerned with lesser offences, which do not normally result in detention, either pre-trial or post-trial.

4. The Directors of Public Prosecutions

Both at state and federal level, their powers, responsibilities, and independence, and that of their staff, are regulated by statute. Their role is to prosecute offences investigated by law enforcement agencies, on their behalf.

At a state level, the Director of Public Prosecutions (DPP) is assisted by permanent Crown Prosecutors who are entrusted with the conduct of trials in the courts, and by legal and other support staff. The ultimate decision to prosecute, or to bring a prosecution to an end for lack of evidence, rests with the Director. He or she cannot be directed by the Attorney General, or Justice Minister, in relation to the exercise of this power, nor, subject to certain qualifications, can a decision to prosecute be reversed by a court.

Commonly, law enforcement agencies will seek advice from the Director of Public Prosecutions as to whether or not there is sufficient evidence to prosecute a case, but the DPP cannot direct these agencies on how to go about their work.

At a federal level, the Director of Public Prosecutions is a somewhat smaller agency, which tends to engage private practitioners to prosecute individual cases in the state and territory courts, but otherwise it's role is similar to that of the state Directorates.

5. The Courts

Typically the courts within the states are organised in a three-tiered system:

(a) Local Courts and Children's Courts

These deal with the lesser offences, which are presented for prosecution by the DPP or by law enforcement agencies. Their powers include the preliminary determination of custody or release on bail pending trial, and the imposition of sentences of detention, for the lesser offences which come before them.

(b) District or County Courts

These courts deal with criminal offences of intermediate seriousness, and again they have a power, in certain circumstances, to determine questions of detention, or release on bail, for suspects pending trial, and to pass sentences requiring imprisonment;

(c) Supreme Courts

These courts are superior courts of record, which try the most serious offences, and which also have an appellate jurisdiction in relation to trials conducted, both in the District Court and in the trial division of the Supreme Court.

They have certain supervisory powers in relation to issues concerning the custody of persons held pending trial (detainees) and of offenders after sentences have been passed (prisoners).

6. The Correctional System

While there are differences in detail between the states and territories, upon an organisational basis, and by reference to the use of corrective centres, which are conducted by private enterprise under contract, there are general similarities. So far as New South Wales is concerned, there is a division as follows:

(a) The Department of Corrective Services

This department manages a series of detention centres and correctional centres throughout the state, of varying degrees of security, ranging from the most secure High Risk Management Unit, through maximum security centres to afforestation camps, and periodic detention centres.

In general terms, adult suspects held pending trial ("detainees") are held in the remand centres, within the correctional services complexes, but have additional privileges and rights not possessed by those serving sentences in the correctional centres ("prisoners").

Provision exists for reclassification, as a prisoner moves through the system, allowing for a progressive increase in entitlements and privileges (eventually including work release), as well as for programs for education, training, counselling and the like, which are aimed at securing as much rehabilitation as can be achieved before release. The system also provides for post release supervision during the balance of the sentence, after the parole period (or minimum term of imprisonment) set by the Court, has been served.

(b) Department of Juvenile Justice

Juvenile Justice Centres are established for offenders up to the age of 18 years, although by Court order, at the time of sentencing, some offenders may be permitted to remain at such centres until, or shortly beyond, the age of 21 years. The emphasis in these centres is upon rehabilitation, with a wide range of educational, training, counselling and other programs or activities available.

The detail in relation to the organisation of the correctional and juvenile justice services, from the departmental perspective and also from the detainees' and the prisoners' perspective, including their legal representation through private and public lawyers, will be developed by the speakers who follow.

7. The Oversight of Detention and Imprisonment

The machinery for the oversight of the rights of persons held in any form of detention, or imprisonment, and for the regulation or enforcement of the obligations of those who are responsible for the initial placement of persons into custody, and for their ongoing management and care, is somewhat complex and fragmented.

A brief outline in relation to the available agencies, and avenues for oversight, may be helpful.

(a) Official Visitors

Most correctional systems provide for the appointment of official visitors to each corrective centre, to whom the prisoners within that centre can direct complaints concerning any form of unfair treatment, or denial of their rights or privileges. They also have a role in relation to

overseeing prison conditions. Their obligations extend to regular visits to the centre, during which they are expected to give interviews to staff and to inmates, to deal with complaints, and to report to the Minister.

(b) The Independent Commission Against Corruption (ICAC)

ICAC has a statutory duty and power to investigate and to report, with appropriate recommendations, in relation to any corrupt activity on the part of public justice officials, which extends to the wrongful performance, or non-performance, of the duties attaching to the staff of the Departments of Corrective Services and of Juvenile Justice.

(c) The Ombudsman

The Office of the Ombudsman has a power of investigation in relation to administrative matters within the correctional system, such as procedural unfairness or oppression, where the internal investigation process within the corrective centre has reached its conclusion, and the outcome remains unsatisfactory.

(d) The Supreme Court

The Court has a limited jurisdiction, pursuant to *habeas corpus* principles, and also in the exercise of its jurisdiction to review administrative decisions, to remedy injustices or unlawful treatment, including unlawful detention, in relation to persons in custody, whether as detainees or prisoners.

In addition, it has the power to review decisions affecting persons who are refused bail pending trial, and to award monetary damages to prisoners who suffer physical injuries while in custody, as a result of the unlawful conduct, or negligence, of correctional officers, and to prisoners who are falsely imprisoned.

It also has a power to quash convictions and to set aside sentences, where error has been made at the trial, or in relation to the sentencing proceedings.

(e) The Human Rights and Equal Opportunity Commission (HREOC)

The Commission plays an important role in relation to the protection of human rights, including those of detainees and prisoners. It extends to monitoring, and investigating Commonwealth legislation and the practices of commonwealth agencies, in order to determine whether they are consistent with Australia's human rights obligations. It also fosters public debate and makes submissions to governments and parliamentary committees to encourage Australian compliance.

Its jurisdiction is however subject to two limitations. First, it is not able to make binding decisions in relation to any issues which might arise between two parties, for example, a prisoner and a correctional centre or the responsible Minister. Secondly, its jurisdiction is limited to the acts or practices of commonwealth agencies and does not extend, as a consequence, to prisoners detained for offences committed under state or territory law, or for federal prisoners held in state prisons.

(f) The Police Integrity Commission

The Police Integrity Commission is a separate agency. It is headed by a Commissioner, and its staff includes lawyers, investigators, financial analysts, and surveillance and technical support officers. It is tasked with the investigation of corruption and misconduct, in relation to the performance, by members of the New South Wales Police Force, of their duties and with reporting to Parliament on those investigations.

In this capacity it is able to investigate and report on abuses of police powers concerning the

arrest, charging and detention of suspects, including, for example, the manufacture of false evidence, police assaults and shootings, the acceptance of bribes and theft.

It supplements the activities of the Force's own Internal Affairs Unit, and it can take over, for its exclusive control, any investigation into complaints of police misconduct or corruption.

It is able to conduct public hearings, and to compel witnesses to give evidence and to produce documents. It has the authority to exercise a wide range of covert and other investigative powers, including the making of searches and the use of electronic surveillance.

8. Refugees

There is one further category of detainees in Australia arising out of its restrictive policies in relation to illegal immigrants. Those refugees who do make it through the immigration zone, or are rescued, are held in a variety of detention centres, either inside the country or offshore, for example in Nauru.

Their processing for refugee status, and their designation as temporary or permanent residents, or as illegal immigrants subject to deportation, is conducted by the Department of Immigration and Ethnic Affairs, subject to review by the Refugee Review Tribunals, with a very limited right of review by the High Court, and, by reference from the High Court, to the Federal Court of Australia.

Otherwise, detainees of this character are not afforded the rights and privileges extended to detainees and prisoners falling within the criminal justice system.

9. Human Rights Standards

(a) International Human Rights Standards

The international human rights instruments, which have a relevance for the detention and imprisonment of persons, include:

Conventions

· The International Covenant on Civil and Political Rights (ICCPR)
· The United Nations Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment (UNCAT)
· The UN Convention on the Rights of the Child (CROC)

Other Instruments of Relevance

· The United Nations Standard Minimum Rules for the Treatment of Prisoners 1955 (SMR)
· The United Nations Rules for the Protection of Juveniles Deprived of their Liberty
· The United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules)
· The Body of Principles for the Protection of all Persons Under any Form of Detention or Imprisonment 1988
· Basic Principles for the Treatment of Prisoners 1990

Australia has accepted relevant obligations arising under the three conventions, and as such, it is expected that it will respect these obligations in the way in which it, and its representatives, act. To a considerable extent the relevant obligations are incorporated into local laws, and as such they are enforceable and capable of being protected in the state or federal courts.

Otherwise non-compliance is subject to scrutiny by the various international committees appointed to supervise state performance under those instruments. As Australia has acceded to the optional protocol to the ICCPR, individuals, including prisoners, can lodge complaints concerning alleged infringements of the ICCPR with the United Nations Human Rights Committee (HRC).

It has not, however, enacted legislation which would give jurisdiction to Australian Courts to consider complaints that would fall within the scope of the protocol.

The remaining international instruments perform the role of providing standards which individual nations are encouraged to incorporate into their local laws, with suitable adaptation for local conditions. Since they do not have the status of international conventions or treaties they have no other legal effect or standing.

(i) The International Covenant on Civil and Political Rights

The general human rights recognised by the ICCPR extends to all individuals, without distinction as to race, sex, language, religion, political or other opinion, national or social origin, property, birth or other status (Article 2), and as such extended to prisoners and detainees. The general norms of relevance for prisoners, include the rights:

· not to be arbitrarily deprived of life (Article 6)
· not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment (Article 7)
· to liberty and the security of person and not to be subject to arbitrary arrest or detention (Article 9)
· when deprived of liberty, to be treated with humanity and with respect for the inherent dignity of the human person (Article 10)
· the right to non-retroactivity of criminal punishment (Article 15)

(ii) The Standard Minimum Rules detail what is generally accepted as being good principle and practice in the treatment of prisoners and in the management of institutions. It is accepted that not all of the rules are capable of application in all places and at all times. The HRC has observed that there are certain minimum requirements which should always be observed. They relate, for example, to the minimum floor space and cubic content of the air for each prisoner, adequate sanitary facilities, clothing which is not to be degrading or humiliating, the provision of a separate bed, and the provision of food of nutritional value adequate for health and strength.

The rules make provision for the following matters, in general terms:

SMR	Provision
7	A register of prisoners must be kept in all places of detention, containing a number of required pieces of information, including the prisoner's identity, the reasons for commitment and the authority therefore, the day and hour of his admission and release.
8	Different categories of prisoners should be kept separate.
9-14	Accommodation must comply with conditions relating to size, number of occupants, lighting, ventilation and sanitation.
15-16	Facilities should be provided for the maintenance of personal hygiene.
17-19	Clothing and bedding must be provided to a specified standard.
20	Food and water of adequate quality must be provided.
21	Every prisoner who is not employed in outdoor work shall have at least one hour of suitable exercise in the open air daily if the weather permits. Young prisoners, and others of suitable age and physique, shall receive physical and recreational training during the period of exercise. To this end, space, installations and equipment should be provided.
22-26	Every institution should have the services of at least one qualified medical

	officer who should have some knowledge of psychiatry. Prisoners must undergo medical inspection as soon as possible after admission; prisoners suspected of infectious or contagious conditions must be segregated. The medical services must include a psychiatric service for the diagnosis and, in proper cases, the treatment of states of mental abnormality, and each prisoner is entitled to the services of a dentist. Special accommodation must be provided for all necessary pre-natal and post-natal care and treatment. Where specialised treatment is required, the prisoner shall be transferred to specialised institutions or to civil hospitals.
27-32	Discipline and order shall be maintained with firmness, but with no more restriction than is necessary for safe custody and well-ordered community life. No prisoner shall be employed, in the service of the institution, in any disciplinary capacity. Conduct constituting a disciplinary offence, types and duration of punishment, and the authority competent to impose such punishment must always be determined by the law or regulation of the competent administrative authority. No prisoner shall be punished unless he/she has been informed of the offence alleged and given a proper opportunity of presenting a defence (where necessary and practicable, through an interpreter). The competent authority shall conduct a thorough examination of the case. Corporal punishment, punishment by placing in a dark cell, and all cruel, inhuman or degrading punishments shall be completely prohibited as punishments for disciplinary offences. Punishment by close confinement or reduction of diet or any other punishment that may be prejudicial to the physical or mental health of a prisoner shall never be inflicted unless the medical officer has examined the prisoner and certified in writing that he/she is fit to sustain it.
33-34	Instruments of restraint, such as handcuffs, chains, irons and straight-jacket, shall never be applied as a punishment; only as a precaution against escape during a transfer, for medical reasons, or as a last resort to exercise control of the prisoner.
35-36	Prisoners must be informed of the rules of the institution and given an opportunity to make complaints.
37-39	Prisoners shall be allowed under necessary supervision to communicate with their family and reputable friends at regular intervals, both by correspondence and by receiving visits. Prisoners who are foreign nationals shall be allowed reasonable facilities to communicate with diplomatic and consular representatives of their State. Prisoners shall be kept informed regularly of the more important items of news by newspapers or radio or by any similar means as authorised or controlled by the institution's administration.
40	Access to books should be permitted.
41-42	Prisoners should be allowed to practice their religious beliefs as far as practicable.
43	All money, valuables, clothing and other effects belonging to a prisoner which under the regulations of the institution he/she is not allowed to retain shall on his admission to the institution be placed in safe custody. An inventory thereof shall be signed by the prisoner. Steps shall be taken to keep them in good condition. On the prisoner's release, all such articles and money shall be returned to him except in so far as he has been authorised to spend. The prisoner shall sign a receipt for the articles and money returned to him. Any money or effects received for a prisoner from outside shall be treated in the same way. If a prisoner brings in any drugs or medicine, the

	medical officer shall decide what use shall be made of them.
44	Notification of death, illness, or transfer must be passed on to relatives or the prisoner as appropriate.
45	When the prisoners are being removed to or from an institution, they shall be exposed to public view as little as possible. It is prohibited to transport prisoners in conveyances with inadequate ventilation or light, or in any way which would subject them to unnecessary physical hardship.
46-54	Detailed rules exist as to the selection and functions of institutional personnel.
55	Regular inspections of the institution should be carried out by an appropriate authority.

(iii) The Body of Principles details a set of principles which are phrased in a very general terms so as to apply to all persons held under any form of detention or imprisonment, including the provision of information to prisoners on their rights, and the means by which they might be enforced, the placement of prisoners as close as possible to their normal place of residence, the securing of regular contact with family and legal representatives, and the provision of proper process for disciplinary proceedings.

(b) Australian standards

The states of Victoria and Tasmania have enacted legislation that confers specific rights on prisoners, which generally reflect the minimum international human rights standards, although this legislation does not give rise to any specific remedy for breach of those rights. Furthermore the rights are expressed in somewhat general terms.

Otherwise the states and territories have their own Acts and Regulations, which specify the obligations and entitlements of inmates, prison management procedures, and rules.

In addition, a set of Standard Guidelines for Correctional Centres in Australia has been established. They reflect the UN Standard Minimum Rules for the treatment of prisoners, and the Council of Europe Minimum Rules, with some modifications to accommodate Australian conditions. Although they are not binding on the Australian states and territories, and do not have the force of law, and although they do not include any provision for addressing the consequences of non-compliance, they do have the value of providing guidance to legislatures and to prison authorities in the drafting of local rules. They extend to matters such as:

· The provision of written and verbal information concerning all matters relevant to the prisoner's imprisonment in a language and form which the prisoner can understand;
· the opportunity to make complaints or requests to a designated authority;
· the entitlement to inform families of their detention and to ongoing telephone access and visits;
· the right to seek assistance and to have legal visits;
· classification according to their needs, and development of a program for their rehabilitation;
· the provision of suitable accommodation and of the necessary facilities to maintain their general hygiene;
· the prohibition of collective punishment;
· the prohibition of prolonged solitary confinement, corporal punishment, reduction of diet and other cruel, inhumane or degrading punishments;
· restriction on the use of instruments of restraint and chemicals, save for control where other measures have failed;
· the provision of punishment for prison offences only in accordance with relevant laws and regulations, and subject to proper process;
· the provision of proper clothing, bedding, food and water, including special dietary food, where necessary for medical reasons, or for compliance with religious duties;
· access to (paid) productive work, education and leisure facilities, to open air for prescribed periods, and to library and information resources;
· the provision of proper health (medical and dental) services, and access to specialist and psychiatric care;

· the provision of accommodation for pre and postnatal care, and of suitable arrangements to permit children, subject to certain conditions, to live with their mothers while they are in prison;
· the rights to practise a religion of the prisoner's choice, and to have access to qualified representatives of those religions, or in the case of Aboriginal or Torres Strait Islanders, to their elders;
· access of foreign nationals to diplomatic and consular representatives of the countries to which they belong or to the national or international authority, whose task it is to protect them.

While the international instruments do not form part of Australian domestic law and, as a result, cannot operate as a direct source of individual rights and obligations, courts can properly make reference to them to assist in clarifying and interpreting domestic law. The extent to which this has occurred, however, has been limited; there has been no attempt, for example, to follow the more proactive approach adopted in Europe, particularly in the European Commission on Human Rights and the European Court of Human Rights, which have considered complaints from prisoners on a wide variety of issues.

10. Terrorism and Organised Crime

There are some provisions in Australian law which confer powers of interrogation of persons suspected of having information concerning terrorist activities, and also concerning organised or major criminal activities which not only enlarge upon the generally permitted powers of detention for interrogation, but also depart from the right to silence in so far as they require the subject of the interview to supply the information and documents or objects which are required.

(a) Terrorist Activity

Under the *Australian Security Intelligence Organisation Act*, a regime has been established for the detention and questioning, under warrant, of persons suspected of having information relevant to a terrorist offence. Terrorist offences include terrorist acts, as well as conduct that involves providing or receiving training, directing organisations, possessing things and collecting or making documents, concerned with those acts.

The warrant is issued by Federal Judges or Magistrates, authorised for that purpose, and the investigation (by an ASIO officer or officers) is supervised by a former Judge who is authorised to act in that capacity. The role of the supervising official is to inform the subject of his or her rights and to supervise the interrogation so as to ensure that it is conducted humanely, and that it is neither unfair or oppressive, or subject to any form of cruelty or degrading treatment.

A warrant may allow for up to 24-hour questioning in 8 hour blocks, and the maximum period of detention allowed is 168 continuous hours, after which the subject must be released. Force and restraint is only permitted where that is necessary and reasonable to arrest the suspect and to ensure his or her continued detention. It cannot be used as a punishment, or as an encouragement to volunteer information. Provision is made to ensure that the subject has proper meals and that his health, religious, sleep and personal hygiene requirements are met.

The interrogation must be video recorded. The subject of the warrant is permitted to have contact with a third person, where that is authorised by the warrant; and in the case of complaints concerning the detention and questioning, with the Inspector-General of intelligence and security, or the Commonwealth Ombudsman. There is, however, no general entitlement to legal representation, or facility for ongoing contact with a family member or friend.

The subject cannot refuse to give any information, or to provide any record or object which is requested in accordance with the warrant, and which is within his knowledge or control. Any information supplied can be used in a trial for a terrorism offence. Offences are created for refusing to supply information and for

giving false or misleading information.

The legislation seeks to achieve the balance between the protection of individual human rights and national security, and to comply with the derogation from such rights permitted under Article 4 of the International Covenant on Civil and Political Rights ("applicable in times of public emergency which threatens the life of the nation"). There are, however, several aspects of this and other international instruments with which it arguably does not fully comply.

(b) Crime Commissions

The Crime Commission of New South Wales and the Australian Crime Commission are agencies created to investigate organised and major crime. They have extensive powers to summon witnesses to provide information and documents or things, which might assist in such investigations. In each instance, the summonsed witness is required to provide the required information and documents; refusal to do so is a punishable offence. The hearings are conducted in private, and while legal representation is permitted, the summonsed party is effectively subject to temporary detention for the purposes of being interviewed.

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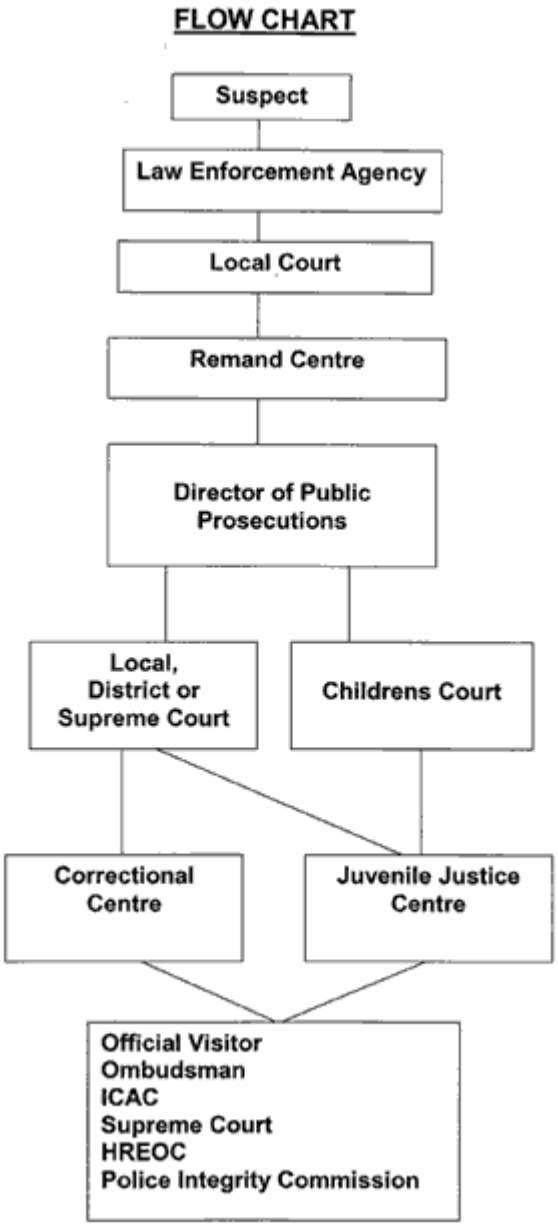

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Court Control In Relation To Detainees And Prisoners

CHINA – AUSTRALIA HUMAN RIGHTS TECHNICAL COOPERATION PROGRAMME: WORKSHOP ON PRISONERS AND DETAINEES: XIAN MAY 2004

COURT CONTROL IN RELATION TO DETAINEES AND PRISONERS

JUSTICE WOOD
CHIEF JUDGE
COMMON LAW DIVISION
SUPREME COURT OF NEW SOUTH WALES

The courts, and more particularly the Supreme Court, have a role in relation to the detention of suspects, and the imprisonment of convicted offenders, in several ways.

(a) Investigation

The courts have power, by warrant, to:

(i) permit an extension of the period allowed to detain a suspect for interrogation;
(ii) require a suspect to submit to certain forensic investigative procedures, including intrusive procedures, and internal searches (for drugs);
(iii) permit the use of listening devices and telephone intercepts;
(iv) to carry out searches of premises.

(b) Arrest

Once a suspect has been arrested and charged, the courts have the responsibility to determine whether he or she should be held in custody at a remand centre, or released upon conditional bail; and to review those decisions pending trial.

(c) At Trial

Where evidence has been unlawfully obtained, for example through an unauthorised detention, or by a procedure during detention that does not comply with the regime for lawful investigation, the courts can disallow its use a trial.

Decisions as to whether a person should be detained in custody during a trial; and whether, upon conviction, he or she should be sentenced to imprisonment or to some other form of detention, are made by the courts.

The alternatives in relation to sentence are:

i) Full time detention;

ii) Periodic detention (that is part time detention)
iii) Home detention;
iv) Suspended sentence of imprisonment;
v) Drug Court programme
vi) Community Service
vii) Bond to be of good behaviour;
viii) Monetary fines.

(d) Post Conviction

There are again several ways in which the Supreme Court can intervene to terminate a sentence of imprisonment, or to require a variation in relation to the way in which it is being served, or to remedy an injustice occurring in the course of the service of the sentence:

(i) Appeal Against Conviction or Sentence

The Supreme Court has the power to quash or vary any sentence imposed by a trial judge for error. Additionally, there is a procedure by which it can conduct a post conviction review leading to a sentence being terminated, where fresh evidence is discovered that would raise a doubt as to the conviction. An independent DNA Review Panel is in the process of being established which will have power to investigate, and to refer to the Court, convictions, where fresh DNA evidence, or analysis, raises a doubt as to the original conviction.

(ii) Parole Review

All prisoners other than those serving life sentences (or fixed terms of imprisonment) have an entitlement or expectation of being released from prison, subject to ongoing supervision by the Probation and Parole Service, after they have completed the minimum term of imprisonment which the Court set when they were sentenced.

Whether or not they are released on parole or probation depends generally upon the way in which they have behaved while in prison, and whether or not they have responded to rehabilitation programs. Their release, and the revocation of their parole and return to prison, if they reoffend, depends upon the decision of the Parole Board.

The Supreme Court (Court of Criminal Appeal) has a statutory power to review decisions of the Parole Board refusing parole, where it can be shown that the decision was made on the basis of false, misleading or irrelevant information.

It also has a statutory power of review in relation to decisions of the Parole Board revoking parole, periodic detention or home detention orders, where it can similarly be shown that the decision was made on the basis of false, misleading or irrelevant information.

(iii) Disciplinary and Management Decisions

Many administrative decisions are made by correctional authorities concerning, for example, the discipline and management of prisoners, their classification, and their entitlement to certain privileges. Formerly it was considered that the courts should not intervene in relation to these decisions, since it was considered that to do so might promote prisoner unrest or undermine the authority of the prison management, or that it might threaten the separation of powers between the court and the executive, or that it might open the floodgates to proceedings in the courts.

It is now accepted that the Supreme Court has a limited power to review decisions of this kind upon administrative law principles.

The circumstances in which it can do so vary according to the nature and significance of the decision, but intervention will, in general terms, depend upon whether it can be shown that the decision was made without power, or was made in bad faith, or for an improper purpose, or involved a denial of natural justice, or resulted in a disproportionate interference with the prisoner's rights and legitimate expectations or was manifestly unreasonable.

Failure to follow due process or to respect the requirements of natural justice in relation to an application of prison rules that leads to a loss of privilege or amenities, might also be reviewed by the Court in the exercise of this jurisdiction.

The exercise of this power of review is, however, relatively rare, it being recognised that there has to be a considerable area of discretion reserved to correctional authorities in relation to internal discipline, and particularly in relation to purely administrative issues.

Deference has also been paid to the special expertise which is possessed by prison administrators in managing correctional centres and their inmates, and to the need for them to guarantee the security of the prisoners as well as the maintenance of prison order.

Intervention will normally be confined to decisions that relate to individual rights, particularly those that might affect the prisoner's potential release. Intervention is unlikely in relation to decisions concerning general managerial or operational aspects of the prison order.

The consequence is that individual complaints are more likely to be dealt with internally, or by reference to the Official Visitor or Ombudsman, that is administratively, rather than judicially.

(iv) Civil Claims for Damages

Where a prisoner suffers injuries, or dies, as a result of any form of unlawful assault by a correctional services officer, or as a result of the breach of duty which is owed to exercise reasonable care for his safety while in custody, the courts can make an order for monetary damages to be paid to him, or to his dependent family.

There are some legislative qualifications, which either exclude the entitlement to damages, or limit the extent of the entitlement (in the case of mentally ill prisoners), where the injury or death of the person occurred as a result of conduct by the prisoner, which amounted to a serious offence, and which contributed materially to his death or injury. Monetary damages can also be awarded by the courts for false imprisonment.

(v) Gaol Delivery and Habeas Corpus

The Supreme Court has a general power to order the release of any person who is being held in custody after completion of his sentence, or who, for any reason, is unlawfully held in custody. In that regard, Australian law does not permit offenders to be held in custody after completion of their sentence in order to protect the community from further offending.

(vi) Mentally ill Offenders

A specific regime exist in relation to offenders who are not mentally fit to stand trial, or who are found not guilty at trial by reason of the mental illness.

In such cases the court makes an order which requires that they be detained, as forensic patients, in such mental health institution or corrections centre as may be directed. They then become subject to regular review by the Mental Health Review Tribunal, which may

recommend their release when satisfied that their safety, and that of any member of the public, would not be seriously endangered by their release. If necessary release may be ordered upon conditions for ongoing treatment, medication or supervision.

(e) General Oversight

Provision exists for each correctional centre to have a Visiting Magistrate, with power to visit that centre, to deal with offences committed by prisoners, and, at the direction of the Minister, to conduct an inquiry into any matter that relates to the security, good order, control or management of the centre.

Judges are generally permitted to visit and examines such centres as they see fit, and are free to submit reports on any matters which might appear, on such a visit, to raise a concern.

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Sexual Assault and the Admission of Evidence

Practice and Prevention: Contemporary Issues in Adult Sexual Assault in New South Wales

12 February 2003

Sexual Assault and the Admission of Evidence
Justice Wood

The legal barriers, the evidentiary requirements and the directions and comments required for the admission of evidence in sexual assault cases are many and varied. Some of the evidentiary considerations particularly relevant to sexual assault cases include coincidence, relationship and "guilty passion" evidence, the use of evidence where there is more than one complainant, the hearsay rule and the issue of delay in, or absence of, complaint. Even a brief consideration of these issues highlight a degree of concern within this area of the law and when combined with the difficulty of prosecuting such trials, the relatively low conviction rates and the additional trauma complainants often experience through the legal process, it is not surprising that many victims prefer to suffer in silence, rather than to report sexual assaults.

> As a result proposals for reform and other possible initiatives are worthy of consideration, particularly those proposals attempting to protect complainants from the more traumatic processes of the justice system whilst still encompassing the essential right of an accused to a fair trial. These can include pre trial video recording of the complainant's evidence, pre trial defence disclosure, protection of vulnerable witnesses or certain restrictions on the cross examination of the complainant.

1 Prosecutions involving charges of sexual assault, whether related to adults or children as victims, present certain unique features in that only infrequently can they rely upon investigations based upon forensic evidence. Rarely are there any independent witnesses, or anything in the way of corroboration, save in the rare case of a group attack where one accused is prepared to provide assistance, after a plea and sentence, by giving evidence against his co-accused.

2 In a typical case, where there has in fact been an offence committed, the complainant can expect the trauma of the initial assault to be compounded by the legal process with its various facets, commencing with a sexual assault examination and police interview, followed by the inevitable delay and uncertainty and occasionally the fear of the offender while waiting for a committal hearing and trial; and culminating in the ordeal of cross examination before a Judge and jury of twelve complete strangers, whose personal attitudes to sexual practices are completely unknown.

3 It is perhaps not surprising, in those circumstances, that conviction rates for such offences are relatively low, or that many victims prefer to suffer in silence, rather than to report sexual assaults, even serious assaults.

4 The purpose of this paper is to note the legal barriers in the form of evidentiary requirements and directions, which are seen by some, with a degree of concern, to make the prosecution of such trials difficult, and to offer some possible proposals for reform.

5 Among the concerns commonly expressed are those relating to the apparent advantage which the accused possesses in being able to attack the reliability and veracity of the complainant, without facing the risk of cross examination, or even adverse comment, in the event that he elects not to give evidence.

6 On the other hand, however, is the consideration that, in any attempt to redress any imbalance which the current system occasions to genuine victims, it is important not to overcompensate in a way that might deny to innocent accused their right to an acquittal. The balance of justice is a fragile concept, which is not to be discarded in the clamour for revenge and punishment which inevitably accompanies the worst cases of sexual assault.

7 Several areas of evidence and the corresponding directions required in relation to them, are worthy of mention.

DIRECTIONS IN SEXUAL ASSAULT CASES

8 The battery of directions which have been established by the course of authority, and which Judges must consider when summing up in relation to the evidence, is formidable:

(a) Check list

9 In *R v BWT* [2002] NSWCCA 60, the following directions were identified in the course of my judgment as relevant for consideration:

> *"32. …*
>
> *(a) the Murray direction (R v Murray (1987) 11 NSWLR 12) to the effect that where there is only one witness asserting the commission of a crime, the evidence of that witness "must be scrutinized with great care" before a conclusion is arrived at that a verdict of guilty should be brought in;*
> *(b) The Longman direction (as reinforced in Crampton and Doggett), that by reason of delay, it would be "unsafe or dangerous" to convict on the uncorroborated evidence of the complainant alone, unless the jury scrutinizing the evidence with great care, considering the circumstances relevant to its evaluation and paying heed to the warning, were satisfied of its truth and accuracy.*
> *(c) The Crofts direction (Crofts v The Queen (1996) 186 CLR 427), if a jury is to be informed, in accordance with s 107 of the Criminal Procedure Act, that a delay in complaint does not necessarily indicate that the allegation is false, and that there may be good reasons why a victim of sexual assault may hesitate in complaining about it, then it should also be informed that the absence of a complaint or a delay in the making of it may be taken into account in evaluating the evidence of the complainant, and in determining whether to believe him or her (but not in terms reviving the stereotyped view that complainants in sexual assault cases are unreliable or that delay is invariably a sign of the falsity of the complaint: Crofts at 451).*
> *(d) The KRM direction (KRM v The Queen (2001) 75 ALJR 550) to the effect that, except where the evidence relating to one count charging sexual assault is admissible, in relation to another count or counts alleging a separate occasion of such an assault, the jury must consider each count separately, and only by reference to the evidence which applies to it; balancing that direction, where appropriate, by a reminder that if the jury has a reasonable doubt concerning the credibility of the complainant's evidence on one or more counts, they can take that into account when assessing his or her reliability on the other counts (see Regina v Markuleski [2001] NSWCCA 290 at paras 259-263).*
> *(e) Any warning which may be required by reason of a ruling that limits the use of evidence concerning a complaint, or delay in complaint, to the question of credibility (eg under s 108(3) of the Evidence Act as an exception to the credibility rule), or alternatively that allows it to be taken into account (under s 66 of the Evidence Act as an exception to the hearsay rule) as evidence of the facts asserted.*
> *(f) The Gipp warning (conveniently so called, although there was divided reasoning in Gipp v the Queen (1998) 194 CLR 106) concerning the way in which evidence of uncharged sexual conduct between an accused and a complainant can*

> *be taken into account as showing the nature of the relationship between them, but not so as to substitute satisfaction of the occurrence of such conduct for proof of the act charged;*
> *(g) Any warning that may be necessary in relation to the use of coincidence evidence (under s 98 Evidence Act) where the accused is charged in the one indictment with sexual assault against two or more complainants, requiring the jury to be satisfied beyond reasonable doubt first of the offences alleged in respect of one complainant, and then of the existence of such a substantial and relevant similarity between the two sets of acts as to exclude any acceptable explanation other than that the accused committed the offences against both complainants;*
> *(h) A BRS direction (BRS v The Queen (1997) 191 CLR 275) that where evidence revealing criminal or reprehensible propensity is admitted, but its use is limited to non propensity or tendency purposes, for example those considered proper in that case, then it is to be used only for those purposes and not as proof of the accused's guilt."*

10 Additionally it was observed:

> *"33. In combination with the other standard directions customarily given in a criminal trial, and in particular any further warnings which may be required under s 165 of the Evidence Act, a trial judge is faced with a somewhat formidable task in sufficiently directing a jury in this category of case."*

11 The Judicial unease which is entertained in relation to the jury management of these directions in sexual assault cases, in particular, was also noted by the Court in *R v RTB* [2002] NSWCCA 104, where it was said:

> *"54. Jurors are not required to think like lawyers when they determine issues of credibility. It is regrettable that many directions which the courts have determined must be given to juries, as well as many issues to which juries are required by statute to attend, notably by the Evidence Act, are framed in terms that could only be devised by lawyers and which, in our opinion, are liable to distort a lay fact-finding process. Nevertheless, it remains desirable, particularly in a context where criminal proceedings turn entirely on the credibility of a single witness, that a trial judge does not constrain or direct the jury's thought processes, unless manifestly required to do so. In particular, a trial judge should refrain from giving the jury directions which suggests that they should think like lawyers*."

12 As McHugh J also observed in *KRM v The Queen* (2001) 75 ALJR 550:

> "*the more directions and warnings juries are given the more likely it is that they will forget or misinterpret some directions or warnings."*

(b) Comment or Warning?

13 The distinction between a comment and a warning in relation to the evidence is potentially problematic, both for Judges and Juries.

14 In broad terms, the circumstances which invite or require *comment* are those which are relevant to an evaluation of the complainant's evidence, that is, circumstances which might suggest that his or her evidence is unreliable. Generally they will be matters which might be expected to be within the jury's common understanding or experience, but which, without suitable reminder, they may have forgotten or overlooked. A comment should be given in terms which make it clear to the jury that it is not a direction of law binding on them, and that they are free to place such weight on it as they consider appropriate.

15 The matters which require a specific *warning* are generally those which are adjudged to reflect the special experience of the law, which in many instances are embodied as a statutory requirement, and which, in any event, need to be conveyed in clear and unmistakable terms, that is, in a way which makes it clear that the Judge is adding his or her own imprimatur to them.

16 The distinction between the two forms of direction, in a charge to a jury, is not always well understood by judicial officers. Whether the distinction between a warning and a comment is sufficiently appreciated by jurors, particularly when either follows upon a standard *Murray* direction in a case where the complainant's evidence is uncorroborated is, at best, problematic.

(c) The Murray Direction

17 Since most sexual assault cases depend upon the word of the complainant alone, it will normally be necessary to give a direction in accordance with *Murray v The Queen* (1987) 11 NSWLR 12, to the effect that the jury must scrutinise the complainant's evidence with great care and convict only if they are satisfied beyond reasonable doubt of its truth, (at least so far as it establishes the elements of the charge).

18 There is no reason why the Judge should not add that this direction does not of itself imply that the complainant's evidence is unreliable. It has however been thought undesirable to categorise the case as one of "*word against word"*, even though that inevitably will be the way in which it is viewed by the jury. Moreover it is erroneous to say anything which would tend to suggest that the jury could convict merely because they prefer the complainant's account to that of the accused, or that their task is to make a "*choice"* between the versions of the complainant and accused (*Liberato v The Queen* (1985) 159 CLR 507).

19 Standard directions confined to the burden and standard of proof will not suffice, it being considered important that it be made clear to the jury that the accused does not have to prove anything, and that they do not have to accept his version of events in order to acquit him.

20 Notwithstanding the reasons behind this direction, the inevitable consequence is to raise something of a question mark over the reliability and/or credibility of the complainant. The possibility of toning it down to some degree has an attraction.

(d) The *Longman* Direction

21 Of particular concern, and a regular occasion for appellate review, has been the *Longman* direction (*Longman v The Queen* (1989) 168 CLR 79) which is now required to be delivered in almost every case involving delay, even where there is some corroboration of the plaintiff: *Doggett v The Queen* (2001) 75 ALJR 1290; *R v BWT* (supra) and *R v Eyles* [2002] NSWCCA 510.

22 Delay in complaint is of such importance for the outcome of a sexual assault prosecution that it is dealt with separately in this paper when consideration is given to the evidentiary requirements. However, it is relevant to note the point made in the dissenting judgment of Gleeson CJ and McHugh J, in *Doggett* which was taken up by Hodgson JA in *R v WRC* [2002] NSWCCA 210, that there may be cases where it would be misleading, and even disadvantageous to the defence, to give a *Longman* direction. There is, or perhaps should be, greater room for a recognition of the forensic reasons why counsel did not seek such a direction.

23 Moreover there may well be occasions to relax the strict approach adopted in *Doggett* by confining the use of the expression that "*it would be dangerous to convict*", with the unmistakable message that it is likely to convey to a lay jury as to the Judge's own assessment of the case, to those trials where there is a sufficient concatenation of events, including delay, to warrant such a warning: see *R v DBG* [2002] NSWCCA 328 and *R v SJF* [2002] NSWCCA 294.

2. EVIDENTIARY CONSIDERATIONS

24 There are a number of considerations relating either to the admission of evidence, or to a limitation

upon its use, that have a particular relevance for sexual assault cases. In part they derive from the particular dynamics of such form of offending which may involve elements of personal deviancy, psychiatric or antisocial disorder, peer group pressure, and even religious/racial discrimination.

25 Of concern is the circumstance that normally expert evidence of human sexual behaviour, whether normal or abnormal, and of victim response, is not admissible, with the consequence that the determination by juries of such cases will to a large measure depend, in a practical sense, upon their own sexual orientation, experience, practices and beliefs. In many instances, although most particularly in relation to child sexual assault, the dynamics of such an assault and of the typical response of the victim, may be quite unappreciated by lay jurors, many of whom may believe in the several myths which surround such conduct.

26 Equally of concern is the circumstance that the general body of evidentiary rules, with a few exceptions, do not take into account such considerations. Several areas of relevance merit attention.

(a) Coincidence, Relationship and "Guilty Passion" Evidence

27 Likely to be of considerable difficulty for jury comprehension is the management of evidence, led in a trial, of uncharged sexual assaults involving the same complainant, or of sexual assaults involving another victim (as to which see later).

28 Depending upon its nature it may be admissible, or so *Gipp v The Queen* ((1998) 194 CLR 106) would seem to recognise, as:

(i) Evidence in rebuttal of coincidence evidence (s 98 *Evidence Act*), in which case it is capable of being received as evidence going towards the truth of the acts charged; although it must first pass the thresholds of ss 98(2), 101, 135 and 137 of the *Evidence Act* – that is, it must be confined to events which are "*substantially and relevantly similar*", and which occurred in *substantially similar circumstances*. The evidence must then be shown to have a "*significant probative value*" being such that its degree of relevance to the offence charged is important or of consequence: *R v Lock* (1997) 91 A Crim R 356. It must also be the case that its probative value substantially outweighs its prejudicial effect, that is, substantially outweighs the risk of it being used upon a basis logically unconnected with the issues in the case: *R v Lockyer* (1996) 89 A Crim R 457.

(ii) Evidence going to explain the nature of the relationship between the accused and the complainant, so that the jury can better understand the context of the incidents which were the subject of the specific charges, but not as proof of their truth (R *v ATM* (2000) NSWCCA 475) in which case sections 135 and 137 will need to be considered;

(iii) Evidence which is designed to show tendency, most particularly the "*guilty passion"* (or sexual feeling) of the accused for the complainant (s 97 *Evidence Act)* and which, similarly to coincidence evidence, is admissible to prove that the actual offence was committed; but only if it passes similar tests to those required for coincidence evidence, if it has a degree of specificity, and if it is proved beyond reasonable doubt (*Gipp v The Queen* (1998) 194 CLR 106 and *R v MM* [2000] 112 A Crim R 519), (although the correctness of the requirement for such a standard of proof was queried in *MM* by Hulme and Dowd JJ, and see also *R v Le* [2000] NSWCCA 49). Additionally it must be shown to be such that there is no reasonable view of it available which is consistent with the innocence of the accused: *Pfennig v The Queen* (1995) 182 CLR 461; *R v AH* (1997) 42 NSWLR 702); *R v WRC* [2002] NSWCCA 210.

(iv) Evidence in rebuttal of evidence of good character led by the defence, subject to ss 135 and 137 of *Evidence Act*, in which case its use must be confined to that purpose: *BRS v The Queen* (1997) 191 CLR 275 and *R v OGD (No 2)* [2000] NSWCCA 404.

29 Necessarily the Crown must nominate under which of these bases it seeks to tender the evidence, and equally importantly the trial Judge needs to explain its purpose, and to give suitable directions to the jury to ensure that it is not used inappropriately: *R v ATM* (2000) NSWCCA 475, and *R v AH* (1997) 42 NSWLR 702.

30 However, whether the relevant distinctions, which the law requires, will be sufficiently understood by a lay jury, is quite another matter.

31 The use of coincidence evidence is particularly problematic since it sometimes appears that there is a lack of understanding at trial level, as to its proper role. Conveniently, Hodgson JA identified in *WRC* (supra) the ways in which it may have a probative value:

> *"31. In some cases, the probative value of coincidence evidence arises entirely from some striking similarity or peculiarity of the related events themselves, which supports an inference that the same person was involved in them. In such cases, if it is shown that the accused was involved in one such event or was the only person who could have been involved in both or all such events, an inference may be drawn that it was the accused who was involved in both or all of them.*
>
> *32. In other cases, the probative value of the coincidence evidence arises not merely from the related events, but also, and especially, from the circumstance that two or more persons independently give evidence of the related events, where it is improbable that they would have given accounts with such similarity unless both or all accounts had foundation in fact.*"

32 The need for particular care in each of the areas of evidence mentioned was emphasised in *KRM v The Queen* (*(2001) 75 ALJR 550*). Additionally, where evidence of sexual misconduct with more than one victim is tendered, in order to rebut coincidence, or as tendency evidence, consideration has to be given to whether or not there was a reasonable possibility of concoction between the several complainants, or of concoction by one complainant after becoming aware of some like event or allegation by another complainant (*BRS v The Queen* (1997) 191 CLR 275 and *R v Colby* [1999] NSWCCA 261). Where such a reasonable possibility exists, that risk deprives the evidence of its significant probative value. In that assessment, a speculative or conjectural possibility of contamination will not justify exclusion; a careful examination of the circumstances of the witness, including opportunity and motive, will accordingly be required.

33 The initiative recently proposed in relation to child sexual assault which would make tendency evidence prima facie admissible if relevant to a fact in issue, and extending the range of matters relevant for consideration, under ss 135 and 137 of the *Evidence Act,* to matters relating not only to fairness so far as the accused is concerned, but also to public interest considerations, may be equally relevant for proceedings involving adult sexual assault.

(b) Use Of Evidence Where There is More Than One Complainant

34 Traditionally, it has been considered necessary to explain to the jury that they cannot use the evidence of one complainant to assist in the determination of the charge or charges that relate to the other complainant: *R v Mitchell* NSWCCA 5 April 1995 and *R v Mayberry* [2000] NSWCCA 531.

35 This is so, even though the accused can seek to use the evidence of each complainant globally, in trying to establish inconsistencies in areas where otherwise one might expect to see common features.

36 The concern which the Courts have relates again to tendency reasoning, and to the prejudice which is thought to attach to it. However, whether juries understand the *Mitchell* direction, particularly when it is given in conjunction with a direction as to the way in which relationship evidence is to be used, is quite another matter.

37 The position would be simplified if the *Mitchell* direction was confined to the circumstance where there is an identifiable risk of there having been contact and a possibility of contamination between the complainants.

38 Again, there may be merit, in extending to adult sexual assault proceedings, the initiative recently proposed in relation to child sexual assault, providing for a presumption that multiple complaints be tried together. Necessarily there would need to be provision for ordering a separate trial, where, in the particular circumstances of the case, there is a real risk of unfair prejudice, as might be the case where

there is a risk of concoction.

(c) Complaint and the Hearsay Rule

39 Evidence of the making, by a victim of a sexual assault, of a complaint can qualify for admission, as an exception to the hearsay rule, as proof of the truth of what it contained (*Papakosmas v The Queen* (1999) 196 CLR 297) if the maker is available to give evidence, and if it was "*fresh*" in the memory of that person at the time of its making (ss 60 and 66 *Evidence Act)*; or if it amounted to an immediate (that is, contemporaneous) representation as to the complainant's health, feelings, knowledge or state of mind (s 72 of the Act). In either case it may additionally be relevant and admissible as a matter going to the complainant's credibility.

40 It might also be admissible by leave under s 108(3), as an exception to the credibility rule, where it is suggested that the complainant's evidence has been fabricated, or re-constructed, or is the result of suggestion. A complaint (prior consistent representation) made years later will not normally be capable of restoring credit or rebutting a suggestion of fabrication or reconstruction, and there is support for the view that proximity of the prior consistent representation to the alleged event may be important for the question whether the evidence has the capacity to rationally affect the credibility of the complainant (s 55 and s 56 of the Act), and hence for the question of leave: *R v BD* (1997) 94 A Crim R 131. Nevertheless s 108 may allow some greater leeway for a complaint that would not otherwise qualify as "*fresh".*

41 Some differences of opinion exist as to what is meant by the expression "*fresh in the memory",* where used in s 66 of the Act, there being suggestions in *Graham v The Queen* (1998) 195 CLR 606 (per Gaudron, Gummow and Hayne JJ) that a complaint is only "*fresh in the memory*", within the meaning of s 66 of the *Evidence Act,* if it was made within a matter of hours or days of the relevant event. In that regard, the term was said to have a temporal connotation rather than one involving a vividness or clarity of recollection.

42 In *R v Le* [2000] NSWCCA 49 it was, however, held that a strict or literal effect should not be given to this passage, relying upon the additional observation of their Honours that a particular application of the section might well raise "*questions of fact or degree",* as to whether an asserted fact was in fact fresh in the memory of the complainant.

43 This has a relevance both as to the basis of admissibility of the evidence, and as to whether some restriction should be placed upon its use, for example as a matter confined to credit (under s 136 of the Act). In *Papakosmas* there were, however, observations supportive of the proposition that s 136 should only be invoked where the dangers attaching to the hearsay nature of the evidence could not be cured by a warning under s 165(1)(a) of the *Evidence Act* (see also *R v TJF* [2001] NSWCCA 127).

44 To add to the complexity of the trial Judge's task, and to the number of matters which the jury is required to take into account, is the circumstance that there are a number of differences between evidence of complaint admitted under s 66 of the Act, and evidence of a prior consistent representation admitted with leave under s 108(3). Where the evidence of the prior representation has been admitted in relation only to credibility, that fact will need to be determined and pointed out: *R v DBG* [2002] NSWCCA 328.

(d) Delay in, or absence of, complaint

45 The fact that the complainant has delayed complaining of a sexual assault, or has not made a complaint at all, has become an important weapon in the defence of sexual assault charges, as well as a frequent occasion for judicial error when summing up.

46 The warning required by a consistent line of authority in the High Court (*Longman v The Queen* (1989) 168 CLR 79, *Crampton v The Queen* (2000) 176 ALR 369 and *Doggett v The Queen* (2001) 182 ALR 1, concerning the *effect of delay* upon the defence, seems however to have an area of illogicality, in the assumption which underlies it.

47 This relates to the assumption that the delay in the making of the complaint means that the accused "*was unable adequately to test and meet the evidence of the complainant": R v Murre* [2001] NSWCCA

286.

48 As was pointed out in *R v BWT* [2002] NSWCCA 60, there may be cases where that is so, for example, where the opportunity to establish an alibi, or to find witnesses or records that could assist the defence has been lost. It may even have that consequence where the complainant's evidence has lost a degree of specificity or accuracy. However, it does not inevitably follow that the delay has meant that the accused had a difficulty in obtaining evidence that would refute the complainant, or otherwise in answering the prosecution case. Clearly that is not the case where the accused was in fact guilty. The presumption of innocence should not, in my view, be taken so far as to give rise to the irrebuttable assumption which seems to underlie this aspect of the now required direction. In fact, that assumption lacks any logical basis in a case where there was no evidence available capable of contradicting the complainant, let alone in a case where the accused was guilty of the offence charged.

49 The more logical approach in relation to the effect of delay is that represented in *R v GPP* [2001] NSWCCA 493 which would permit the warning to be given in terms that the delay "*might have created forensic difficulties*" for the accused in meeting the complaint. Alternatively it might be confined to the case where there is at least some positive evidence of disadvantage to the accused presented to the jury.

50 The *Crofts* direction (*Crofts v The Queen* (1996) 186 CLR 427 and see also *Kilby v The Queen* (1973) 129 CLR 460) which requires the trial judge to balance the explanation that evidence of a failure to complain of an assault, at the earliest reasonable opportunity, does not necessarily mean that the complaint was untrue, (s 107 *Criminal Procedure Act* 1986), with a direction that the jury can take that delay into account as reducing the complainant's credibility, is also problematic. As Gaudron and Gummow JJ had earlier noted in *Suresh v The Queen* (1998) 153 ALR 145, the assumption that the victim of a sexual assault will complain at the first reasonable opportunity is of "*doubtful validity",* as common experience in fact shows. In *Crofts*, it was however emphasised that the equivalent provision (Victoria) was intended to reform, not to remove, the balance of the jury instruction as to delay or absence of complaint; in particular, it was not intended "*to convert complainants in sexual misconduct cases into an especially trustworthy class of witnesses".*

51 It is at least arguable whether the s 107 direction would be seen by a jury, using its own experience of life, as going so far. It is also arguable that the balancing direction in fact entirely negates that direction, particularly where there has been no exploration of the complainant's reasons for delay.

52 It is obviously appropriate that the jury have an explanation that any evidence showing reasons for the delay in, or absence of, a complaint, can be taken into account, in relation to the credibility issue, although the directions must not invite speculation, or suggest reasons which are not supported by evidence: *R v Williams* [1999] NSWCCA 9. Similarly it is appropriate that they have an explanation, in relation to the prejudicial effect of delay, so far as the defence case is concerned, that it is the *fact* of the delay that is relevant, and that the existence of a good reason therefor does not negate any resulting prejudice.

53 However, without some firm basis for the suggestion that the delay might have affected the complainant's credibility, or some evidence pointing to actual prejudice to the accused, it is arguable that the balance has been tipped too far in these respects.

(e) Evidence of recently recovered memory

54 Recovered memory has been a contentious area, giving rise to differences in expert psychiatric opinion as to its validity, as well as to issues concerning its use and admissibility. In part, the problem relates to the possibility of suggestion arising from the literature, and the support groups, which have advanced the theory of suppressed memory, and the existence of various pseudo scientific techniques for its recovery, including EMDR, primal therapy, drug abreaction, guided imagery and various forms of group therapy.

55 There has been a degree of reluctance in the use of such evidence in support of a prosecution, as is indicated by the guidelines promulgated by the Director of Public Prosecutions (NSW), concerning EMDR and hypnosis, which would confine the evidence to matters recalled and related prior to any such intervention (although further detail recalled for the first time, in the course thereof or subsequently may, subject to the Court's ruling, be used in support of the original account).

56 There have also been concerns as to the risk of secondary abuse to the victim, and to the alleged offender, where the recovered memory is shown to be false, as has been the case in several disastrous trials.

57 The distaste of the Courts for the use of hypnosis and similar techniques to enhance memory was reflected in *R v Jenkyns* (1993) 32 NSWLR 712 and in *R v Tillott* (1995) 38 NSWLR 1, in the latter of which the Court of Criminal Appeal considered that it presented risks of suggestibility, confabulation, pseudomemory, an unjustified increase in witness confidence, and possible falsity. As a result, prosecution disclosure is required of any material in the DPP's possession concerning the circumstances in which a memory has been recovered: *R v CPK* NSWCCA 21 June 1995.

58 Evidence from third party witnesses, to the effect that a complainant has disclosed to them that a memory of a sexual assault had only recently been recovered, has been held to be relevant only to the complainant's credibility, and thus inadmissible by reason of s 102 of the *Evidence Act;* not being such as to qualify as an exception to the credibility rule under s 106(d) of the Act (as a matter of which the complainant was "*unable to be aware*"). That does not however mean that the complainant could not be cross examined under s 103 of the Act to suggest that the memory had only recently been recovered: *R v PLV* [2001] NSWCCA 282.

(f) Evidence as to the date of the offence

59 In most instances, evidence of the time when an offence was committed will not concern a matter going to the essence of the charge. However there are cases where it will be so regarded, so that unless the evidence shows that the offence was committed on the day charged, the prosecution will fail. *R v Kennedy* [2000] NSWCCA 487 provides an example of such a case, being one where the date of the offence was fixed as coinciding with a particular event, and where in order to convict the accused, the jury would have needed to treat one part of the Crown case as reliable, and another part as unreliable.

60 Otherwise, problems of duplicity can still arise by reason of the requirement for specificity of particular acts when an offence is of an ongoing, or repeated nature, or involves multiple forms of invasion on a single occasion: *S v The Queen* (1989) 168 CLR 266 and *R v Khouzame and Saliba* (1999) 108 A Crim R 170. The nature of a typical sexual assault, particularly a prolonged or repeated assault, does not lend itself well to any legal system dependent upon undue specificity. It remains preferable, in my view, to permit such offences to be charged in a more general way, for example, by a charge of unlawful sexual activity or unlawful sexual dealing (as to which some precedent exists in relation to the persistent sexual abuse of a child under s 66EA of the *Crimes Act* 1900 (NSW).

(g) Medical history taken by an examining doctor

61 Commonly, the Crown considers it necessary to call evidence from the medical practitioner who conducted a sexual assault examination. Questions have however arisen as to the admissibility of the history taken, because of its hearsay nature, and also as to the relevance of the findings where, as commonly occurs, they are neutral.

62 In *R v RTB* [2002] NSWCCA 104, it was held that a history of sexual assault wider than the acts charged was inadmissible as irrelevant, and as not providing the basis for the opinion given. The use of s 136 of the *Evidence Act* to limit the use of a history, as the basis of the opinion, and not as proof of the truth of the facts asserted, was suggested to be an appropriate course, so as to remove the risk of unfair prejudice.

63 Where the evidence is neutral, in the sense of neither establishing nor excluding the commission of the offence, it will often be appropriate for it to be adduced, to ensure that the jury does not speculate about the absence of a medical evaluation. In this respect the offering of an opinion that, although neutral, the examination was "*consistent with*" the complainant's evidence, is recognised as problematic, particularly if given in response to a leading question from the Crown Prosecutor. If evidence of this kind is given, it was suggested in *RTB* that it should be done in a way that does not bolster the complainant's credit.

64 Other possible approaches can be considered, for example those suggested by Heydon JA in *R v Dann* [2000] NSWCCA 185. They include agreement between the Crown and defence not to call any medical evidence on the issue, and to ask the trial Judge to direct the jury not to attach any significance to the absence of such evidence; and/or the securing of an undertaking from the defence not to comment on the absence of such evidence if it is not called.

65 In some cases, the Crown may be in possession of conflicting medical opinions as to the occurrence or otherwise of a sexual assault. As appears from the decision in *R v ATM* [2000] NSWCCA 475, it will need to exercise considerable care in dealing with any such conflict, given its duty to serve the reports of both doctors and to call all relevant evidence. In that case, it was held that the calling of one Doctor to give evidence that the opinion of the other doctor may have been unreliable, when that had not been suggested to the latter, was unfair, leading to allowance of the appeal. The suggested solution was for the Crown to have sought leave, under s 38 of the *Evidence Act,* to cross examine the doctor whose evidence it sought to discount as an "*unfavourable witness*".

(h) Aggravated sexual assault – in company

66 Of relevance, for group sexual assaults, is the decision in *R v Button; R v Griffen* [2002] NSWCCA 159, concerning the meaning of the expression "*in company*". It was there held that physical presence is an elastic concept and that evidence showing sufficient proximity, at the time of penetration, as would enable the inference that the *coercive effect of the group* operated, either to embolden or to reassure the offender, in committing the crime, or to intimidate the victim into submission, would suffice. Additionally there would need to be evidence that the accused, and the person or persons said to be in company, shared a common purpose to sexually assault the victim.

Absence of consent

67 In order to make out a sexual assault offence depending upon an absence of consent, the Crown must prove, not only that the complainant did not consent, but also that the accused knew that to be the case, or was reckless in that regard.

68 Yet again this is an area of some complexity for a jury in appreciating the meaning of "*reckless*" in so far as the accused's state of mind is concerned. In summary, for this element of the offence to be made good, the jury must be satisfied by the Crown, beyond reasonable doubt upon the evidence, either that:

> (i) the accused adverted to the possibility that the complainant was not consenting, and, with that awareness, proceeded to have intercourse in any event: *R v Hemsley* (1988) 36 A Crim R 334; or
>
> (ii) if the accused did not turn his mind to the question of consent at all, the risk that the complainant was not consenting was one which would have been obvious to a person of his mental capacity had he turned his mind to it: *Regina v Tolmie* (1995) 37 NSWLR 660.

69 While this second formulation appears to have an objective flavour to it, so far as it relates to a "*risk…that would have been obvious*", it remains the case, as established by *R v Newham* NSWCCA 26 November 1993, *R v O'Meagher* (1997) 101 A Crim R 196 and *R v Mitton* [2002] NSWCCA 124, that what is in issue is the *subjective* state of mind of the accused. The direction which is required in this respect runs into the now familiar difficulty which Judges and juries confront when dealing with offences which depend variously upon objective or subjective states of mind.

(i) Prior Good character

70 As the High Court held in *Ryan v The Queen* (2001) 206 CLR 267, there is no rule minimising the relevance of good character, on the part of an accused, in sexual assault cases. Although that decision was concerned with a sentence hearing, it is equally applicable where character evidence is led at trial.

71 Since such evidence may go to propensity (tendency) and/or credibility, it is important that the trial judge makes it clear both in relation to ruling on admissibility, and when summing up, as to the way in which it is to be used: *Melbourne v The Queen* (1999) 198 CLR 1, where McHugh J pointed out that there was something of a flaw in relation to the approach of the common law to character, so far as it tends to treat people as "*one-dimensional personalities who have either good or bad characters or dispositions".*

72 The extent to which the Crown can question the character of the accused is constrained by the *Evidence Act*. First, s 104(2) precludes cross-examination of the accused "*about a matter that is relevant only because it is relevant"* to his credibility (subject to the exceptions noted in s 104(3), unless the Court gives leave. Secondly, where evidence of good character is led by the defence, the Crown requires leave under s 112 of the *Evidence Act* to cross examine the accused in relation to any matters which are said to rebut that evidence; and this, in turn, requires that reference be made to the considerations specified in s 192 of the Act as being relevant to the exercise of discretion which is involved. They relate to the effect of such cross examination upon the length of the hearing, any unfairness occasioned to either party, the importance of the evidence, the nature of the proceedings and the nature of any direction which may be required or given in relation to the evidence: *Stanoevski v The Queen* (2001) 202 CLR 115.

73 Of some relevance is the recent decision of the High Court in *TKWJ v The Queen* [2002] HCA 46, negating the proposition that the trial judge was empowered or authorised to give an advance ruling as to how discretions, such as those conferred by section 135 and 137 of the *Evidence Act,* should be exercised, in relation to the admissibility of evidence which the Crown foreshadows calling in rebuttal of any evidence of good character, which the defence wishes to call. However, it was suggested that advance rulings may be appropriate where leave, permission, or a direction is required under s 192 of the Act.

74 Somewhat intriguingly the Criminal Justice Bill 2002 (UK), which followed upon the Review of the Criminal Courts of England and Wales conducted by Auld LJ (2001), would permit the introduction of evidence concerning previous convictions of the accused in certain situations, including those where it amounted to important explanatory evidence, where it constituted evidence of a conviction for a similar offence to that charged, where it was relevant to an important issue and had substantial probative value, where it would correct a false impression given by the accused, or where the accused had made an attack on another person's character.

(j) Why would the complainant lie?

75 Following the decisions in *R v Jovanovic* (1997) 42 NSWLR 520, *Palmer v The Queen* (1998) 193 CLR 1 and *R v Smith* [2000] NSWCCA 468, the posing for the jury of this question (whether in the prosecution address or in the summing up) requires considerable care, and should be avoided, unless it has been ventilated as a factual issue going to motive, either in the cross examination of the complainant, or in the defence case. That is so, even though it is a question which, almost inevitably, the jury are likely to ask of themselves, arising out of their own experience of life.

76 Where it does become appropriate for that question to be ventilated, it will normally be necessary to remind the jury that even if they reject the motive to lie suggested by the accused, it does not follow that the complainant is necessarily telling the truth (*Jovanovic).*

77 On the other side of the record, it remains inappropriate for the Crown to cross examine an accused as to whether he suggests that the complainant, or other prosecution witnesses, were lying, or to put to the accused that he cannot suggest a reason for any such lie. Such line of cross examination, it has been held, amounts to an invitation to the accused to enter into the mind of these witnesses and to say whether he thinks that what they said was due to invention, malice, mistake or some other cause. As such it risks deflecting the jury from a proper assessment of their credibility, in accordance with the burden of proof resting upon the Crown: *R v Gilbert* NSWCCA 10 December 1998 and *R v Dennis* [1999] NSWCCA 23.

78 The validity of such assumptions remains arguable, as McHugh J pointed out in *Palmer*, particularly in so far as it departs from the way in which most members of the community would think. Silence on the topic only allows what is regarded to be a forbidden line of reasoning to be applied. However, to make any mention of it will only invite its consideration, that is, if it has not already operated in the

minds of a jury, which has seen the complainant put through the pain and embarrassment of a vigorous cross examination.

(k) Accused electing not to give evidence

79 Since the decision of the High Court in *Azzopardi v The Queen* (2001) 205 CLR 50, the circumstances in which a trial judge can inform the jury (by way of a comment) that it can draw inferences more safely because of the failure of the *accused* to enter the witness box, have been heavily circumscribed. In practical terms, save perhaps in a "*smoking gun*" case, or in a circumstantial case where there are *additional* facts which would explain or contradict an otherwise compelling inference of guilt, and which could only come from the accused, the giving of such a direction would now seem to be fatal.

80 In those rare cases where the present law would permit a comment, it seems that it should be phrased in terms of a failure to
"*provide an explanation such as might have been expected if a truthful explanation would have been consistent with innocence*", rather than a failure to give evidence (per McHugh J in *RPS v The Queen* (2000) 199 CLR 620 and per McHugh and Gaudron JJ in *Azzopardi v The Queen).*

81 Moreover it would need to be given as a comment, (rather than a direction of law) which the jury are free to disregard, and placed in its proper context. That is, the judge would need to identify the facts which are said to call for an explanation, and to give directions concerning the onus of proof as well as to underline the absence of any obligation in the accused to give evidence; pointing out that his election not to do so does not constitute an admission of guilt, and that it cannot be taken to fill in any gaps in the prosecution case, or used as a make-weight in assessing whether the Crown has proved its case.

82 As a result of the decision of the High Court in *Dyers v The Queen* [2002] HCA 45, it is also now impermissible to give a *Jones v Dunkel* direction in a case where an accused has given exculpatory evidence even though, in the course of so doing, he has suggested that there are witnesses who could support that evidence, yet has failed to call them in his case.

83 The decision rests upon a strict application of principle relating to the burden of proof, and upon the obligation of the Crown to call all relevant available evidence.

3. SOME POSSIBLE INITIATIVES

84 While there are sound policy reason for not creating significant differences in relation to the evidence which may be led, or in relation to the procedures which may be utilised, according to the nature of the case, there are some initiatives which are worthy of consideration, which may better reflect the dynamics of sexual assault.

(a) Sexual Assault examination

85 One area for potential conflict between expert witnesses which has been addressed in some jurisdictions, is the initial sexual examination.

86 Those jurisdictions encourage the use of colposcopy, which is either video recorded or captured by digital camera, and which can produce a precise visual record of any signs of sexual trauma. That record can be reviewed both by experts, and if need be, by counsel and the jury. Some jurisdictions allow on-line review, either contemporaneously with the initial examination if a defence expert is available, or subsequently.

(b) Pre trial video recording of the complainant's evidence

87 Initiatives already exist, and have been recommended from time to time, whereby the testimony of the victim of a sexual assault could be pre-recorded and admitted into evidence at the trial, at least as

that witness's evidence in chief (for example in the case of children: see *Evidence (Children) Act* 1997, Part 3, although subject to the complainant being available for cross-examination, and also subject to the need for the jury to be warned not to draw any inference adverse to the accused, or to give the evidence any greater or lesser weight because it was given in this way). Depending upon how close to the events in question the recording occurs, it could be of considerable value in encouraging greater specificity, in avoiding errors due to the inevitable lapses in memory which occur with the passage of time, and in reducing the trauma of the delay between charge and trial, as well as those associated with the giving of oral evidence in a Court room setting.

88 Whether the accused should be permitted to participate in the video recording, through counsel, is a matter upon which legitimate debate exists. As is the question whether the impact of the witness's evidence in chief might be reduced if not given live, that is, in the presence of the jury. Some would argue strongly that pre trial recording, or the taking of evidence by video link, would rebound against the prosecution. They would also argue that there is merit in allowing the complainant an opportunity to settle into the witness box, and into the adversarial environment, by being allowed to give evidence in chief before being exposed to cross-examination.

(c) Pre trial defence disclosure

89 Sexual assault cases, which depend so heavily upon the word of the complainant, lend themselves particularly well to the defence approach of pre trial silence, and even trial by ambush. Rarely will the Crown know in advance whether the issue for trial is whether the acts charged occurred at all, or is one concerning consent, identification, or otherwise.

90 At present, the pre trial disclosure regime is limited to complex trials, although some incentive now exists for defence co operation with the Crown in limiting issues, or in focussing on shortening the trial, at least so far as sentencing is concerned (s 22A *Crimes (Sentencing Procedure) Act* 1999.

91 The time is ripe for a consideration of extending the pre trial disclosure regime to a wider category of cases than those currently within its reach, and for the introduction of more effective sanctions for non co operation.

(d) Evidence via audio or audiovisual link

92 While the facility exists for evidence to be given by audio or audiovisual link (*Evidence (Audio and Audio Visual Links) Act* 1998), or from a remote location, it is used relatively infrequently, and is subject to somewhat stringent conditions for its approval in a trial (s 5B(2)) and for its deployment (ss 20A and 20B).

93 A case may well exist to permit its greater use in circumstances where that may fairly be said to reduce the trauma to the complainant of giving evidence in an open court, and in the immediate presence of the accused and his associates.

(e) Protection of vulnerable witnesses

94 In the United Kingdom and Scotland, steps have recently been taken to provide better support for victims and vulnerable witnesses via an array of measures including the establishment of a Witness Liaison Service to liaise with the prosecution service, and with the defence and criminal justice agencies; the provision of separate facilities for victims and witnesses in order to maintain their physical separation from the accused and their associates; the closing of the court; the concealment of names and addresses of complainants, and other ways of ensuring anonymity.

95 In New South Wales there is a statutory power to allow certain proceedings to be heard in closed courts (s118 *Criminal Procedure Act* 1986 and arguably s 80 of the *Supreme Court Act*); and to suppress publication of the evidence given in those proceedings (s 119 of the *Criminal Procedure Act*). It is not, however, a power which is widely exercised, and it is one, in relation to the exercise of which, the media (although query the complainant or witnesses) may seek leave to be heard: *Nationwide News Pty Limited v District Court of New South Wales* (1996) 40 NSWLR 486. Of significant

importance, at least where adults are concerned, has been the desire to ensure that criminal procedings in the courts remain open to public scrutiny (*Raybos Australia Pty Limited v Jones* [1985] 2 NSWLR 47 and *John Fairfax and Sons Pty Limited v Police Tribunal of New South Wales* (1986) 5 NSWLR 465). In the weighing exercise the specific concerns and needs of complainants, however, have not always been adequately addressed.

96 Under s 578A(2) of the *Crimes Act* 1900, there is a general prohibition upon the publication of any matter which would identify or which would be likely to identify the complainant in prescribed sexual offence proceedings. Exceptions are created under s 578A(4) of the Act. Additional restrictions arise in cases where the accused is a child, under s 11 *Children (Criminal Proceedings) Act* 1987, which similarly permits of certain exceptions. It cannot however be said that the occasion for their exercise has not been without a deal of controversy, relating in particular, to what might be in the "*public interest*" (s 578A(5) *Crimes Act*), or in the "*interests of justice*" (s 11(4B) and (4C) of the *Children (Criminal Proceedings) Act)*.

97 The uncertainty and the limitations attaching in this area do raise the question of whether there should be a more general power to suppress the publication of evidence, or for the use of pseudonyms, in particular where it is thought necessary for the proper administration of justice, including the protection of the victim of a serious sexual assault from further risk of harm. Additionally, consideration could beneficially be given to clarifying the entitlement of the media, along with others having a sufficient interest in the matter (such as the complainant), to be heard on the making of the relevant order or its variation or revocation (and upon any appeal).

98 Also of importance is the consideration, identified in the recent review conducted by the Honourable Gordon Samuels QC, of the need for prosecution authorities to maintain close contact with complainants, and to keep them both informed and consulted in relation to important decisions concerning the abandonment of charges, or the acceptance of pleas to lesser charges in full satisfaction of an indictment. A common complaint has been that victims have not been sufficiently apprised of developments in relation to pending prosecutions, or as to their progress. Sensitive and adequate communications with witnesses is essential, not only in relation to the fair prosecution of any complaint, but also in relation to the well being and recovery of the victim from the double trauma of sexual violation, and the processes of the justice system. Equally important, it is suggested, is the continuity of those involved in the investigation and prosecution of offences, in order to build a relationship of trust and understanding, and to deal with emerging problems and fear on the part of the victim.

(f) Restrictions on cross-examination of the complainant

99 A familiar complaint in sexual assault cases is that the accused was permitted to cross examine the complainant in a way that was unduly aggressive, humiliating, confusing or intimidating.

100 It is the case that, under s 41 of the *Evidence Act*, a trial judge may disallow questions put in cross-examination, or inform the witness that they need not be answered, where they are "*misleading"*, or "***unduly*** *annoying, harassing, intimidating, offensive, oppressive or repetitive";* and that in so ruling the Judge may take into account any relevant condition or characteristic of the witness, as well as any mental, intellectual or physical disability to which the witness is subject.

101 This is a power which is seldom invoked, possibly out of fear that the defence will use it to its advantage, by attracting counter sympathy from the jury that it is not being given a "*fair run"*. In truth, such fear is misguided because an aggressive and unfair cross-examination can be suitably dealt with by the Judge in the absence of the jury.

102 A somewhat radical solution would involve limiting the cross examination of a complainant, either wholly or in relation to particular issues, for example consent, unless the accused undertakes to give evidence generally, or in relation to that issue. A less radical solution would be to permit the Crown or judge to comment upon the failure of the accused to give evidence, where a complainant has been subjected to a vigorous attack in relation to the credibility of the complaint.

103 In some jurisdictions, restrictions have been proposed, or introduced imposing some restraints upon the cross examination of the complainant – for example, by disallowing an accused, who appears in person to do so, or by appointing a court selected advocate to undertake the cross examination on

his behalf: for example the *Sexual Offences (Procedure and Evidence) Act* 2002 (Scotland). Each is worthy of consideration.

(g) "Rape Shield Laws"

104 The balance between the protection of the complainant, by restricting cross examination upon her past sexual reputation and history, and ensuring to the accused a fair trial (for example as contained in s 105 of the *Criminal Procedure Act* 1986), has recently attracted attention in several jurisdictions. One such decision was that of the House of Lords in *Regina v A* [2001] UKHL 25, where the possibility of the relevant provision (s 41 of the *Youth Justice and Criminal Evidence Act* 1999*)* infringing the accused's right to a fair trial (under Article 6 of the European Convention of Human Rights) raised its head. In the end, the question was not resolved, it being held that where the material in question was so obviously relevant that its exclusion would endanger the fairness of the trial, evidence of such a relationship and cross examination concerning it, were admissible.

105 The Michigan model, on which s 105 of the *Criminal Procedure Act* is based, has been held to be unconstitutional in Canada and replaced by a redrafted provision, which excludes evidence of other sexual activity where it is relied upon to support an inference that by reason of it, the complainant was more likely to have consented, and is less worthy of belief. There are however exceptions which permit its reception, if the Judge determines that it involves specific instances of sexual activity, that it is relevant to an issue in the trial and that it is not significantly outweighed by the danger of prejudice to the proper administration of justice (see *R v Darrach* 191 DLR (4th) 539 for its operation).

106 Research has suggested that despite the legislation, evidence of sexual reputation and prior sexual experience is, from time to time, introduced in sexual assault trials via the permitted exceptions. Where it is not admitted, the emphasis in cross examination is often turned to other topics such as the complainant's mental state, or her drinking and drug taking habits, in order to discredit her. A question arises as to whether similar limitations should not apply in relation to such avenues for cross examination.

107 The observation has also been made (by Heydon JA (as he then was) in *R v Dann* [2000] NSWCCA 185) that while the rape shield laws were introduced in order to protect complainants from oppressive cross-examination in relation to their private sexual lives, they are cast in language which renders the particular evidence inadmissible and can be equally invoked by an accused if it suited his case to do so. There is a need for a continuing review of the operation of rape shield to ensure that they are not being circumvented or abused.

(h) Possible Innovations from the Inquisitorial system

108 In a study conducted by the Dublin Rape Crisis Centre, in conjunction with the School of Law, Trinity College, Dublin (*The Legal Process and Complaints of Rape: a comparative analysis of the laws and legal procedure relating to rape and their impact upon complaints of rape, in the fifteen member states of the European Union – 1988*) attention was drawn to several possible innovations, including:

> (i) The examination of witnesses by the Judge. Although seen as less confrontational for the complainant, there was however a concern by complainants that questioning by a judicial officer left an impression of hostility or partiality on his or her part;
> (ii) The complainant being given separate legal representation. This practice has been adopted in France and Belgium and is one where the complainant is seen as a party rather than as a witness. In Denmark, a victim of sexual assault is provided, upon request, with a lawyer, who is permitted to represent that party at all stages of the proceedings;
> (iii) The training and use of specialist judges in cases of sexual assault.

109 Some initiatives along these, and similar lines, have been seen in the recent recommendations of the Law and Justice Committee for a new model for prosecuting child sex offenders, which include a pilot project to trial a specialist court. Assessment of that project, for its possible extension to trials involving charges of adult sexual assault, would appear to have merit.

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Forensic Sciences from the Judicial Perspective

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Forensic Sciences from the Judicial Perspective

Justice Wood

Supreme Court of New South Wales

1. THE EXPERT WITNESS IN THE AGE OF TECHNOLOGY

1.1 Well before the acceptance of forensic evidence in the courts, Sherlock Holmes remarked to Dr Watson "*They say that genius is an infinite capacity for taking pains… It's a very bad definition, but it does apply to detective work*" [1].

1.2 That observation provides the theme for this paper which examines the particular care required of law enforcement, the forensic sciences community, the legal profession, and the judiciary in a system of criminal justice which has moved so dramatically from "*confessional* evidence" to evidence based prosecutions which are heavily dependant upon forensic analysis, and particularly upon DNA profiling.

1.3 The emergence of DNA profiling as a key weapon in law enforcement over the last two decades has been nothing short of startling. It has also occurred at a time when many of those involved in the justice system have thought it necessary to take a critical look at the role of the expert witness, a review which has an immediate relevance for the forensic scientist or criminalist.

1.4 The unravelling of the mystery of DNA as the chemical which carries the genetic code of each human body occurred in 1953, as a result of the work of James Watson and Francis Crick, for which they received a Nobel Prize.

1.5 Its first forensic use came 1986, some thirty years later when Leicester Police called on the assistance of Professor Alex Jeffreys to help solve the rape and murder of two young girls. Following the later discovery of the subterfuge which Colin Pitchfork had adopted to avoid mass screening, and a subsequent match of DNA recovered from crime stains with his DNA profile, the new technology secured his conviction. The claim to being the first person convicted through its use however went to Robert Melias, in 1987, for rape [2].

1.6 DNA profiling then began its voyage into the armoury of law enforcement officials, replacing to a considerable extent the traditional forensic tool of serological matching, based upon inherited characteristics manifested in blood and other body fluids identified through antigen, enzyme or protein tests.

1.7 The experiences of that voyage bear remarkable similarities to those of fingerprinting, which was accepted in England for criminal identification purposes in 1901, following the inclusion of fingerprints in the anthropometric system which was developed by Alphonse Bertillon in France, and the publication of Sir Francis Galton's book "*Fingerprints*" [3].

1.8 The advantage of DNA profiling lies in the circumstance that DNA (deoxyribonucleic acid) is contained in the 23 paired chromosomes in the nucleus of human cells, which are inherited from one's biological parents, and that apart from identical twins, the DNA of each individual is thought to be unique. It is the minor anomalies or differences in DNA between individuals (the polymorphisms) that provide the key to profiling, and which permit the DNA from crime stains (tissue, blood, semen, bones, teeth, bodily wastes, saliva, sweat and hair), or from a foetus, to be matched with the DNA profile of a suspect or putative parent, either to exclude that person as a suspect or parent, or to include them as a person of continuing interest for investigative purposes.

1.9 There have been considerable advances in the technology used to scan DNA's double helix molecules, consisting of sugar and phosphate, and the four bases of adenine, thymine, guanine and cytosine which join together to make the rungs of the twisted ladder which the molecule resembles and which form the code of life.

1.10 Restrictive Fragment Length Polymorphism (RFLP), which was developed in 1984, has now been replaced by Polymerase Chain Reaction Amplification (PCR), which has permitted the examination of smaller crime stains and greater quality resolution, as well as avoiding problems such as the mysterious "*band-shift*" which had raised its head on occasions.

1.11 Mitochondrial DNA profiling has opened up a new vista in so far as it allows the examination of the DNA which is found in cells that do not have a nucleus (eg mature red blood cells and hair shaft cells), as well as severely degraded cells. It does not however permit the same level of discrimination since there are only a limited number of locations that can be tested. Moreover, mitochondrial DNA is only inherited from one's mother. As a consequence, maternally related individuals will have a shared profile. The development of the potential to recover and analyse traces of DNA deposited as the result of touch, and from shed skin (epithelial fractions) is similarly of considerable significance for the investigation of property crime and drug offences [4].

1.12 The similarities between fingerprint analysis and DNA profiling is not confined to the initial resistance to their reception as evidence in criminal prosecutions, or to their progressive acceptance by the scientific community, or even to the assumption as to the existence of individual characteristics which underpins them, and which led Professor Jeffreys to coin the unfortunate expression "*DNA fingerprints*" for his system. As this paper will examine, it is the creation of similar databanks, their potential use beyond the investigation of a particular crime, and the extent to which the evidence emerging from analysis can be subject to error or manipulation that is of contemporary significance.

1.13 These questions collide neatly with the proper role which the criminalist or forensic scientist should now occupy, and with the responsibilities of the legal profession in protecting privacy interests, and in avoiding miscarriages of justices.

1.14 While DNA profiling is unlikely to be the last emerging technological innovation in law enforcement, it provides a suitable vehicle for an examination of the justice outcomes which are associated with developing forensic science, and of the need to ensure that it does not capture the justice system, to the exclusion of the human element.

2. DNA IN THE INVESTIGATIVE PHASE

(a) Validity of the Analytical Technique Used

2.1 From 1998, all Australian jurisdictions agreed to utilise the Profiler Plus system developed by the Perkin Elmer Corporation, and as a consequence a common standard has been created for DNA profiling in Australia. It has replaced various other techniques which had been used, for example the quadruplex system which similarly used short tandem repeat (STR) analysis [5].

2.2 After several challenges, the Profiler Plus system has been held to be reliable and accepted by the forensic scientific community [6]. It is a system which analyses the length variation of alleles at a number of short tandem repeat loci, in the non coding or "*junk"* regions which account for approximately 97% of the total human genome, and also looks at the amelogenin locus which determines the individual's gender.

2.3 The laboratories employing the system utilise reference databases of frequencies of allele values for each of the relevant STR locations for Australian populations and sub-populations, from which, by an application of the product rule (multiplying the probability of the occurrence of each of the alleles at

the nine loci), one may arrive at a statistical probability of a random match.

2.4 As the test analyses areas of the genome that have no bearing on the phenotype, it cannot be employed to detect other physical characteristics or future vulnerability to disease, although work has been under way investigating its possible use to determine ethnicity.

2.5 It is the fact that many genes for physical characteristics have now been identified, and the potential exists for advances in the human genome mapping project, which began in 1990 and led to the announcement of a working draft ten years later, to produce further refinements in this area, and to add to the matching potential of existing technology.

2.6 Care will be needed whenever any new system of analysis is produced, to subject it to the kind of rigorous review which has been applied to Profiler Plus, to understand the extent to which physical characteristics are governed by genetic components, and by environmental factors such as nutrition and sun exposure, and to be aware of contamination possibilities.

2.7 The latter is of importance since polymerase chain reaction amplification is particularly susceptible to contamination by foreign DNA. Moreover, care and skill are needed in the amplification stage, so as to prevent distortion through over-amplification or the stochastic effect which results from under-amplification; and in the interpretation of the electropherograms upon which the system relies, particularly where artefacts such as "*stutters*" or "*pull ups*" occur, or where there is a possible mixture of two or more different strands in a DNA sample.

2.8 In this regard the decision of *R v McIntyre* [7] is of importance so far as it rejected the challenge to a Profiler Plus analysis raised on the voir dire, based upon the proposition that, where nullalleles have been reported, a valid result cannot be achieved, for the suggested reason that it, or similar systems, cannot discriminate between a homozygote and a nullallele. That was however preserved as an issue which was potentially capable of being resolved by a jury.

2.9 In view of the need for accepted and relevant standards [8], and for accreditation and regular re-evaluation of laboratories, so as to secure the viability of a national database, it is essential that any change in new analytical techniques and the technology used be uniform, at least on a national basis, and that it be subjected to suitable validation studies.

(b) Exhibit Integrity

2.10 Critical to the value of DNA evidence is the need for extreme care in the crime scene investigation to document the precise circumstances in which a crime stain is collected, and to ensure that there has been no contamination, either deliberate or accidental in relation to it.

2.11 For this to occur, police and technicians involved in crime scene investigation require specific and extensive training to ensure, for example, that:

· exhibits are properly identified and continuity of exhibit movement is carefully controlled and documented;
· investigators walking through the crimes scene, or handling suspects, do not transport crime stains or exhibits to them;
· exhibits and crime stains do not become intermingled, or degraded through the effects of sunlight, heat and humidity, or contaminated by exposure for example, to yeast, bacteria or fungus;
· available DNA samples collected in relation to a crime scene are in fact tested, thereby avoiding the wrongful conviction which was later quashed in a recent case in Queensland where exculpatory evidence was found when seminal fluid stains on bed sheets were subjected to later DNA testing [9], and that;
· proper laboratory standards and controls are maintained, of the kind which, if adopted, would have avoided the potentially disastrous consequences for DNA evidence arising from the 1989 decision in *The People of the State of New York v Castro* [10].

2.12 Of potential concern in this regard is the possibility of noble cause corruption occurring in circumstances where, police who suspect a particular person of a crime, manage surreptitiously to secure a DNA sample (eg from a cigarette butt, hair, dandruff, blood or bodily fluids) following the crime, and then introduce it into the crime scene.

Fingerprint lifting has not been entirely unknown, but the possibilities for the corrupt use of DNA samples are very much greater, and require vigilance on the part of police services, forensic experts, prosecutors and defence lawyers alike.

2.13 The possibilities in this regard are not, however one sided, since there have already been experiences of suspects switching suspicion to others through the exchange of bodily fluids, or of confounding the apparent results of DNA analysis. In one such case an imprisoned rapist sent a sample of his semen to a female friend so that she might report a rape case allegedly occurring while he was in custody, revealing a DNA profile which apparently matched his.

(c) Investigative Use

2.14 Police do need to understand their duty to employ the technology fairly, and where appropriate to reveal test results which are capable of excluding a suspect. Already in the United States, an Innocence Project has led to a significant number of pardons, or to the quashing of convictions, of persons previously found guilty of murder and serious sexual offences, on the basis of suspect forensic evidence. In New South Wales a similar project has been established.

2.15 Moreover, it is important that police do not refrain from testing crime stains, or conceal their discovery, out of fear that they may exclude a suspect. The Justice System expects more than the bare compilation of impressive conviction statistics. It is degraded by unfair convictions.

2.16 In this context it is also important that if the results of DNA testing are put to a suspect in the course of official questioning, that it be done fairly and accurately. In a recent case [11], the suspect was informed that DNA analysis had excluded two other possible suspects, that there was a less than 0.0001% chance that he was not the father of the victim's child, and a 99.999% chance that he was its father. He was then asked to comment on these results. Clearly this exchange erroneously stated the significance of the tests and had it resulted in a confession, the evidence of it would almost certainly have been excluded [12].

2.17 There is nothing wrong with a police officer placing before a suspect, evidence which suggests that his or her account could not be true [13]. However, it is important that this be done fairly, and as a result police do need to take care that they understand the significance and limitations of any forensic evidence, lest they render an interview, or confession, inadmissible by reason of inappropriate questioning.

3. DNA IN THE COURT ROOM

3.1 A clear understanding by trial lawyers, and by the Judiciary, of what is involved in DNA profiling, and of the limitations of the technology, is essential lest it be used in a way that leads to a miscarriage of justice.

(a) The Prosecutor's Fallacy

3.2 It took some little time before judges and lawyers came to understand the precise significance of DNA statistical evidence, and of the risk of its misinterpretation in the way which has to come to be known as "*the Prosecutor's Fallacy*".

3.3 An example of the fallacy was given in *Regina v Doheny and Adams* [14], in the following terms:

> "*It is easy, if one eschews rigorous analysis, to draw the following conclusion:*
> *(1) Only one person in a million will have a DNA profile which matches that of the crime stain.*
> *(2) The defendant has a DNA profile which matches the crime stain.*
> *(3) Ergo there is a million to one probability that the defendant left the crime stain and is guilty of the crime*."

3.4 The error in the reasoning was succinctly explained as follows:

> "*Taking our example, the prosecutor's fallacy can be simply demonstrated. If one person in a million has a DNA profile which matches that obtained from the crime stain, then the suspect will be 1 of perhaps 26 men in the United Kingdom who share that characteristic. If no fact is known about the defendant, other than that he was in the United Kingdom at the time of the crime the DNA evidence tells us no more than that there is a statistical probability that he was the criminal of 1 of 26.*
> *The significance of the DNA evidence will depend critically upon what else is known about the suspect. If he has a convincing alibi at the other end of England at the time of the crime, it will appear highly improbable that he can have been responsible for the crime, despite his matching DNA profile. If, however, he was near the scene of the crime when it was committed, or has been identified as a suspect because of other evidence which suggests that he may have been responsible for the crime, the DNA evidence becomes more significant. The possibility that two of the only 26 men in the United Kingdom with the matching DNA should have been in the vicinity of the crime will seem almost incredible and a comparatively slight nexus between the defendant and the crime, independent of the DNA, is likely to suffice to present an overall picture to the jury that satisfies them of the defendant's guilt*."

3.5 The existence of this fallacy, and the need to avoid it, are now well recognised [15]. That it is a fallacy lies in the circumstance that the statistical probability within the relevant population does not translate to the same statistical probability for a given member of that population.

(b) The Defence Attorney's Fallacy

3.6 The defence attorney's fallacy has been described as the suggestion that associative statistical evidence is irrelevant regardless of the "*matching*" [16]. What this fails to take into account is the circumstance that the great majority of the pool of people with relevant or potentially relevant DNA matching are not suspects, or persons against whom any extrinsic evidence exists linking them to the case.

3.7 The real force of DNA evidence, as the observations in *Doheny and Adams* show, relates to the impact which it may have for persons who are otherwise shown to have had an opportunity to commit the crime, or to have some link with it. It will be a rare case indeed which rests upon evidence of DNA matching alone.

3.8 A good example of this is a case involving the sexual assault of an intellectually disabled woman which led to her pregnancy and stillbirth [17]. She was a resident of a group home in circumstances where only 5 males had any opportunity of contact with her. Two were patients with serious disabilities which meant that it was impossible for them to have had intercourse with her. The remaining three men were workers at the home. Two of those workers were excluded by DNA profiling of the foetus and blood samples which they provided. Profiling of the third man, the accused, produced a paternity index figure showing that it was 2.4 million times more likely that he was the biological father of the foetus than anybody else taken at random from the community.

3.9 Although various errors were found to have occurred in relation to the way in which the results of this analysis were placed before the jury, the combined circumstances of the case were such that the proviso was applied, the Court of Criminal Appeal being satisfied that he had not lost a chance of acquittal.

(c) Bayes' Theorem

3.10 Attempts to employ Bayes' Theorem as a method whereby a jury might piece together the impact of discrete pieces of evidence tendered as proof of guilt, including DNA evidence, and then reach a numerical probability weighting to other pieces of evidence that bear on the likelihood of an event happening has been given a cold shoulder by the courts. In *Regina v Adams* [18] it was said [19] that to introduce it, or any similar method into a criminal trial "*plunges the jury into inappropriate and unnecessary*

realms of theory, and complexity deflecting them from their proper task" [20].

3.11 This does not, however, mean that the DNA evidence should not be taken into account as part of a circumstantial case, in which the other elements might include matters such as opportunity, motive, and so on.

(d) The Appropriate Directions To The Jury

3.12 Recent decisions have established several principles providing guidance as to the nature and extent of the information which may or should be placed before a jury, and the assistance which the trial judge should give in relation to it.

Arithmetical Figures

3.13 In a recent case [21], the trial judge allowed the Crown to lead evidence that the DNA testing showed that the accused could have been the father of the child born to the girl who he had allegedly sexually assaulted, but ruled that it could not place "*arithmetical figures*" before the jury. On appeal, it was held that the paternity index figures, but not the relative chance of paternity percentages should have gone to the jury.

3.14 The total exclusion of *"arithmetical figures*", it was held, risked skewing the evidence of the expert who had been called to establish the results of DNA analysis, without contributing to the fairness of the trial [22].

3.15 The exclusion of the relative chance of paternity expressed as a percentage was justified upon the basis that, being so close to 100% (99.9995% according to one expert and 99.9993% according to another expert), there was a real risk of the jurors concluding that there could be no reasonable possibility that the appellant was not the father of the child. Clearly the danger with evidence of that character is that its very precision and concreteness suggests an exactness which statistical distribution does not have [23].

The Prosecutor's Fallacy

3.16 Necessarily, the trial judge must refrain from giving any direction which is suggestive of the prosecutor's fallacy, for example, that the DNA evidence showed that it was (x) times more likely than not that the accused was the offender.
3.17 Associated with that proposition is the further requirement that when the jury is directed on the result of the statistical analysis, they should also be reminded that the evaluation of that evidence remains a matter for them in the light of the totality of the expert and non expert evidence [24], and that the issue to which it relates should not be approached on a purely mathematical basis [25].

(e) Presentation and Evaluation of Complex Scientific Evidence

3.18 In any criminal trial conflicts of evidence, including scientific and statistical evidence, are to be resolved by the jury as the constitutional trier of fact [26]. It is well accepted that juries are capable of understanding complex issues, and that various studies do not support the contention, which is often made, that the selection process skews the panel, or the jury drawn from it, towards the less well educated segment of the community.

3.19 Nevertheless, it has also been recognized that there are *"unusual cases in which the Judge has reason to fear that the jury will be overawed by the scientific garb in which the evidence is presented and will attach greater weight to it than it is capable of bearing*" [27].

3.20 In any such case, consideration will need to be given to whether or not the evidence should be excluded upon the basis that there is a real risk of its prejudicial effect outweighing its probative value [28]; and to whether or not such prejudice can be overcome by the way in which the evidence is presented, and later explained by the Judge to the jury.

3.21 The need for care and expertise on the part of the legal profession in this respect is obvious and it extends not only to DNA evidence [29], but also to any other evidence of a complex technological or scientific nature, by reason of the risk that the apparent precision and objectivity attaching to it, and its dependency upon laboratory apparatus and computers, suggest an objective infallibility which it does not necessarily possess.

3.22 In some jurisdictions, video or power point presentations, posters, diagrams, and other techniques permitting a visual explanation, for example, of the process of extraction and analysis of DNA, and of the statistical consequences, are already in use. That is a procedure to be encouraged, and legislative authority should be conferred where it is presently lacking. In the course of doing so, it should be expected that matters such as confidence levels, and error rates of the testing laboratory are also properly explained to the jury, and are not left hanging in the air.

3.23 Dialogue between lawyers and forensic experts should be encouraged in order to produce the necessary visual aids, and to achieve the establishment of a degree of understanding that is appropriate for the criminal justice process.

3.24 In this context, it is also necessary to stake out the boundaries between evidence which is directed to the proof of a fact, which can be directly observed in relation to a crime scene (including matters detected through the examination of crime stains), and that which involves the expression of an opinion as to the conclusion to be drawn from such examination.

3.25 In relation to the former, the evidence is not subject to the opinion rules (provided that the scientific validity of any examination conducted is established) while the latter does involve an application of the rules which, either at common law, or under statutory codes, permit opinion evidence to be given [30].

3.26 To qualify as opinion evidence under the uniform Evidence Code, the witness must be shown to have specialised knowledge based on his or her training, study or experience, and the opinion must be wholly or substantially based on that knowledge. In jurisdictions which have adopted that code, or similar provisions, opinion evidence is not inadmissible (subject to proof of relevant expertise) only because it is about a fact in issue or even an ultimate issue [31].

3.27 However, the courts have warned that particular scrutiny is required by a trial judge when an expert offering an opinion moves close to the ultimate issue, to ensure that the witness is acting within his or her field of expertise and is not offering some opinion which is unsupported by disclosed factual findings or assumption which can be contested [32].

(f) Hearsay

3.28 As a result of a recent decision [33] which is of considerable practical importance for Crown Prosecutors and forensic experts, it is necessary, in order to place before a jury evidence of a match in DNA, that the Crown call:

· The medical officer or crime scene investigator, who gathered the sample from the victim or crime scene, as well as the person who gathered a sample from the suspect;

· The police officer who received those samples and was responsible for their custody and delivery to the analytical laboratory;

· The employee of the laboratory who received these samples and prepared stain cards from them;

· The employee of the laboratory who then submitted them to DNA testing and who produced the print outs;

· The forensic biologist who interpreted the test results, i.e. the print outs

3.29 In that case, although it was established that the testing was done under supervision of one of the forensic biologists who interpreted the results, and that there were established procedures in place for this aspect of the exercise, the absence of the persons who tested and produced the print outs, meant that the opinions of the witnesses who interpreted the printouts were inadmissible hearsay. This arose because there was no direct proof of identification of the samples with the printouts.

4. DNA AND JUSTICE ISSUES

(a) Databases

4.1 DNA evidence has a special significance since not only can murder victims speak to us from their graves with vital clues to their killer trapped in their bodies, but so too can a DNA profile taken from a suspect or convicted offender reach into the future. In this sense it gives rise to a new form of inexpensive and long-term surveillance which does not need to be covert. In fact, its overtness and the knowledge of an offender that his or her DNA profile, sitting in a database, may provide a link to a later crime may operate as a far greater deterrent than the recollection of a previous term of imprisonment.

4.2 The establishment of a national database is now a reality with some jurisdictions having already passed legislation permitting the collection of samples from convicted offenders, from suspects and from volunteers, and the transmission of their digital profiles to the National Criminal Investigation DNA Database (NCIDD) for their electronic storage [34]. NCIDD has been introduced as part of the Crimtrac Agency project, which also includes the National Automated Fingerprint Identification System utilising digital and laser technology to scan fingerprints and, for the first time, palm prints.

4.3 The system contemplates the keeping of a crime scene index, a missing persons index, an unknown persons index, an offenders index, a suspects index, a volunteers (limited purposes) index and a volunteers (unlimited purposes) index, as well as a statistical index. The legislation identifies the circumstances in which information on any one index may be compared with that contained in any other index, and specifies the purposes for which information stored on the database may be accessed.

4.4 Significant privacy interests arise, which have been addressed by provisions for the destruction of identifying records where an accused person is found not guilty or where charges are discontinued; by the creation of offences for the misuse of stored information; by the requirement for a caution and electronic recording of the procedure used to obtain the sample; by the right to have an interview friend and legal advisor present; by provisions for the inadmissibility of evidence gained from improper forensic procedures [35], or of the results of analysis where the law required the forensic material, from which they were gathered, to be destroyed.

4.5 Compliance confirmation is important, and in this regard the Privacy Commissioner at the Federal level, and the Ombudsmen at State level [36] have a potentially important role to play.

4.6 While intra-jurisdictional matching has been established, there are still issues to be resolved concerning inter-jurisdictional access. Assuming however that all States and Territories do join in the system, there is the potential not only for matching a person with a crime for which he or she is already a suspect, but also for matching that person with unsolved or future crimes, that is by way of a "*cold-hit*". The success of this process, sometimes known as "*DNA mining,*" in the United Kingdom has been widely reported, as has the closure of a number of cases that had been unresolved for many years.

4.7 Of potential concern for those who oppose the establishment of a national data base is the possibility of "*function creep*" whereby once established and accepted, with reasonable controls, in relation to criminal investigations, the door may be opened for a wider access by researchers and others, or for the progressive screening of all citizens, commencing for example by a call up of the Guthrie card records, which have now been assembled, following the introduction of heel prick tests on all infants born since the late 1960's.

(b) DNA Request Surveillance

4.8 Examples have been seen of persons facing mass screening, or individual testing, reacting in a way which either flags a consciousness of guilt or leads to an outright confession. The Pitchfork case in England and that of Trevor Boney in Wee Waa New South Wales, fall into this category.

4.9 This has a particular relevance for those jurisdictions where provision exists for voluntary and/or compulsory submission to the supply of either an intimate or non-intimate sample for DNA analysis. While, in most cases, the provision of such a sample involves no real threat to the bodily integrity of the suspect and is largely painless (eg the buccal swab), there is inevitably some invasion of civil liberties involved.

4.10 From a legal perspective, questions are likely to arise as to whether:

· a confession that was induced by the prospect of being required to submit to a DNA test, or being invited to participate in mass screening is properly to be considered as voluntary, or as involving an infringement of the privilege against self incrimination;
· the adoption of a subterfuge to avoid being tested, or the deliberate destruction of a sample, can properly be regarded as displaying a consciousness of guilt [37];
· Signs of fear or anxiety which arise from the psychological pressure accompanying a request for a sample, can be led in evidence, or can lawfully provide a basis for further enquiries derivative therefrom, or might even satisfy the requirement of reasonable suspicion, which would transform the person in question to a suspect, who could then be compelled to provide a sample;
· Limitations should be established, and conditions imposed as to the circumstances in which voluntary mass screening could be deployed, so as to overcome any concern that its use will reverse the presumption of innocence.

(c) The Phenotype

4.11 The logical extension of existing profiling is to move on, from the non-coding areas, to the identification of personal characteristics such as hair and eye colour, and the other features which go to the make up the Phenotype, from analysis of the remaining DNA which contains the individual's genes. While any such information would not be as discriminatory as the profile drawn from the "*junk*" DNA, it could assist to build up a more accurate identikit picture of the suspect, which could then be compared with eyewitness identification evidence as part of a circumstantial case.

4.12 Intrusion of this aspect of the human genome project into the forensic field does raise complex moral and ethical questions, because of its potential to reach deep into the personal lives of suspects, and to expose information including predisposition to certain forms of disease which may be intensely private.

4.13 Particularly is this so if a search is conducted for genetic information underlying personality or behavioural traits or mental illnesses. These characteristics could be relevant for cases where defences of mental illness and diminished responsibility, (now in NSW substantial impairment by reason of abnormality of mind) arise, or where it is otherwise asserted that an offender's actions were caused or influenced by the pre-existing genetic characteristics.

4.14 However, concern does exist as to the possibility of this work igniting a new form of eugenics or racism, and encouraging a quest to detect a "*criminal or violent gene*", which could justify preventative detention of a person whose genetic make up suggests that he or she is inherently dangerous. More alarming would be the prospect of beneficial manipulation involving the selective implantation of embryos in the course of IVF programs, or the abortion of foetuses which possess the "*criminal gene*", or the use of some form of genetic therapy to alter the individual's personality or mental state.

4.15 Already forensic psychiatry has experimented in this area with the redundant y chromosome theory, which supposed a super male with an excessively aggressive personality, a stereotype supposedly based on studies since discredited, showing that an undue proportion of persons in custody had the xyy karyotype.

4.16 The impact of such information could become problematic, so far as it might be asserted that the offender's objective or moral culpability was reduced by reason of the inherited characteristics which led him or her to act in a particular way, or compromised the free will which underpins criminal responsibility [38].

4.17 Some attempts to employ this as a line of defence, or in mitigation of sentence, in the United States, have run into a brick wall [39], but it would be naïve to assume that it will not re-emerge in one form or another, as genome mapping over the next 20 years or so fills in the human jigsaw, and adds to the 40,000 or so fully characterised genes now identified. The challenges of the Rosetta Stone and of unlocking the secrets of cryptography pale into insignificance when compared with this project, as do their practical implications.

(d) Equality Before the Law

4.18 On one view, the provisions for testing and recording the DNA profiles of convicted offenders is discriminatory of such persons, and antithetical to their human rights and rehabilitation prospects. Of additional concern is the circumstance that, for individuals already recorded on the data base there would be a higher risk, statistically, of a misidentification by chance, than for those who were not registered.

4.19 On the other hand, there are distinct advantages for such persons in the availability of such a database for projects such as the *"Innocence Project"*, which have revealed a substantial number of cases where persons have been wrongly convicted, and which, in some jurisdictions at least, have allowed for a limited payment by way of compensation for those who are exonerated as a result of re-analysis and review of the database. It may also help in revealing cases of police fabrication or manipulation of forensic evidence.

4.20 In these circumstances there is a legitimate argument for the retention of crime scene samples, which can be re-analysed when new technology emerges with increased sensitivity and powers of discrimination.

5. THE PROPER ROLE OF THE FORENSIC EXPERT

(a) Admissibility of Expert Evidence

5.1 The use of expert witnesses, as an aid to the justice system, was a significant advance when compared with medieval reliance upon faith, which was itself dependant upon the ordeals of cold water, hot iron and combat. Underlying their use, however are two fundamental circumstances:

· The proper role of the expert witness is to assist the Court, that is the Judge and Jury, in a criminal trial, in relation to the inferences to be drawn from the facts proved at trial; and
· Expert evidence should not be approached in a way which turns a trial into a search for which of the competing experts is seen to be the more impressive [40].

5.2 As a result of the recent shift to case management, which is progressively finding its way into the criminal justice system [41], clearer confirmation of the role of the forensic expert is now appropriate.

5.3 As yet unresolved in an entirely satisfactory way is whether the appropriate test for the admissibility of expert evidence should be the *Frye* test [42], depending upon whether the theory or technique upon which the opinion is based is generally accepted within scientific circles; or the *Daubert* test [43] under which scientific validity or reliability depends on matters such as falsifiability, known or potential error rate, peer review, publication and so on [44].

5.4 Resolution of this issue has a real significance if junk science is to be excluded from the forensic scene. Critical review of some of the techniques which have been employed in the past, or which are currently in use in some jurisdictions, including for example spectographic voice recognition [45], and the polygraph, would not necessarily pass a

Daubert test in this country.

(b) The Expert as a Witness of the Court

5.5 The problem of bias in expert evidence has long been recognised [46]. There are several reasons for expert evidence being influenced by bias, which is as often as not unconscious as it is deliberate. These include:

· The circumstance that it is inevitable that the parties, on either side, will select experts who are recognised as likely to provide an opinion which favours their case, leaving unexplored a range of opinions on the continuum which may be more representative of the relevant speciality;

· the involvement of the expert as part of the team for a party, in the course of which she or he may assist in the formulation of the case, and search for holes in the opinion of any expert qualified by the opponent;

· the practice effect derived from regular appearances in the Courts, as a result of which the witness may learn to adjust his or her testimony to accommodate potential problems, and may also learn how to present an aura of confidence and persuasiveness, in a way which will be dismissive of any challenge.

· the drift of retired practitioners lacking current research and clinical experience, but with impressive credentials, into practice as an expert witness; accompanied by a reluctance of some of the most able practitioners to enter the field because of the disruption which it has for their work, and their dissatisfaction with what may seem to be the artificial restraints of the adversarial system; and

· the emergence of an economic tie between the witness and the engaging party which may be either a prosecuting authority or a legal practice heavily engaged in the criminal justice system, or perhaps of greater potential concern the tie arising from a commercial interest in some newly developed technology.

5.6 It involves too great a leap of faith to assume that the right of cross-examination, seen as the Common Law's answer to artifice and untruth, is sufficient to overcome bias in experts. It can only ever be as effective as the skill of the lawyer wielding it, and in the present context, it depends entirely upon his or her understanding of the area of expertise involved, something which is usually picked up on the run through past experience, or via a crash course for a particular trial.

(c) The New Expert

5.7 There have been a number of developments in recent times which have been directed towards establishing the duty of an expert as one that is owed to the Court rather than to the party by whom he or she is engaged. They include:

The establishment of expert witness institutes

5.8 These bodies (for example the Expert Witness Institute formed in the UK in 1996, and the Expert Witness Institute of Australia formed in 2001) have been formed with specific objects of developing protocols, providing ongoing training in the delivery of expert evidence, and in some instances of accrediting or certifying experts in specific disciplines. Some have reserved to themselves a disciplinary role in relation to experts who have failed to maintain the standards to be expected of a reasonably skilful and careful expert witness.

5.9 A critical assumption underpinning their formation is that the purpose of the expert is to assist the Court in the resolution of issues of a kind, which it does not have the capacity to determine without assistance, and to ensure that it arrives at an answer which is fact and science based. This involves something of a departure from the adversarial system of justice, under which the parties allow cases to be decided with reference only to the facts or opinions which they select.

5.10 These Institutes can provide a useful umbrella organisation which is capable of representing cross-sectional interests and of liasing with the courts and government. Additionally, the creation of the Registered Forensic Practitioner Scheme may go some way to providing an accreditation system, which will assist in excluding inappropriately qualified witnesses, who might otherwise claim to have expertise in a field of forensic science in which they have no specialised knowledge.

Codes of Ethics

5.11 Several individual professional associations have, in recent times, developed codes of professional practice for their members, with a view to emphasising objectivity and raising the standards of expert evidence in the several disciplines which they represent. Examples can be seen in the Australian and New Zealand Forensic Science Society (ANZFSS), the Australian Medical Association (AMA), and the Australian Council of Professions, whose code interestingly defines the duty which the expert owes to the engaging party as one which is subordinate to the duties owed to the court, and to the body of knowledge and understanding from which the witness' expertise is drawn. In the field of expertise of immediate relevance for this paper, support for objectivity and independence can be, and is, provided through bodies such as the National Institute of Forensic Science (NIFS) and The Senior Managers of the Australian and New Zealand Forensic Laboratories (SMANZFL).

5.12 Adherence to these codes precludes the circumstance, often seen, of the expert becoming an advocate for the engaging party, and giving evidence which may not only lead to an injustice but which may also devalue the relevant profession in the eyes of the community.

5.13 In this regard it is important that experts who give evidence in relation to new technology, rise above commercial concerns to promote a technology in which they have a financial interest, and refrain from offering spurious findings or objections in relation to a rival technology.

5.14 Equally it is important that they do not seek to blur the line between scientific certitude, and proof beyond reasonable doubt, when offering opinions as to alternative hypotheses, for example as to the causation of death which are at best remote or fanciful, or when offering odds of a random match in terms which equate or even exceed the world's population.

Rules of Court or Practice Directions

5.15 It has long been recognised by the Courts [47] that expert evidence should be the independent product of the witness, uninfluenced as to form and content by the exigencies of litigation [48]. The duty owed is one to express only opinions that are genuinely held, to consider all material facts, and not to mislead by omission [49].

5.16 The development by the Courts of rules or practice directions to achieve these objectives has had the support of the Australian Law Reform Commission, and of the Woolf Report [50], which led to the introduction in the United Kingdom of a core set of rules relating to the use of expert evidence in civil trials.

5.17 Many of these rules, which place a premium on the objectivity and independence of the expert witness, have been taken up in Australian jurisdictions [51]. Their common theme is to emphasise that the expert owes a duty to the court and is not to be an advocate for a party. Additionally they call for disclosure of the information of relevance relied upon for the opinion which is given, along with a statement of whether or not the finding is qualified in any way, and is or is not fully researched. They also require disclosure of any change of opinion and encourage the convening of joint conferences between experts.

5.18 There are good reasons for extending these key duties positively to the criminal jurisdiction of the courts pursuant to statute, if statutory authority is needed to overcome the heavy emphasis which has been given to the adversarial tradition in the criminal justice system. Some modification may be needed to ensure that the privilege against self incrimination is preserved, for example in relation to disclosure by an expert qualified for

the defence which may reveal a piece of information which may ignite a new line of investigation by the prosecution, or qualify as an admission. However, subject to suitable safeguards, there is no legitimate reason why the evidence of an expert called by the defence should be the subject of a lesser disclosure or need for objectivity than that of an expert called by the prosecution.

Joint Conferencing

5.19 The experience of "*hot tubbing*", or of convening joint conferences between experts (sometimes referred to as a conclave) has proved successful in civil litigation, very often leading to settlements, and otherwise to a narrowing of issues. Codes of conduct have been developed for their use which are designed to preserve the independence of the witnesses when they meet; to avoid the occasion of the meeting being used as a means of bolstering up opinions which are not genuinely held, or of intimidating other experts into giving up views which they genuinely hold; to encourage the elimination of erroneous assumptions or theories; and to confine any remaining issues to the critical points of difference.

5.20 The reasons for their success appear to lie in the circumstances that:

· when experts need to justify their opinions to fellow experts, extreme views are moderated, since bias or adherence to junk science is quickly apparent.

· it is easier to concede a point in a non-confrontational environment, than it is in the glare of a trial, where there is pressure to adhere to a previously expressed opinion, if not to overstate it, since to shift from that opinion may involve a loss of face and can be seen as weakening the witness' overall credibility.

· the meeting is often the occasion for disclosure of facts or relevant information that was unknown to, or unappreciated by, one or other of the experts, and which at times can lead to improvements in the technology or methods used.

· most often, peripheral issues can be agreed or isolated as being of no moment, while significant points of disagreement can become identified and better defined;

· the discussion between the experts is likely to be conducted on a higher plane, and in a more scientifically appropriate fashion, than in court, where it is led by counsel unversed in the technology and is framed in terms understandable to laymen, and

· the discipline of drafting a joint report itself tends to bring sharper focus to the issue.

5.21 The convening of such joint conferences is a logical development of the requirement now adopted in several jurisdictions for the disclosure (in response to prosecution disclosure) of the reports of defence expert witnesses, and of the material upon which they relied [52].

5.22 The extension of the Civil Procedure Rules concerning the duties of expert witnesses, including the power to direct such witnesses to confer and to produce a joint report, has now been recommended by Lord Justice Auld in a review of the Criminal Courts of England and Wales [53]. A similar proposal has been developed in New South Wales by Justice Sperling and adopted, following consultation with a working party [54].

5.23 While there was no opposition by the working party to the proposal that expert witnesses in criminal trials should be required to ascribe to a code of conduct similar to that which applies in relation to civil proceedings, there was opposition to convening a joint conference of such witnesses unless held by consent. The recommendation which has gone forward was accordingly confined to conferring a power to direct such conferences to be held where the parties consent, for a trial period.

5.24 The issues which arose in the course of the deliberations of the working party, and which will need to be reviewed after the proposals in the UK and NSW have had a

chance to be trialed, relate to whether:

· information received in confidence by an expert should remain confidential at the meeting;
· there might be a lack of transparency if experts modify their opinions;
· an autocratic charlatan might overwhelm a less confident or experienced, but honest witness;
· it would be appropriate for the prosecutor to use the occasion to bolster its case, for example by closing any holes which might emerge in its expert reports;
· there could be an unfairness arising from unequal access by the defence to the resources required for expert evidence.

5.25 While these are legitimate considerations, there is a genuine case for pursuing this approach, which was employed in a somewhat informal way in a recent trial in the Supreme Court of Victoria [55], as a means of enhancing the efficiency and the validity of the outcome of criminal trials which, in the light of recent advances, are likely to be progressively more dependant upon forensic expertise, whether it be in the field of microbiology, ballistics, document examination [56], fingerprints, chromatography, toxicology, spectrometry, trace analysis, solid-phase micro extraction, crime scene reproduction and so on.

(d) The Response of the Forensic Community

5.26 It is not unknown that there have been miscarriages of justice through corrupt and/or negligent handling and manipulation of forensic evidence. Examples which come to mind include the Maguire Seven, the Birmingham Six, the Guildford Four and closer to home the *Splatt and Chamberlain Cases* [57]. In recent times a forensic laboratory in Ohio has been indicted for falsifying test results, suspicion has fallen on a similar laboratory in Oklahoma, and even the FBI Crime laboratory has been severely criticised [58].

5.27 What is of critical concern is that that the processes of the much vaunted adversarial justice system were not adequate to deal with the forensic errors or corruption of results, which emerged in these cases, and that non-adversarial inquiries following the exhaustion of the rights of the accused at trial and on appeal, were needed.

5.28 It is essential, in those circumstances, that there be an added emphasis on the adoption of high standards of competence, adherence by laboratories to protocols, and acceptance of a duty to the court on the part of criminalists and forensic scientists, as an adjunct to the adoption by the Courts themselves of procedures, which are designed to improve the quality and the manner of presentation of expert evidence.

5.29 In this regard the need for quality assurance and quality control is imperative, carrying with it matters such as the regular checking of forensic laboratories by random blind sampling, the recording of error rates, and the giving of attention to the training of technicians not only in a way which ensures their competence, but which also brings home to them the significance and potential consequences of their work, so far as suspects and victims of crime are concerned.

5.30 Additionally there could be merit in ensuring defence access to State supported forensic laboratories, so as to ensure equality of opportunity, and encouragement of objectivity on the part of those forensic experts whose continuing close contact with police investigators can lead to unconscious bias. The risk of that bias is self evident in circumstances where forensic experts become accustomed to focusing on a search for indicia of guilt, in which they may overlook pointers toward innocence, and even commence their work with a presumption of guilt in relation to the person identified by police as a suspect. That has a particular relevance for crimes of a high profile nature which have shocked the community at large.

(e) Sanctions

5.31 So far as the courts are concerned, some interesting questions arise as to what they can do where there has been an obvious lack of objectivity or positive falsification of results, or manipulation of evidence, To date the immunity of expert witnesses from suit has been recognised, and the courts have been reluctant to initiate prosecutions for contempt or perjury where evidence is offered in the form of an opinion.

5.32 It may well be that unless there is stringent self regulation, consideration will need to be given in the future to measures such as:

· the court accreditation of expert witnesses in various fields of specialty;

· the creation of an exemption from witness immunity when an expert abuses his or her position;

· the establishment of a procedure for the sanctioning of such witnesses, either by the court itself (although this would raise considerable difficulties in the way of establishing a basis for jurisdiction) or by reference to a relevant professional association.

· resort to prosecution for one of the several offences which may arise in this context, involving for example conspiracy to pervert the course of justice, perjury and other more specific Public Justice Offences [59].

6. CONCLUSION

6.1 What can we expect in an era that offers ever more refined technology and opportunity for scientific proof, alongside a culture which expects a greater degree of objectivity and subservience of personal interest to a duty owed to the Court?

6.2 The expectation of greater impartiality and quality of reporting, and of certainty of evidence is there. We would however be looking for a chimera, if we were to assume an absolute expectation of forensic evidence which is unsullied by fallible human process. In reality, we can understand that there will be errors in exhibit continuity, occasions where contamination will arise, and room for misconceptions and legitimate differences of opinion. What we are entitled to expect, however, is avoidance of the dishonest falsification of test results, of exhibit tampering and of the offering of opinions which are biased, spurious or scientifically dishonest.

6.3 The Courts are heavily reliant upon the scientific community for their mutual cooperation in this area, and for the frank exchange of views and strategies which will expose error and dishonesty, since the body of current forensic and scientific knowledge is such that specialised experience is required for its proper understanding. The justice system remains prepared, with that assistance, to provide the mechanism by which competing opinions on forensic issues, to which experts will need to ascribe their oath or affirmation, to be fought out objectively, and decided by an impartial jury.

6.4 The importance of an acceptance of mutual obligations, in this regard, lies in the circumstance that the public interest is not advanced by the securing of convictions or acquittals through bad forensic evidence. It also lies in the circumstance that doubts entertained by defence lawyers or experts can be dispelled by the production of credible and reliable forensic evidence. That may, in turn encourage a suspect more confidently to offer an early plea of guilty, with the mutual benefits to the justice system and to the accused, which then attach.

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1 Sir Arthur Conan Doyle, *A Story in Scarlet* , published in Beeton's Christmas Annual, 1887, Ward, Locke & Co, London.
2 In the United Kingdom.
3 1892, Macmillan & Co, London
4 RAH Van Oorschot & Jones, "DNA Fingerprints from Fingerprints", *Nature* (1997) 387:767
5 Although at four loci.
6 R v Karger (2001) 83 SASR 1 per Mullighan J, and *R v Gallagher* [2001] NSWSC 462(per Barr J). In particular, the argument that the validity of the test has not been capable of external evaluation by reason of the refusal of the Perkin Elmer Corporation to disclose the results of key evaluation studies, and of the DNA structures of the primers which are used, has not found favour. In that regard the reproductability of the system and the reliability of the tests has been established through collaborative trials and proficiency tests.

7 [2001] NSWSC 311
8 For example those traditionally used for fingerprinting have come to be questioned in recent times.
9 *R v Button* (2001) QCA 133
10 545 NYS 2d 985
11 *R v Galli,* (2001) 127 A Crim R 493
12 In jurisdictions subject to the *Evidence Act* by reason of s 85; and otherwise in those States where legislation renders inadmissible confessions which are induced by "*untrue representations*", as did the former s 410 of the *Crimes Act 1900* (NSW) or which preserve a discretion to exclude unfairly prejudicial evidence.
13 *Errey v The Queen* (2001) WASCA 75 at par 55.
14 [1997] 1 Cr App R 369 at 372-3.
15 See for example *R v GK* (2001) 53 NSWLR 317; R *v Galli* (supra) and *R v Keir* (2002) 127 A Crim R 198.
16 Redmayne, *Doubts and Burdens: DNA Evidence, Probability and the Courts*, (1995) Crim LR 464 at pp 474-6.
17 *R v Galli*, supra.
18 [1996] 2 Cr App R 467
19 At 482
20 This view was endorsed in *R v Doheny; R v Adams* [1997] 1 Cr App R 369, and also in *R v GK* and *R v Galli*, supra.
21 *R v* GK, supra.
22 Similar conclusions were reached in *People v Coy* (2000) 620 NW 2d 888 at 896, and *R v Noll* (1999) 3 VR 704 at 708-709.
23 Per Spigelman CJ in *R v Galli* (2001) 127 A Crim R 493 at para 50.
24 *R v GK* (supra) at para 59
25 *R v Galli* (supra) at para 55
26 *Chamberlain v The Queen (No 2)* (1984) 153 CLR 521 at 558, 598.
27 *R v Duke* (1979) 22 SASR 46 at 48, per King CJ.
28 For example, under s137 of the *Evidence Act* (NSW) 1995 and equivalent legislation.
29 Issues concerning DNA evidence have been accepted as properly left to a jury: *R v Lisoff* [1999] NSWCCA 364 and *R v Jarrett* (1994) 62 SASR 443.
30 S 79 *Evidence Act* 1995 (NSW) and similar legislation.
31 S 80 *Evidence Act 1995* (NSW).
32 *R v GK* (supra) at para 40, and *HG v The Queen* (1999) 197 CLR 414 at 429.
33 *R v Sing* (2002) 54 NSWLR 31
34 For example the *Crimes Amendment (Forensic Procedures) Act* 2001 (Cth) and *Crimes (Forensic Procedures) Act* 2000 (NSW).
35 Subject to the Court finding, after having taken into account a number of specified matters, that the desirability of admitting the evidence outweighs the undesirability of doing so.
36 As well as the Standing Committee on Law and Justice, of the Legislative Council (NSW).
37 Evidence of a refusal or failure to consent to a forensic procedure is not admissible as proof of guilt: s 84 *Crimes (Forensic Procedures) Act* (NSW) 2000.
38 See C. Wells, "*I Blame the Parents: Fitting New Genes in Old Criminal Laws*" (1998) 61 Mod L Rev 724
39 Within the Australian judicial system subjective circumstances of this kind, including matters such as poverty, emotional deprivation, substance abuse and so on, have generally been regarded as providing a reason for criminality, rather than an excuse, and hence have not provided much by way of assistance in sentencing. Significant problems of line drawing would emerge if genetic factors were to be given a separate treatment.
40 An approach to the resolution of scientific argument which was in fact encouraged in the charge of the trial judge to the jury in the infamous Birmingham Six case.
41 See, for example, the Report of the Working Group on Criminal Trial Procedure to the Standing Committee of Attorneys General, 22 September 1999; *Criminal Procedure Act* 1986 (NSW), Part 3, Division 2A (added to the Act in 2001).
42 *Frye v The United States* (1923) 293 Fed 1012.
43 *Daubert v Merrell Dow Pharmaceuticals* 113 S Ct 2786.
44 The opportunity to resolve this issue was not taken up in *HG v The Queen*; while both tests appear to have been adopted in *R v Gilmore* (1977) 2 NSWLR 935; *R v Pantoja* (1996) 88 A Crim R 554 and *Osland v The Queen* (1998) 159 ALR 170.
45 Sometimes tagged as "*voice fingerprinting*" which was derailed by a FBI sponsored study which showed that the underlying premise of voice uniqueness had not been validated, and that there was insufficient data to conclude that sound spectography could truly identify a speaker.
46 For example see the survey conducted by Dr Freckleton "*Australian Judicial Perspective on Expert Evidence: An Empirical Study*" (1999), for the Australian Institute of Judicial Administration.
47 For example see the classic statement by Cresswell J in the *Ikarian Reefer* (1993) 20 FSR 563 confirmed on appeal (1995) 1 Lloyds Rep 455

48 Per Lord Wilberforce in *Whitehorse v Jordan* (1981) 1 WLR 246 at 256-257.
49 Per Cazalet J in *Re J* (1991) FCR 193 at 226.
50 *Access to Justice: Final Report to the Chancellor on the Civil Justice System in England and Wales*, July 1996.
51 See for example Part 36, rule 13C and 13CA of the *Supreme Court Rules* (NSW), the Code of Conduct, Schedule K to those Rules and Practice Notes 104, 109 and 121; and order 34A of the *Federal Court Rules*.
52 See NSW Law Reform Commission Report 95, T*he Right to Silence*, July 2000; and Part 3, Division 2A of the *Criminal Procedure Act* (NSW) 1986 which commenced on 19 November 2001. Similar disclosure provisions exist in Victoria, and Queensland and have been recommended in Western Australia.
53 *Review of the Criminal Courts of England and* Wales, September 2001, at paras 132 and 146.
54 Involving representatives of the Law Society of New South Wales, the New South Wales Bar Association, the Legal Aid Commission, the Public Defender's Office, the Director of Public Prosecutions, the NSW Institute of Forensic Medicine, and the Academy of Forensic Sciences.
55 Dr R. Heyes, "Expert Evidence: DNA Profiling", *The Forensic Bulletin*, November 2001. Website: www.nifs.com.au/ANSFSS.html
56 Ruled to be unscientific in the United States of America: *US v Starzecpyzel*, 880 F. Supp 1027, but regularly accepted in Australia.
57 Which have variously involved possible contamination in the recovery of forensic samples; insufficient specificity of the tests used for example to detect whether they display traces of explosives, and if so, their chemical composition; misidentification of whether what was assumed to be blood was something else such as red dust or a sound deadening product; simple overconfidence in experts operating at the margins of their experience or failing to consider and eliminate alternative possibilities; and the withholding or suppression of unfavourable test results.
58 In the 1997 report for the Inspector General of the US Department of Justice.
59 See for example *Crimes Act* 1900 (NSW), Part 7.

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Expert Witnesses - The New Era

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EXPERT WITNESSES - THE NEW ERA

Justice James Wood June 2001

In 1900, Judge Leonard Hand observed that *"no one will deny that the law should in some way effectively use expert knowledge wherever it will aid in settling disputes. The only question is as to how to do it best."*

In this paper, I examine some of the contemporary developments which are directed towards answering this question.

1. DNA EVIDENCE

A convenient starting point for a consideration of the new era for expert evidence is that of DNA profiling, since it throws up all of the issues which arise in terms of:

a) the absolute impartiality and integrity required of those forensic experts who handle the sample, who test and interpret the results, and who give evidence in Court;

b) the legal test as to admissibility of such evidence;

c) the manner in which it should be presented and evaluated by the trier of fact;

d) the wider ethical issues associated with emerging forensic opportunities.

DNA profiling had its origins, in the forensic field, in the early 1980s following the rape and murder, occurring in identical circumstances, of Lynda Mann and Dawn Ashworth in Leicester, England. Police turned to Professor Alec Jeffreys, who was carrying out research into diseases caused by mistakes in DNA. His tests confounded police so far as they confirmed their theory that the same person had been responsible for each offence, but conclusively established that their prime suspect, who had confessed to the second killing, could not have committed either killing. Subsequent mass screening in the area surrounding the murder sites threw up James Pitchfork as the real killer, a man who had endeavoured to avoid detection during the screening by persuading a friend to stand in for him. Once his deception became known, and a sample taken from him, his fate was forensically sealed.

So the age of DNA profiling in crime investigation began, with extraordinary implications for all concerned. Murder victims can now speak to us from their graves, with clues to their killers concealed within, or strapped to, their lifeless bodies, which can be preserved and tested after decades, both to support prosecution cases and to exclude the innocent.

So far as *police and the forensic communities* are concerned, the use of this technique has reinforced the need for stringent evidence based inquiries, commencing at the crime scene and working outwards, on the way eliminating some suspects and unfruitful lines of investigation, and establishing links to the true offender. The collection of vital clues, and the integrity of exhibit handling and continuity, require early involvement by forensic experts, and intensive specialist training of Police Crime Scene or Scientific Officers. It also calls for the establishment of comprehensive national data bases, and for a proper understanding of statistical theory.

As an aid to law enforcement, it provides a system of long term non covert surveillance, through its availability to link offenders to future crimes, as well as to past crimes, and in that sense it has a capacity to act as a deterrent.

For the innocent, there are important benefits in excluding persons wrongly under suspicion for current offences, and in reversing prior convictions through Innocence Projects of the kind established some

years ago in the United States, and recently announced for New South Wales.

For the legal profession, testing and acceptance of the evidence has been something of a battleground in recent years. Initially, it was received without much questions as a new and seemingly unanswerable science. In more recent times, issues have been vigorously contested in relation to testing procedures and protocols, the statistical validity of the data bases employed and the conclusions drawn. Much of the debate has centred on the Profiler Plus system used by all government forensic laboratories and police services within Australia. It has brought to sharp focus the extent to which there should be disclosure of the details of the test protocols and procedures, in respect of which intellectual property and commercial secrecy rights may exist, as well as whether, particularly in Evidence Act jurisdictions, there should be a shift from traditional tests for the admission of expert opinion to some test depending upon a modification of the Fry or Daubert approaches, which turn, respectively, upon general acceptance in scientific circles, and scientific reliability or validity.

Important questions have also arisen in relation to:

· the procedure to be used whereby admissibility should be determined, in particular whether it should be done pre-trial or mid trial upon the voir dire;

· matters such as pre trial disclosure of experts reports and joint conferences;

· the proper role for the jury, once the evidence is admitted, in particular to arm them with the means of understanding it, and to avoid them being overpowered by a science of great technicality, that depends upon computer technology and inbuilt coding instructions, which seemingly cannot be falsified.

It is in this area that experts and lawyers need to demonstrate skill in understanding the limitations and potential for error associated with possible exhibit contamination; the ways in which matching of profiles can be visually demonstrated; and the translation of a chemical match, via statistical probability into legal proof. Challenges arise for the use of modern courtroom technology via power point presentation, video clip, imaging and similar techniques, so as to ensure its meaningful presentation.

For the wider community a number of ethical and civil liberty questions arise concerning, for example:

· the circumstances in which samples might be collected from persons convicted of crime, from suspects and from the community via mass screening;

· by whom should data bases be kept and the terms or conditions upon which access should be allowed;

· for how long and subject to what conditions, samples and profiles should be held.

On one view, the collection of DNA samples should not attract concern, since the buccal test is no more intrusive than the fingerprinting or photographing of suspects; since it is designed to solve serious crime; since it can protect the innocent; and since the profiling process used works on junk DNA, ie non-coding loci, without revealing the more personal aspects of an individual's genetic make-up.

On the other hand, concerns arise involving self incrimination in the case of compulsory submission to testing as well as in relation to unintended or involuntary admissions of guilt, derived from the reaction of an offender who is required to submit to a test, and in relation to confessions offered where the suspect feels convinced that the test will provide a match.

2. THE PROBLEMS WITH EXPERT EVIDENCE

While DNA profiling throws into relief the challenges which emerging technology and fields of scientific endeavour pose, some reflections on the past reveal the obstacles which expert evidence has faced. Essentially, they relate to:

a) Bias

Studies, such as that conducted by Dr I Feckleton for the Australian Institute of Judicial Administration, have revealed that a perception of expert witness bias was entertained by a very large proportion of the trial judges who responded to the survey. That bias has been assigned to the inevitability that the parties will select on each side, experts who are seen to support their case, leaving unexplored the continuum between their views; to the economic ties that develop between experts regularly retained by a frequent litigant, or by lawyers whose practice is oriented either to plaintiffs or insurers; to the involvement of the expert in the "team" which prepares and conducts the case; to the practice effect derived from trial experience; and to the fine line which exists between the presentation of facts by a lawyer to an expert and clarification of the opinion based upon it, on the one hand, and substantial input into the presentation of a report, on the other hand.

b) Expense and delay

The Woolf Report suggested the expert evidence was one of the two principal causes of the excessive expense and complexity in the civil justice system (the other being discovery). Experience bears this out, particularly in those jurisdictions where limits have not been placed upon the number of experts who can be qualified and called. Quantity rather than quality of opinion has often been the norm. Experience also shows that there has never been a shortage of experts willing to enter into new areas of supposed illness or injury, commonly tagged as syndromes, in order to meet the demands of a society fixated on assigning blame, and on seeking compensation for every misadventure that occurs. As causation theory expands its reach, so does this encourage speculative litigation and the ingenuity of experts in these areas.

c) The Assessment Process

In the case of a jury trial, it is a matter of concern that difficult questions, upon which experts cannot agree, are assigned for decision to persons with no relevant expertise, who have been selected at random from a variety of backgrounds, who are not permitted to participate in the process of testing the competing opinions or to consult any relevant text books or research papers, and who learn only of the matter in issue from answers given to questions put by lawyers untrained in the relevant field, whose interest obviously lies in pursuing a pre-determined position. It is of no less concern that the basis upon which they are often expected to resolve those issues is likely to turn, primarily, upon demeanour or upon the impression made by the experts, and to a lesser degree upon a comparison of their relative qualifications and expertise. The supposed brake of cross examination which is seen as the answer to artifice and untruth, is similarly of dubious value in this area, since its effectiveness depends upon the skill of the lawyer wielding it, and upon his or her understanding of the science or area of expertise involved.

3. THE NEW REGIME - THE COURTS

In response to the well recognised problems attaching to expert evidence, and to meet the challenges of emerging science and technology, there have been some innovations from the Courts, as part of their general drive to take greater control of the process of litigation through case management strategies.

a) Rules of Court or Practice

It has long been recognised that, for expert evidence to maintain any credibility, it is essential that there be a duty of objectivity, which includes obligations to express only an opinion that is genuinely held, to consider all material facts, not to mislead by omission, not to omit material facts which could detract from the opinion, and not to be influenced by the exigencies of litigation.

The classic analysis of the duties and responsibilities of expert witnesses was given by Creswell J, in the Ikarian Reefer. It has since been taken up by the Woolf Report as a consequence of which a core set of rules has been developed in the United Kingdom, to replace those of the Supreme Court and the County Court, and which came into effect in April 1999. Part 35 of those Rules creates an overriding duty, in the expert, *to help the court* on matters within his or her expertise, which is not to be compromised by any obligation towards the engaging party.

Under these Rules, the calling of experts is now completely within the control of the court, in that:

· no party can call an expert without the court's permission

· the court may limit in advance the expert's fees and expenses that may be recovered from the other party

· the court is to closely manage how an expert gives evidence and to try to restrict it to written, rather than oral, evidence and in that

· the rules encourage the use of a single jointly instructed expert.

To a significant extent, many of these provisions have been taken up within Australian jurisdictions, by rules of Court, practice notes, or guidelines.

Their common objectives are to:

· emphasise the overriding duty of the expert to assist the court on matters relevant to the expert's area of expertise;

· ensure that there is proper disclosure of information of relevance for the basis on which an expert opinion is formulated, and whether the findings or opinions offered are qualified, or not fully researched;

· promote efficiency in narrowing the area of dispute;

· remove any restriction which a party retaining experts may wish to impose upon their freedom to agree on matters discussed at any joint conference, and to

· ensure that any change of opinion is disclosed.

Under consideration is the possibility that treating medical practitioners should receive some exemption from the rules, so far as they involve a shift in their duty, lest their ongoing patient-doctor relationship be jeopardised.

Subject to this consideration, the jury is still out as to whether the new regime has brought about or will lead to a change in culture, or whether lip service will be paid to it. If not the courts will need to take a pro-active role in enforcing the new regime.

This will require attention to:

· liaison between the courts and the relevant professional associations for the imposition, by those associations, of disciplinary sanctions upon non complying witnesses;

· disallowance of the costs incurred in relation to those witnesses;

· the creation of an exemption for witness immunity, when the position of the expert is abused; and

· the possible use of court based sanctions through perjury, contempt of court, or prosecution for conspiracy or attempting to pervert the course of justice.

b) Alternatives to the adversarial reception of expert evidence

Several other techniques for the reception and processing of expert evidence by methods which are more akin to the inquisitorial tradition, and which pass a greater role to independent experts, have been developed and are becoming more common. Especially has this been so in specialised areas of dispute such as patent law, and building/engineering disputes, although it has by no means been confined to those areas.

These alternative techniques now include:

· court appointed advisers or assessors, who are allowed to sit with the judge and to assist in the understanding of the evidence and its application to the case in hand;

· referees to whom technical issues are referred out for inquiry and report back to the court;

· court appointed experts whose task it is to undertake the inquiry into the technical or scientific issue involved, whose reports may or may not be supplemented by evidence from the parties' experts

· a single expert nominated for the trial, an approach encouraged by the Woolf Report.

c) Convocations of Experts

(i) Joint Conferences

The experience with joint conferences of experts, had been entirely positive, since it appears that:

· when experts need to justify their opinions to fellow experts, extreme views are usually moderated, bias or adherence to junk science being quickly apparent and abandoned;

· it is easier to concede a point in a non confrontationist environment, than it is in the glare of a trial, where there is pressure to adhere to a previously expressed opinion, if not to overstate it, since to shift from that opinion involves a loss of face and can be seen as weakening of the witness's overall credibility;

· the meeting is often the occasion for disclosure of facts or relevant information that was unknown to, or unappreciated by, one or other of the experts;

· most often, peripheral issues can be agreed or isolated as being of no moment, while significant points of disagreement can become identified and better defined;

· the discussion between the experts is likely to be conducted on a higher plane, and in a more scientifically appropriate fashion, than in court, where it is led by counsel unversed in the technology, and

· the discipline of drafting a report itself tends to bring sharper focus to the issue.

The positive nature of this experience has led the Supreme Court of New South Wales to develop, and to adopt Practice Note Number 121 which is attached to this paper, to regulate joint conferences. Its extension to criminal trials is under current active consideration by a Working Party convened by the Court, including representatives of the prosecution and defence.

Of some significance is the proper role of legal practitioners in relation to joint conferences. The better view seems to be that their presence is of value, so far as that may enhance the confidence of the parties in the process, so far as they can ensure that the meeting is properly conducted and not de-railed by irrelevant considerations, or by improper pressure, and so far as the experts are not mistaken as to any relevant principle applicable. Otherwise, they should not participate in the discussions or act in any way that may be seen as advocating a particular outcome.

(ii) The hot tub or Expert Panel

> Of particular interest in this regard is the 'hot tub' variant developed in the Australian Competition Tribunal and adopted for use in the Federal Court by Lockhart J. It provides for experts to give their evidence on the same occasion. Typically, it begins with an oral exposition by each of their own position, and comment by each on the other opinions, which is followed by cross examination and re-examination, either witness by witness on all topics, or alternatively on single issues. The questioning can be conducted by the witness, the judge, or counsel, or all of them, as appropriate.

d) Criminal Trials

The SCAG Working Group on Criminal Trial Procedure, in its September 1999 Report, recommended the adoption of rules in relation to the presentation of expert evidence in criminal trials, akin to those applicable to civil trials, including the obligation of full prosecution and defence disclosure and joint conferencing.

It has to be acknowledged that it may not be to the advantage of an accused to co-operate in any procedure which is designed to arrive at greater factual certainty, unless emergence of the truth happens to coincide with his or her own interest. Moreover, it is not always the case that the defence can assemble a team of forensic experts of equivalent experience and expertise to those who work full time for forensic science laboratories or police services.

On the other hand, there are advantages in so far as:

· forensic laboratories used by prosecution authorities almost inevitably focus on looking for indications of guilt; and may overlook factors which question those findings or point to innocence, but which may come to light when the experts confer;

· there is a public interest in not securing convictions based on bad forensic evidence, and the identification of problems in technology and procedures, in the course of joint conferencing, may lead to improvements for the future;

· doubts entertained by a defence expert may be dispelled by the additional information or explanation provided in a joint conference, allowing the accused more comfortably to offer an early plea of guilty, and thereby receive the benefit of the discount attaching to that circumstance;

· the expert evidence can be led in a more compact and meaningful way if there has been substantial agreement, avoiding the risk of the jury being sidetracked from the central issues into complexities beyond their ken, and of being overpowered by technology, which is likely to be more powerful on the prosecution side, into returning a verdict that is unjust.

4. SPECIALIST WITNESS INSTITUTES AND ASSOCIATIONS

The development within the professions of relevant protocols, and of the provision of ongoing training in the delivery of expert evidence has also been a welcome development. Among the bodies which have emerged, and taken up this role, are:

· the *Expert Witness Institute of United Kingdom* which was formed in 1996 and whose objectives are to:

· encourage professionals with relevant expertise to become expert witnesses in both civil and criminal cases;
· advocate quality in their work for the legal system by ensuring that they understand their role and how best to work with clients, solicitors, barristers and judges;
· approve or certify experts using appropriate criteria, and
· to work with professional bodies to develop standards.

To achieve these objectives, it publishes newsletters, maintains a helpline for support and advice, develops training and education on courtroom skills and report writing, provides access to research resources, maintains a facility for certification and referrals for work, and publishes case notes of interest to expert witnesses.

It has also developed its own Code of practice, and a disciplinary system to deal with questions as to whether a member has failed to maintain the standards to be expected of reasonably skilful and careful expert witness. It has also been endeavouring to secure acceptance of a Code of Guidance for Experts.

· *The Expert Witness Institute of Australia Limited*

This is a body recently formed, along the lines of the United Kingdom Institute, with similar objectives, and with representation from the professions most closely connected with the presentation of expert evidence. It is poised to develop its own code of conduct, to conduct seminars and similar training programs, and to represent relevant interests in dealings with professional associations and with the courts and governmental authorities.

· Several other institutions exist, with similar objectives, and in some cases with their own codes of practice, and training programmes, including *The Australian College of Legal Medicine,* the *Medical-*

Legal Special Interest Group of the Royal Australian College of Surgeons, the *Australian and New Zealand Forensic Science Society,* and *the National Institute of Forensic Science.*

It is likely that the Expert Witness Institute of Australia Limited will be able to perform a useful role in securing some commonality of approach and co-operation, between these organisation, and in acting as a clearing house, so as to avoid fragmentation of effort, and so as to secure optimal utilisation of the funding and resources available to each.

A critical assumption underpinning the formation of this kind of institute or association is that the purpose of expert evidence is to *assist the Court* in its resolution of issues, which it does not have the knowledge or capacity to determine itself, and to ensure that it arrives at an answer which is fact and science based. This itself involves something of a departure from the adversarial system which, if the parties so determine, allows cases to be decided without reference to relevant areas of expert opinion, or even to relevant facts.

The new era offers much in the way of greater impartiality, and of an improvement in the quality of expert evidence. We would be looking for a chimera if we were to expert all such evidence henceforth to be unsullied by fallible human process. We need to accept that there will be errors, and room for legitimate differences of opinion. What we can hope for is a regime which will minimise the risk of error, exclude bias and dishonesty, and reduce the costs, both direct and indirect, which junk science and partial opinion bring to the justice system.

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Matters of Principle - A Reflection on the Judicial Conscience

The Hon Justice James Wood

Uniting Church Ashfield

14 November 1999

When inviting me to speak, the Reverend Bill Crews made it clear that I was not being asked to preach a sermon. Rather, he said, I was to be the sermon; I was to speak of something of the utmost importance to me.

There are many things of importance to me, but I gathered that I should direct myself to something that was not too far detached from my working life.

In his introduction to "the Lawyer's Calling", Joseph Allegretti recalled explaining to a friend that he was writing a book examining what it meant to be a Christian lawyer. There was a long silence, before his friend said, "Joe, what will you do with the rest of the page?"

The concern Allegretti's friend entertained is neatly encapsulated in the exclamation of a law student to his professor, after hearing the result of a hard case: "but that's not just", to which the Professor's reply was: "If you wanted to study justice, you should have gone to Divinity School".

These responses, I am afraid, are not uncommon. There are many who believe that there is a fundamental contradiction between adherence to, and enforcement of, a system of legal order laid down by a secular authority, and loyalty to the dictates of conscience and faith, particularly where it can be seen that the legal code, or some portion of it, is morally indefensible or unjust.

While immediately disheartening, concern of this kind causes one to ponder whether there is in fact anything to be written on the page which Bill Crews has given me. It so happens that there is a matter of principle of which I would wish to speak, and an area of significance for which it has a contemporary relevance.

In drawing my thoughts together, I have reflected over the century that is about to close. That century has been one that has seen two world wars, countless local conflicts, the Great Depression, the emergence of totalitarian political regimes, atrocities long ignored by the United Nations, in Rwanda, Uganda, Ethiopia, the former Yugoslavia, Cambodia and Indonesia, the coining of the terrible euphemism, "ethnic cleansing", and the reality of nuclear holocaust.

The century has also been one enlivened by enormous strides in medical science and communication technology, by the experience of the moon landings, by Glasnost, Perestroika, the fall of the Wall, and the collapse of communism, by the growing awareness of the humanising value of civil rights, of equality and of tolerance in matters of race, religion and gender, and by the shaky beginnings of the enforcement of the Geneva and Genocide Conventions as seen in the arrest of General Pinochet, and the recent NATO and United Nations actions in Kosovo and East Timor, the first occasions on which there has been military intervention, not for commercial or territorial advantage, but for ethical principle alone. These events are shadowed to a degree by the reluctance of some nations to extend their full co-operation in the prosecution of those guilty of crimes against humanity, and to establish a permanent International Criminal Court of Justice, but they provide at least a glimmer of hope.

At midnight on 31 December 1999, this century will, according to popular although not scientific measurement, come to an end. So far as we in this country are concerned, the new Millennium will approach us from the East that night at a rate of 15 degrees of longitude per hour. For some, this will be the time of Armageddon. For others, it will be an occasion on which the technological explosion of this century will fail due to the ignorance and greed of those who programmed the new age.

I am prepared to take my chances that the world will continue, and that any technological hiccups will be insignificant and temporary. I am not, however, prepared to enter the next century with any sense of complacency about the willingness of the Justice system to take a principled stand on issues that matter. In the text I previously mentioned, Allegretti suggested that the practice of law should be seen as part of a spiritual journey in this world, and that lawyers of conscience can, consistently with their faith, allow personal values and beliefs to penetrate and govern their work. The task, as he sees it, is to apply those values with an awareness that they can be an influence for the improvement of society, and with the understanding that one remains accountable not just to a secular authority, but also to a spiritual authority - a philosophy not far removed from Lord Coke's rejoinder to King James , "Not under man, but under God, and the law".

The model, as he sees it, is one that requires a human face and presence to be placed upon those who enter the justice system - to take account of the fact that they are likely to be people in turmoil and pain who seek help, as well as people whose freedoms and privileges are at risk, either because of their own conduct, or the conduct of others. No longer can any of those people be comfortably dismissed as files, or as ciphers to be manipulated according to the dictates of law, or of executive decisions, that may be arbitrary and unfair.

Illustrations are manifold of those judges who have placed blind obeisance to the authority of the day, and to its code, before their own principles, and in this way become party to the perpetuation of terrible injustices.

One need only think of the judges in Nazi Germany, most notably Roland Freisler, the infamous President of the National Socialist Peoples Court, whose rantings have been so vividly captured on film, as he consigned those, who had the courage to resist, to death by strangulation for treason.

The response of the defence attorney for Professor Kurt Huber in the White Rose trial, when he stood during the proceedings, cried "Heil Hitler" and asked, as a loyal German, to be released from the case, a request readily accepted by Freisler, stands as a permanent indictment of all who would place self advancement and rigid adherence to the system of the day, before personal conscience and faith. Disgracefully, the judges of Nazi Germany took no collective stand against the removal from the Bench of their Jewish colleagues, 643 of them in 1933 alone, the passing of the Nuremburg race laws, or the other horrors of this era. The only known occasion on which they collectively stood up to Hitler was when they wrote a letter to him complaining of a proposed alteration in their pension rights.

Can anything more be said of the majority of judges in South Africa, who remained silent, in the face of government sanctioned murder, banishment and detention, during the years of apartheid; of the judges in Chile and Argentina who averted their eyes during the years of the juntas; of those despised former judges in Eastern European countries who despatched "telephone justice" - in accordance with a call on the eve of the case as to how the State wanted it decided; and of those judges today in countries within our own region who have allowed their office to be bent to satisfy the dictates of their political masters?

There have been those who stood their ground, most noticeably those who have been in the dissent in cases involving the most acute of moral dilemmas. For example Justice Daniel of the United States, who had the courage to dissent in the Dred Scott case in the 1850's, the majority opinion in which supported the withdrawal of judicial protection from slaves, and directly contributed to the Civil War. His resistance stands in stark contrast to that of the majority of the antebellum Judges who, despite their personal opposition to slavery, subjected their consciences to legal and formalistic abstractions in enforcing the laws legitimising slavery, including the fugitive slave laws under which those who made good an escape were rounded up and returned to their brutal masters.

In South Africa, there was the late Justice John Didcott, whose passionate belief in justice, and whose contempt for those lawyers and judges who were apologists for the gross abuses of human rights committed in that country, left him shining as a beacon. In a memorial ceremony following his death, at a special sittings of the Constitutional Court to which he had been appointed by Nelson Mandela, he was described as a friend of the weak, the bullied, the disempowered and the oppressed seeking protection from repression and tyranny. The vision which sustained that image, it was said, helped South Africa rescue so much from the law which was ageless, just and noble from that which was arbitrary, capricious, wicked or crass, a rescue which proved crucial for a defensible and stabilising transition to a constitutional democracy.

Didcott above all retained a sense of humour, amid the absurdity of executive policy of the day. When confronted with a proclamation, issued by the Minister of Sport under the Group Areas Act, that made it an offence for a disqualified person (read 'a black person') to spend a "substantial period of time" in a designated group area, a proclamation issued to prevent a multiracial cricket club from playing in the leagues, it was his advice that those batsmen who reached a century could be prosecuted, while those who went for a duck could not. The solution was that they should bowl brilliantly, bat very badly, and not stay for tea.

Then there was Judge Frank M Johnson, a judge appointed to the District Court Bench in Montgomery, Alabama, in 1955, a time when the struggle against segregation had just begun. Before his work on the court was done, a cross was to be burned in his yard, his mother's house was bombed in the mistaken belief that it was his, he received death threats, he required constant protection from US marshals, and he survived a vote of the Alabama House of Representatives to ask the US Congress to impeach him.

His decisions made him one of the most hated men in the South thirty years ago, as he re-wrote State laws to allow black citizens to vote; fashioned new forms of relief to let black children go to white schools, over the defiant opposition of Alabama Governor George Wallace, who branded him as an "integrating, scalawagging, carpetbagging liar"; desegregated public transportation, and demanded and received assurances from the President, Lyndon Johnson, that orders of his Court would be enforced. In 1961 he took on the Ku Klux Klan by restraining them, and the City, from further violence after the assault, at the Greyhound bus terminal in Montgomery, of the freedom riders who had arrived from the Northern states to bolster local civil rights demonstrations. In 1965, he sanctioned resumption of a voting rights march from Selma to Montgomery which had earlier been interrupted by officially sanctioned assaults and abuses of rights by State lawmen, and even allowed it to block portion of US Route 80. He also brought to an end, by one decision, the literacy requirements for registration as a voter which had been rigidly enforced in relation to blacks but ignored for whites. Today he stands as one of the most revered figures in the history of jurisprudence of that country.

There have been others, some of whose names occupy barely a few lines in written memory, and whose stand on principle led to dismissal, a prison cell, or worse. The Centre for the Independence of Judges and Lawyers, established by the International Commission of Jurists, issues an annual report "*Attacks on Justice - The harassment and persecution of Judges and Lawyers*". Its reading is grim fare for those countries where the hold of justice, in the full sense of that word, is at its most tenuous.

It is unlikely that any judge in this country will ever face the fate or the pressures those judges endured. At most they risk having their decisions ridiculed by ill informed politicians, as was the case with the Mabo and Wik decisions, or of being dismissed as judicial activists or lawmakers. For those who do face, in their judicial capacity, moral dilemmas of the kind that emerged in Nazi Germany, that existed under apartheid and segregation, that arose when the military, in conjunction with the police and militia, at Santa Cruz and other places in East Timor, chose to act in defiance of the law, let them listen well to what Solzhenitsyn wrote in the First Circle:

"What is the most precious thing in the world? It seems to be the consciousness of not participating in injustice. Injustice is stronger than you are, it always was and it always will be; but let it not be committed through you."

I have not in my fifteen years on the bench had to face any serious moral dilemma of the kind which has confronted those expected to enforce truly unjust laws. I would hope that should the occasion arise, I could embrace the philosophy proposed by Allegretti, and practised by those I have mentioned.

I have, however, had the opportunity through the Royal Commission, and later as a Delegate to the Drug Summit, to step outside the shackles of judicial office and to speak somewhat more directly than otherwise might have been the case, with a class of persons who risk injustice in this country at the hands of those who would cling to the hard letter of the law, and to harsh policy.

It will be no surprise that the persons I have in mind are those who have succumbed to the scourge of drugs, a legacy for which the second half of this century must answer, lest we condemn those in the new millennium to an ever spiralling cycle of addiction, crime and destruction. My dealings in this area have been not only with users, but with those whose corrupt conduct dances in and around the drug trade, and those who would write off its victims as flotsam, or they might prefer as jetsam thrown

overboard in the hope that they might sink and leave the rest of us safe on the vessel.

When I began the practice of law, the use of drugs was practically unknown in this country. With the advent of the psychedelic sixties and the visits of servicemen on R and R during the Vietnam war, all that changed. The siren call of Timothy Leary, “Turn on, tune in and drop out” was beguiling, and our young rushed to the mind altering substances of the day, as well as to the designer drugs which have followed in their wake.

It is now too late, and no good purpose would be served, in trying to determine why that was so - whether it was due to disillusionment and despair over the failure of society to maintain the opportunities for education and employment that once were there, a reaction to the Asian war, or out of the growing importance of self and the relaxation of personal standards that a more egocentric and consumer oriented society has encouraged.

The reality is that drug abuse has become endemic. Recent importations of heroin and cocaine in quantities in excess of 100 kg, the discovery of clandestine amphetamine laboratories of some magnitude, show that to be the case as does the rising proportion of those in custody for drug related offences. The mortality figures for injecting drug users, and the time ambulance crews spend administering Narcan, similarly point up the problem.

The failure of the threat of imprisonment to halt the drug trade, and the empty rhetoric of the phrases “War on Drugs” and “Zero Tolerance”, an exercise now costing the USA $115 billion per year, are all too apparent.

If one thing stood out from the Royal Commission, it is that organised crime has changed to centre itself on drugs - an activity that it once eschewed - and that the trade in those substances was the single most important feature in taking otherwise decent and honest police off course.

What of the victims? Sadly, those that I saw informally, and still see today in a more official capacity, are young, basically decent and desperate to get off their drug habit. One is entitled to a degree of cynicism when such views are expressed post arrest, but those who are close to the scene, who have worked in the back streets of Kings Cross and in the refuges - people like Father Chris Riley of Youth Off the Streets, Dr. Alex Wodak, Tony Trimmingham, and the brave Sisters of Charity who dared to try, will testify to their genuineness and need.

The assertion that their plight is one of self choice, and that the only way to deter them and others, is the strict legal punishment model, comes from those who have not been anywhere near the front line. It comes from those who do not appreciate the combination of circumstances and forces that take young people into this seedy world - physical and sexual abuse as children, broken homes, absence of education, lack of employment, early and unnecessary imprisonment for minor forms of criminality, peer pressure and the natural inquisitiveness and rebellion of youth.

No one suggests that they should be given the slightest encouragement to believe that drug abuse is acceptable, or that there is merit in experimentation. Nor can anyone question the need for preserving the strictest regime of the law for those who import, manufacture and supply drugs. But do we need to impose the same rigours on those whose youth, innocence, natural inquisitiveness or dysfunctional background have set them on this route, from which it is so hard to retreat?

The harsh reality is that law enforcement is effective in encouraging addicts out of the market, only when there is somewhere to go. At present there are nowhere near enough places for treatment and rehabilitation. Paradoxically, it is much cheaper and easier to find and buy drugs than it is to obtain treatment.

The theory behind zero tolerance, that to force up the price of drugs will keep users out of the market, has a claim to logic, but the theory has proved empty in practice. On the supply side, the market forces in this country, estimated to represent an annual market in the order of $14 billion, ensure that to be so.

Drugs remain as available on the streets as ever. What is in fact happening, despite significant seizures and arrests, is that they have become cheaper, and the age of first use has decreased.

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Royal Commissions: A Prelude to the Reform Process

Address by the Hon. James Wood

Chief Judge at Common Law of the Supreme Court of NSW

to the IACOLE conference in Sydney

6 September 1999

"Throughout history, it has been the inaction of those who could have acted; the indifference of those who should have known better; the silence of the voice of justice when it mattered most; that has made it possible for evil to triumph" *attributed to Haile Selassie*

THE CLIMATE FOR A ROYAL COMMISSION

The process of scandal, inquiry and reform of Police Services with which we have become familiar has tended to be a cyclical process, universally shared. The inquiry or Royal Commission that follows such a scandal provides an occasion for a valuable insight into the well being and efficiency of the Service, and most particularly into its stance on corruption, and its ability to deter and to respond to the problem.

Each revolution of the wheel, however, has the potential to cause great harm to the reputation of the Service, and to threaten destruction of the careers of able and corrupt police alike, as well as to occasion great personal harm.

The question which must be asked is whether the cycle, which is capable of being arrested, but equally capable of resuming its path in forms, and to an extent even more malignant than before, is inevitable, or whether procedures can be established to bring about permanent or at least long lasting change?

The most recent Royal Commission in this country, that conducted into the Police Service of New South Wales, commencing in 1994, might provide some answers to that question.

As with other Royal Commissions, for example the 1994 Mollen Commission of Inquiry into the allegations of Police corruption in the New York City Police Department, and the 1987 Fitzgerald Commission of Inquiry, into Possible Illegal Activities and Associated Police Misconduct within the Queensland Police Force, the New South Wales Royal Commission was established in a climate of concern as to the existence of unhealthy links between criminal

elements and the police, and exposed by investigative journalists.

Inevitably, the reaction of a Service under this kind of siege has been one of stalwart denial and indignant protest, a response that more often than not has attracted the support of the political party in power, fearful of embarrassments at the hands of its Police Service. The question may be asked why should this be so?

If the Service has no problem and the allegations are misguided or mischievous, it stands to benefit, by demonstrating that to be the case, as does the Government. If, on the other hand, the concerns are genuine, the quicker they are identified and remedied the better. There is nothing more sure in life than that such concerns will worsen and eventually explode upon the public.

The powers entrusted to police to carry arms, to use force and even to take lives in exceptional circumstances, to inquire into deep and dark secrets, to eavesdrop on private conversations, and to deprive citizens of their liberty, are very substantial powers. Conversely, with their significance, they are most often exercised by the younger and less experienced officers working at street level, than they are by commanders with the wisdom of age and experience. Moreover, they are exercisable in circumstances where the opportunities for temptation and corruption are often very high. This is particularly true in relation to drug law enforcement, when the monetary stakes and risks of arrest are enormous.

Attached to those powers are considerable discretions, whether to arrest or not, whether to allow a criminal venture to continue for a while so that evidence can be gathered, to turn and use a minor participant in an undercover capacity, or to turn a blind eye to the activities of a useful informer. Sound judgment is required in the exercise of these discretions. Depending on that judgment they may properly be used in the public good, but conversely they may be used for corrupt purposes, or as an excuse when an officer is caught out.

It is inevitable that a police officer vested with such powers and discretions will be invited, in the course of his or her official duties, to act corruptly - to turn a blind eye to particular acts of criminality, or to provide a favour to a person facing a possible arrest or already charged and before the Courts. The nature of the powers and discretions that exist, the circumstances in which they come to be exercised, and the potential rewards for co-operation that arise are such that some police are bound to succumb. No Police Service can legitimately have any other expectation, but that circumstance does not of itself mean that corruption needs to become endemic or established on a systemic basis across the Service.

It is the point at which corruption passes beyond individual and isolated acts, and becomes shared between police, or becomes adopted across a significant element of the Service, as a common value, with which this paper is principally concerned. When the cycle pauses at this point, it can properly be said that law and order risks being subverted and turned into an instrument of evil rather than an instrument for the protection of the community. No longer can a Police Service in that position claim to be a legitimate part of the democratic structure. It has become a law unto itself.

It was this point which had been reached with sections of the NYPD when the Mollen spotlight was shone upon them. In the 1970s, the Knapp Commission had discovered widespread corruption of the systemic or institutionalised kind, in which a blind eye was turned to the breach of a wide variety of laws at a local level, in return for payments shared on a formalised basis between patrol officers, detectives, supervisors and commanders. A concentrated effort to break up this form of local “pad corruption” followed, under the guidance of Commissioner Patrick Murphy, but it eventually failed because no mechanism was implemented to sustain the integrity controls and new code of ethics that were introduced.

By 1994, the Mollen Commission of Inquiry found a new and more insidious form of corruption infecting parts of the city, particularly in high crime precincts with an active narcotics trade. Rather than police taking money to accommodate criminals by closing their eyes to illegal activities, they were now seen as acting as criminals themselves, especially in connection with the drug trade. This was not corruption of a fortuitous, opportunistic nature, or arising out of human frailty. Rather it was the result of created opportunities. It involved a premeditated and organised group effort at Precinct level.

Similarly, it was the position reached in Queensland in relation to those elements of the Service, working particularly in the enforcement of licensing and vice laws, with connections reaching to the top of the Service, that became exposed by the Fitzgerald inquiry as deeply corrupted. That Commission of Inquiry only became possible because of current affairs programmes such as “The Moonlight State”, which eventually galvanised a community, cynical of its police Service, after years of inaction into a response.

So it was in New South Wales that concerted media pressure, resulted in the more widely focussed 1994 Royal Commission. It was established with specific terms to inquire, inter alia into the nature and extent of corruption within the Service, particularly of an entrenched or systemic kind, and into the activities of the Professional Responsibility and Internal Affairs branches in dealing with the problems of corruption and internal investigations.

By that time, at least in certain circles of the media, and among those practising at the criminal bar, there was a strongly held belief as to the existence of strong links between crime figures and sections of the Service, and as to the institutional practice of, as well as tolerance for, those forms of process corruption that involved the fabrication of evidence, and the extraction of non voluntary confessions, or otherwise involved a perversion of the criminal justice system - not only to secure convictions but, where the opportunity arose, to ensure that the chosen were spared from criminal prosecution.

The criticisms had not been ignored by the Police Service. Commissioner Avery targeted the concentration of power within the Criminal Investigation Branch by a policy of devolution and regionalisation, and by the establishment of an Office of Professional Responsibility with a brief to develop anti corruption measures and educational programmes, in addition to its responsibility for reactive internal investigations.

The motives were right, and the commitment was there, but as events turned out, there was little change. The reasons for that require exploration.

THE EMERGENCE OF CORRUPTION

In order to develop corruption prevention or control strategies for any Police Service, it is essential first to understand the local climate, and the reasons why corruption has emerged. For the most part the reasons are common to policing generally, but their significance, and the precise guise in which they emerge, do differ from Service to Service. What they do share in common is the fact that corruption does not emerge suddenly. By its nature it is spawned in stealth, and only grows in a climate in which it is comfortable.

In New South Wales, the forms of corruption discovered were those that might have been expected. They included the receipt of bribes; the protection and franchising of gaming interests, drug dealers and others; the elimination of competitors of favoured drug cartels and gaming establishments; the theft of money and of drugs found during the execution of search warrants, and the recycling of the latter; the leaking of confidential information and warnings of pending police activity to persons under investigation; extortion and shakedowns; fraudulent misappropriation of allowances; the assault and mistreatment of civilians; compromise of prosecutions; insurance fraud; recreational substance abuse; interference with internal investigations; and process corruption in its many forms.

The practices uncovered are well known and do not require greater amplification. What was, however, important was that they were not confined to individuals, but were found to have been widely shared in some squads or localities, and developed to an art form.

The emergence of this state of affairs was assessed by the Royal Commission to have been attributable, principally, to the following circumstances:

Adoption of a Crime Control Model of Policing

There had been long term tolerance in New South Wales of victimless crime in the form of SP betting, gaming, vice and unlicensed sales of liquor. The justification for such tolerance, and the willingness of police to accept payments for turning a blind eye, was that by allowing a chosen few to continue such activities, they could be kept within acceptable limits. Further, it was assumed that they caused no great harm, in a city the size of Sydney, for which a reputation for a degree of raciness and character did no harm.

This model of policing conveniently overlooks the compromise of individual integrity, and the cynicism it breeds at all levels. Officers who see crime untouched, or who are thwarted from targeting certain areas, naturally assume the worst in their commanders, and become reluctant to report corruption. The message that goes out is simple and obvious - protection can be secured, and it is dangerous to question it. Moreover, it provides the perfect environment for the hard officer, that is the officer who is knowledgeable in the ways of the city, who fraternises with organised crime figures, who uses those connections to provide protection to some and to

arrest competitors or those who step too far out of line, thereby profiting personally through bribes and promotion, and who builds a network of power and influence. Perversely, such officers have in the past often been treated as role models.

Dumping Grounds

A circumstance that also emerged within the NYCPD was the tendency to create dumping grounds for the misfits, the malcontents, and the incompetent or less disciplined officers, in high corruption areas, and then to use them to blood trainees as quickly as possible into the hard realities of policing. Inevitably, police who believed that they have been dumped in such a location will develop a perverted pride in their unsavoury reputation, and act it out.

Young officers will invariably be tested out in such an environment for their preparedness to succumb to temptation, and to support the culture of loyalty to their colleagues.

Preservation of the Reputation of the Service

Another circumstance similarly shared with the NYCPD was an institutional pressure to suppress, or contain, the disclosure of corruption in the belief that this was in the best interests of the Service so far as its reputation and morale were concerned. A poor external reputation, so it is believed, will worry the public, reduce its co-operation and trust, and empower criminals.

Institutional suppression of the problem is an inevitable recipe for collapse of command responsibility for the maintenance of integrity, and for reinforcement of a “them and us” culture that encourages a defensive mentality. It sends a very powerful message to the ranks not only that the rhetoric to which they are exposed in this respect is empty, but that the opposite is what is truly expected.

It is an attitude that needs to be stood on its head, but it is also one that requires a degree of public education. The Service, the media, and politicians need to be convinced that the uncovering of corruption by the Service, is not necessarily evidence of bad management or of integrity problems. Rather, it can be seen as evidence that the system is working, and that there is a brake being applied to the inevitable problems that would otherwise fester and multiply before the inevitable scandal broke.

The Police Culture and its Code of Silence

Woven in and around these problems has been the culture that is so much part of any Police Service. It is inevitable that it develop within any group that faces the dangers and difficulties of policing. It is a vocation in which its members come to socialise and depend on each other both on and off the job. It is one in which in times of crisis, heavy reliance needs to be placed on the loyalty and immediate response of fellow officers. Many of the work experiences cannot readily be shared with outsiders, and tension is often broken in ways that might not otherwise be seen to be politically correct.

In dealing with criminals, and the less savoury elements of society, friendship, respect and courtesy are not usually returned and it is easy to view the environment as hostile. It is also easy for police to feel that the value of their work is not appreciated by the public and that the latter are far too ready to complain about minor matters. Inevitably, in these circumstances police will band together, and develop an intense group loyalty. This loyalty is entirely positive if employed in the interests of legitimate policing, but it can easily be distorted, when called in aid by the corrupt, as was seen to have occurred in New South Wales, and in Queensland.

The code which is part of the police culture has been shared by the honest and corrupt alike, and it is one that has to be targeted as vigorously as any other aspect in the reform process, because:

· the notion that loyalty to colleagues is more important than loyalty to the Service is not overlooked by the corrupt or those susceptible to corruption, and can only give them confidence;
· silence, or active interference with internal investigations, renders the task of those undertaking such inquiries next to impossible;
· ultimately, it taints the reputation of all and risks jeopardising the safety of an honest officer who comes into contact with a criminal who has been stood over, or let down, by a corrupt member of the Service one time too many;
· it breeds a kind of cynicism, a feeling of disempowerment, and an erosion of pride, in those honest police who despise the corrupt members of the Service and silently hope they could be removed from their ranks.

Process Corruption

The inquiry revealed that, over the years, process corruption had been developed into an art form by some sections of the Service, notwithstanding strenuous attempts by the criminal bar to challenge police verbals, the planting of evidence and induced confessions. In part they were aided by a degree of judicial naivety in not waking up earlier to these practices, even though there were some guideline decisions preventing, for example, the tender of unsigned records of interview, and concentrating greater attention on the voluntariness of confessions and on the lawful collection of evidence.

The circumstances that allowed process corruption to develop are complex, and its study is complicated by the fact that often the truly corrupt rely upon the more altruistic reasons for its adoption, as an excuse or mask for their venality. In its various forms it tends to be explained by reference to:

· the inadequacies of the judicial system and the frustration of honest police trying to lock up those who they know are guilty of crime;
· the need to even the odds in a fight against criminals who are not constrained by any code or rules other than those they set for themselves;
· the “taxation” of criminals, particularly drug dealers, who might otherwise escape justice, or receive a penalty that is seen to be disproportionately lenient; and
· the message given by Commanders that high arrest rates are expected, and that performance in this respect is likely to be better recognised and rewarded than any display of integrity.

While the superficial attraction of some of these arguments cannot be ignored, the reality is that as often as process corruption has been the result of “honourable” motives, it has also been engendered by black motives referable to opportunistic theft, the elimination of rivals at the behest of a protected criminal, self advancement in securing promotion, thrill seeking, and simple laziness or unwillingness to do the hard work required for an ethical investigation. Whatever the motivation, experience shows that there is even greater reluctance by individual officers to reveal this form of corruption because of the numbers of persons potentially involved, and its acceptance as a reality of policing.

The problems that have emerged from this form of conduct, most of which have probably been unappreciated by those who have resorted to it, are manifold:
· an officer who has become involved in any form of process corruption is potentially compromised for all time. Not only is that officer vulnerable to pressure from other police to remain silent, but he or she has begun to learn the art of lying and covering up, and to see the ease with which that can be practised;
· the “taxation” of drugs or money from criminals can soon become a more general practice once the taste for extra “earnings” is obtained. The practices learned, and the awareness acquired that few if any members of the Service let alone criminals are likely to complain, are not easily ignored; and
· the opportunities offered can be used by the most experienced and venal officers to build a substantial power base and reputation that is hard to dent.

Very often it was found that a willingness to participate in this form of conduct was regarded as a rite of passage, and as the means by which ambitious young officers could attach their stars to those within the powerful cliques which had formed within the Service, and who were able to influence career paths and promotional opportunities. The disillusionment and frustration of those who remained outside these circles was palpable, and their operational careers were inevitably limited.

The ball is passed on

A particularly disturbing feature emerged in the form of evidence from a number of officers that having been recruited into corrupt practices in their early years, they expected that on attaining Commissioned rank, they would by and large leave such practices behind.

Their understanding was that they should allow others to reap their share of corrupt rewards, that they should not be too anxious to detect or target them, and that they should only respond, (and then somewhat savagely) when someone was caught out in corrupt conduct that could not be covered up.

It is the presence of this feature within a Police Service that most clearly justifies the tag entrenched, or systemic, and which makes the fight against corruption from within so difficult. It represents a double standard that creates an impossible position for young police. It is a feature which most encourages the inimical aspects of the police culture - the unwillingness to report misconduct, the fear of institutional payback for speaking out, the confidence that other police

will back up or at least tolerate the corrupt, and the development of a misplaced group loyalty.

Inadequacies of the system for Internal Investigations

It cannot be gainsaid that virtually every Police Service in the world has had difficulty in establishing an entirely satisfactory or effective system for internal investigations. It similarly cannot be gainsaid that every Police Service must retain a real role in policing itself. To pass the problem entirely to an external body is only to guarantee disaster. Absent responsibility, vigilance and pride in the job will collapse.

The New South Wales Police Service was no exception in the deficiencies which were exposed. Notwithstanding the dedicated efforts of many who were posted to work in Internal Affairs or in the area of Professional Responsibility, the system was found to be slow, inflexible, insufficiently responsive and lacking in credibility.

Among the problems uncovered, some of which were inherent to any system of internal investigations, and others of which had more of a local basis, were:
· the notion of police investigating police - a concept which runs headlong into the adverse aspects of the police culture, embracing as it does a traditional reluctance to inform on close associates, and the fear of harassment and of institutional payback;
· the reactive focus of the complaints system on single instances of misconduct, which tended to conceal the discovery of links and patterns indicative of organised corruption, and overlooked the broader management and intelligence considerations indicative of more widespread corruption as well as the opportunities for early remedial intervention;
· the highly labour intensive, technical and dilatory nature of the complaint procedures which led many officers to resign the Service with stress related conditions referrable to the time taken for the resolution of relatively simple matters;
· the failure to utilise financial and intelligence analysis and covert operations including the roll over of individual officers able to expose a wider net of corruption(because of the perceived need to immediately prosecute or discipline any individual caught out in corruption);
· the concentration on an adversarial complaint system in which a punitive, rather than a remedial approach inhibited police from admitting to mistakes, and encouraged a culture of group cover up;
· the limited resources that had been given to the Professional Responsibility Command, and the downgraded, unpopular status of office within that command, in some quarters regarded as a retirement haven for the near retired, or for those who do not otherwise fit the mould, or alternatively as a mere stepping stone to promotion (without commitment to the job);
· an inherent bias in investigations as the result of which the Service was seen to fail to carry out impartial investigations, or to pursue allegations with the same rigour seen in ordinary criminal inquiries (it often seemingly being the case that the inquiry was directed towards finding justification for the officer’s conduct, rather than matters which might corroborate the complaint);
· lack of security in relation to corruption investigations, with information and warnings being promptly passed on to police under investigation. The expression “whale in the bay” became part of the language of the Service, being understood as an alert to the existence of an IA inquiry.

· the use of ineffective investigative techniques, for example the release of details of the complaint followed by the issue of directive memoranda calling for an explanation in writing, which allowed groups of police under investigation to be forewarned of the inquiry, and to manufacture a watertight defence in collaboration;
· the use of an investigation methodology which frequently began and ended with the officer's denial of the allegations, on the basis that faced with such a response, the true facts could not be determined, an investigative approach which would rarely terminate a conventional criminal inquiry; but which allowed corrupt police to return to duty with their reputations enhanced either as "untouchables" or as effective police who were hurting criminals, and on that account, attracting complaints; and
· the lack of protection given to internal informants.

BLUEPRINT FOR A ROYAL COMMISSION

The decision to appoint a Royal Commission should not be taken lightly. If it is to be conducted effectively, it will require time and commitment, and it will be expensive. It will involve a substantial suspension of individual rights, and often require a preparedness to prefer the acquisition of intelligence or knowledge to the collection of evidence that can be used in a criminal prosecution. There may be unintentional damage to careers or reputations by association, and there needs to be a preparedness on the part of the government to allow the Service to bleed, in a very public way, before it begins to reform itself.

In New South Wales the Royal Commission was fortunate to receive the full support of the government and the media, as well as that of other law enforcement agencies, both at a state and Federal level, for whom there were tangible benefits in reversing the problems of the past. If a Commission of Inquiry of this kind is to be established, as a temporary institution, it has to be equipped with the powers, and to be resourced, so as to get into the heart of the problem quickly. Unless it has that guarantee and the time needed, corrupt elements will simply shut up shop and wait for it to go away. The New South Wales experience revealed that attention must be given to the following aspects:

Terms of Reference

These need to be settled with care so as to ensure that the relevant inquiries can be conducted, without the Commission being caught up in litigation, while its activities are challenged in the Courts.

Powers

Legislation will normally be necessary to confer coercive powers to carry out search and seizure operations, to employ listening devices, to intercept telecommunications, to issue notices for the production of information and documents, and to require evidence to be given notwithstanding the possibility of self incrimination and derivative use.

These powers will need to be reinforced, as they were in the case of the Royal Commission by statutory offences for non compliance, and obstruction of the Commission. Additionally to the specific offences, the Commission needs powers to refer witnesses who refuse to give evidence, to a Court for punishment for contempt.

Memoranda of understanding will need to be established with the Service under investigation and external law enforcement agencies, the Taxation Office, financial reporting agencies, Casino Control Boards, Totalisator Agency Boards, Telecommunications Companies, Customs, Immigration, Road Traffic and Licensing authorities, and a host of other agencies within the government and private sector, including banks and financial institutions, so that information concerning movements, associations, financial transactions and personal details can be readily accessed. It is only upon the basis of this information that intelligence and financial profiles can be built up that will establish associations and the presence of means that are not explicable absent corruption or criminal activity.

In some instances, eg. the Police Service itself, access needs to be achieved by direct electronic link into its systems. In other instances separate arrangements can be made. Where electronic access is secured this is best arranged through password protected stand alone terminals, so as to block access or hacking to the main IT system of the Commission.

History has shown that organised crime can effectively be attacked through its pocket, and particularly through income tax and racketeering laws. So it is with serious police corruption, it often being better that the trail start from organised crime connections and work backwards to those police who are on their payroll.

In some instances, access to the information needed will depend upon legislative amendment to overcome secrecy provisions and to impose corresponding confidentiality obligations upon the Royal Commission.

Liaison with the Police Service, in the present instance, was arranged through a specially established Royal Commission liaison unit, whose staff were selected for their integrity, subjected to confidentiality arrangements and freed from Service obligations to report to the Police Commissioner or to superior officers, on any matters of misconduct by other police that came to their notice in the course of their duties, or otherwise to report on their activities. The existence of such a unit is valuable in searching for and physically obtaining Service documents that may otherwise be unprocurable.

Secrecy provisions, immunity from civil suit in relation to matters undertaken bona fide, and procedures for formal dissemination to other law enforcement agencies and revenue authorities, pursuant to certificate of the Royal Commissioner, will be necessary, and will need to be secured by the enabling legislation.

Staff

It goes without saying that the level of skill and integrity of a Royal Commission staff will determine its successes. Recruitment and positive vetting are essential.

In New South Wales the Commission worked under a hierarchy as follows:

Royal Commissioner

Senior Counsel Assisting

Chief Investigator

Teams comprising

Counsel

Solicitors

Investigators

Paralegals

(There were three independent teams working on the Police Corruption reference)

Support and Administration

Surveillance Teams and Technicians

Information Technology

Administrative Staff

Registry

The teams worked on individual references, chosen by Senior Counsel Assisting and the Royal Commissioner, upon the basis of information received as to likely targets.

The role of Senior Counsel Assisting as tactician, overall co-ordinator of investigations and arbiter as to priorities for surveillance and analytical services, was critical. In addition, his presence enabled the Royal Commissioner to remain independent of the day to day investigative work.

The role of Chief Investigator was also important in acting as an adviser to Counsel Assisting and team leaders, in investigative techniques and opportunities, and in ensuring the availability of the surveillance and investigative staff needed.

The teams worked separately, save where there was some cross over involved, or where a particular operation required additional resources. The investigators were all recruited from external law enforcement agencies, being seconded from their present agencies for the term of the Commission.

Essential to operations of a Royal Commission is a comprehensive IT program, supported by an IT team. Considerable security is needed to ensure lawful holding of Listening Device and Telephone Intercept product, as well as security of intelligence and operational running sheets which will have to be confined, on a needs to know basis, to the team working on the reference.

A significant Registry capacity is required to receive, record and electronically record the documents that are received from external sources, or generated as exhibits. Without a sophisticated system of this kind, the use of such materials will depend on memory or “serendipity”, the latter having been acknowledged in a public hearing of the Commission as the foundation of the former intelligence data base for those involved in child sexual abuse.

Additionally, it will be advisable to employ a suitably qualified officer to act in a security and counter intelligence capacity so as to ensure the early detection of any signs of penetration of the premises, of the IT system or of operations, and of any possible security lapse that might be noticed and used by outsiders. Upon the strength of security depend not only the success of investigations, but the lives of those working undercover.

Operations

The Royal Commission differed from many similar inquiries which took a historic approach reviewing past events and procedures. The decision was made that unless serving police and criminals could be compromised in current activities, and then persuaded to assist the Commission in an undercover capacity, or at least in the supply of information, there was little hope in penetrating the code of silence.

So it was that the Commission engaged in proactive covert inquiries, heavily dependent on physical and electronic surveillance. These were directed at suspect areas, such as Kings Cross, which had always been the haunt of organised crime figures, as well as a substantial outlet for the drug trade through the sex shops, brothels and clubs for which it is notorious.

Having trapped one such officer who was persuaded to roll over, and work in a covert capacity for the Commission for an extended period, the net of co-operating police was progressively widened. The eventual public exposure of this witness in public hearings, while bringing that phase of operations to an end, was designed to unsettle other areas of the Service upon which

the Commission was working.

The operational methods used in relation to Kings Cross were replicated in other areas, with similar results. Surprisingly, notwithstanding the knowledge, which might have been assumed to detectives working in criminal investigations, concerning the use of physical and electronic surveillance, they continued to meet and either to engage in continuing acts of corruption, or to discuss defensive techniques. This was either a sign of confidence that they were untouchable, or of a concern on their part to cover up their tracks. Either way they remained open to exposure. Each approach, I suggest, was consistent with a reflex response born out of the code of silence. What was new and unfathomable and hence unsettling, was the roll over of hard and experienced officers.

As observed earlier, the Commission also worked backwards from criminals, several of whom were persuaded to co-operate, and from financial analysis that threw up signs of wealth that could not have been obtained lawfully.

An investigative matter that is of significance relates to the need for a Commission of this kind to have authority to conduct controlled undercover operations that might have otherwise involved its staff, or those recruited to work for it, in criminal activities. As can be appreciated, absent a proper legislative basis for such operations, difficulties of a real kind, as well as conflicts of interest can arise if members of the Service were accidentally to come across such conduct, and to exercise normal police powers.

Necessarily, if roll over witnesses are to be used, the Commission must have the backing of the Executive government to offer undertakings not to use evidence gathered with their assistance, against them, or to give immunities from prosecution. In extreme cases as in Hong Kong, a general amnesty may have to be offered in return for full and frank disclosure of information.

In New South Wales a limited amnesty (not extended to serious crimes of violence or sexual assault of children) was offered, conditional upon full co-operation, frank and truthful disclosure, and resignation with loss of all but accrued benefits.

The success of such an offer will depend upon the strength of the code of silence, the potential financial consequences to an amnesty applicant in terms of loss of benefits and exposure to amended income tax assessments for undisclosed earnings from corrupt activities, and the assessment that some are likely to make that it is better to wait until caught, in the expectation that similar arrangements can be negotiated if significant or new information is then volunteered.

These are real considerations which need to be taken into account by any Inquiry considering an amnesty. Such an offer is an exceptional step, and will only work if it is truly of benefit to past offenders, such as was the case with the Truth Commission in South Africa, and with the Hong Kong Police Service, which permitted co-operating police to continue in office with the page closed on disclosed corrupt activities.

Moreover, whether the approach pursued is that of amnesty or undertaking and immunity, the Commission and the Executive government must be prepared to take, and to justify the somewhat bold course of placing public disclosure and the gathering of knowledge ahead of and in many instances, at the expense of prosecution. Absent that value judgment, which may not be readily understood by the media and the public, there cannot be a reliable platform upon which the Service can be rebuilt.

Because of the risk of suicide of officers caught out in this kind of inquiry, and because of the need for considerable personal support of those working in stressful and dangerous undercover activities, a Commission will be well advised to have on staff a psychologist with particular experience in dealing with police as well as crisis links to a group of psychiatrists. The need for such a resource should not be overlooked, nor should the stresses involved be underestimated.

Public Hearings

Essential for an Inquiry of this kind is the public exposure of the results of its inquiries. Absent that exposure, it is impossible to gain the confidence of the public, or the constant flow of intelligence which is the lifeblood of a Royal Commission.

To secure this, the Commission constructed a custom built hearing room with modern technology including real time transcript, video screens for the display of the results of covert operations and of documents scanned onto the hearing room system, and the equipment needed to receive evidence through video conferencing or from a remote location.

Two necessary adjuncts require mention. First, the employment of a Media Liaison/Public Relations officer is essential to promote the flow of information, and to control suppression orders in relation to names or details that need to be confined to the hearing room. Secondly, a Commission will require a suitable witness protection programme, and a capacity to access such legislation as exists in relation to the alteration of identities. As those who have been concerned with witness protection arrangements know all too well, they require extensive planning and resources and can be very expensive. Unless properly arranged they can be the cause of considerable resentment and unhappiness on the part of the witness and/or family. They can undermine a Royal Commission very quickly as the media are not slow to pick up on problems of this kind. Disinformation can also be expected from those who wish to work against theinquiry, and that will inevitably involve casting doubt upon the arrangements made for witnesses and upon the effectiveness of amnesties or undertakings.

Continued Inquiries

It is also essential that there be a follow up for an Commission of this kind, otherwise there is every risk of business resuming as usual. In New South Wales, there were a number of investigations that could not be completed in time, as well as a substantial volume of potentially useful intelligence available. The Commission was able to pass the results of its activities and its intelligence holdings on to the Police Integrity Commission later mentioned.

Absent that option there could have been considerable problems, operationally and in terms of personal security, in passing the materials back to the Service. The alternative option of destruction of the records, even if permitted under archival laws, would involve an unacceptable waste of valuable information.

Another matter which became readily apparent was the need to apply considerable resources to wind up the Commission, not only to marshal the material in a way that ensured its future retrieval, but also to comply with the laws relating to listening device and telephone intercept materials and to prepare prosecution briefs for those cases that were to follow that path. A Royal Commission follow up team will be needed for this purpose, including both lawyers and investigators.

A Reflection

As can be seen from the foregoing, the Royal Commission in New South Wales was established, and conducted, as a fully functioning criminal investigation unit, combined with a traditional inquiry at which evidence was led through witnesses, and physical exhibits were tendered by Counsel in a formal hearing presided over by the Royal Commissioner. So conducted, the hearing phase approximated a normal hearing of a judicial kind, in which those police or other witnesses who were called to give evidence were given advance warning that they were under adverse notice (although without detailed particulars) and were entitled to be legally represented. They were free to offer such evidence or explanation as they wished, they had a limited right to cross examine their accusers, and they had the chance to make formal submissions concerning any matter that might have led to an adverse finding.

As a consequence of the far reaching powers and the structure required for a wide reaching inquiry into corruption, the establishment of a Royal Commission should be preserved for those occasions where there is a clear justification for it. The undertaking involved is considerable and the suspension of individual rights significant. Unless properly empowered and resourced the failure of any such inquiry will be guaranteed, and even greater harm will be done than might otherwise have occurred. It follows that if it is to be undertaken, and if the cycle of corruption is to be halted to any real extent, then it must be done properly.

Unless the time frame offered, and the budget available, permits adequate planning and the creation of a capacity sufficient to meet the exigencies of the investigation, then I would caution that a Commission of Inquiry not be attempted.

THE WAY AHEAD

In its final Report, the Royal Commission made recommendations for a wide reaching reform of the Service, ranging from new procedures for recruitment, promotions, operational measures, internal investigations and external oversight. No single approach will ever cure corruption within a Police Service once it is entrenched to any degree. Nor can an Internal Affairs branch, or an external oversight agency, however committed or effective, provide the solution by itself.

At best such a body can operate as a watchdog or safety net. What is required, is a comprehensive plan in which:
· efficiency and integrity are properly recognised;
· ethics are taught and reinforced at all levels of service;
· promotion is merit and integrity based;
· proper opportunity is provided for skill enhancement and advancement within the Service;
· resources, powers and training are provided that permit of ethical evidence based investigations;
· operational procedures are laid down that are workable and reviewable;
· a proper balance is struck between managerial/remedial intervention for minor infractions and prosecution for corrupt conduct;
· local commanders assume a real responsibility for the performance and integrity of officers under their command;
· effective and responsible first line supervision is provided;
· power exists for the prompt removal of those officers for whom the Commissioner has legitimate cause for a lack of confidence in their integrity;
· police are appropriately remunerated according to skills possessed and duties performed;
· internal witnesses are properly protected in their office and person;
· an effective Office of Internal Affairs is established, attachment to which is seen as a positive career move;
· effective external oversight is available through a specifically tasked body;
· activities likely to lead on to corrupt practices and loss of professionalism, such as substance abuse, manipulation of expenses, non compliance with informant management plans, stereotype performance evaluations, are specifically targeted;
· there is acceptance, across the Service, that integrity matters and that corruption is a problem for all of its members.

Without seeking to diminish the significance of each of those elements for a comprehensive plan that is designed to promote policing as a calling dependent on integrity and professionalism, some of more immediate relevance may be singled out for greater attention.

Career Development

Among the matters recommended by the Royal Commission was the need for raising recruitment standards and entry age, so as to meet the kind of exposure which, in the past, led astray many young police of limited education and maturity. Considerable strength of character and confidence, of the kind that can only be gained by some experience outside a disciplined service, and which comes with maturity, is needed to resist the inducements of older and more senior officers bent on securing participation in, or at least tacit tolerance of their corrupt activities. This can only be achieved if, in addition to recruitment policies that depend on suitability and maturity for the job, there is a sound recruitment training, and a continuing development program that combines a academic input from a Police Academy that has a university link, as well as practical training from police instructors who have demonstrated integrity and who have earned respect.

Similarly, the Service should demonstrate through an assessment centre process, or an

equivalent procedure of the kind used in modern commercial institutions, that promotion is to be earned through merit and integrity. Some resentment can be expected from officers, who expected promotion through seniority alone, when they are passed over. Time will, however, cure that, and a Service can only grow in stature and performance if young and able officers are able to advance quickly, although commensurately with their skills and experience.

For those officers, who possess and wish to develop special skills in forensic fields and information technology, where technical advances are rapid and ever increasing specialisation is required, incentives are required for their retention, which may go beyond mere promotion.

An allied consideration which the Royal Commission wished to encourage was lateral entry and transfer between Police Services. This model, which is seen in the United Kingdom, expands career opportunities and has the advantage of bringing in new ideas and attitudes, of breaking up cliques, and of placing in positions of authority officers who are free from insidious earlier connections with corrupt police still in the Service.

Unless policing can be elevated, from a narrow discipline driven Service, into an organisation driven by modern management approaches, in which rank is retained for proper purposes, then it cannot expect to attract the features of professionalism that emphasise integrity and generate respect.

The Role of Police Associations

The Police Associations have a critical role to play in encouraging serving police to fight corruption, in co-operating in the prosecution of the corrupt, and in converting the police culture into one that is wholly positive. Unless their assistance can be harnessed a significant obstacle to reform remains. Such role can be exercised without surrender of their equally important industrial function.

Too often in the past, they seem to have placed the strident defence of police, later shown to be absolutely corrupt, ahead of the education of their members about the dangers of corruption and serious misconduct, and to have turned their backs upon internal informants, a response that has only strengthened the instinct of police to unite in self protection.

This is not to deny the proper role of the Associations in defending members who may have been unfairly treated, or to have been the subject of a wrong decision. It is only to emphasise the positive role of the Associations in ensuring safety and integrity in the workplace, and in the support of honest police faced with the unenviable job of exposing the rotten apples.

Investigative Integrity

The Royal Commission recommended the adoption of a number of significant measures designed to improve the quality of investigations, and to reduce the opportunity for challenges of the kind that tend to undermine public confidence in the police. They have by and large been

adopted either by virtue of statutory enactment and/or the issue of operational instructions, including:
· the adoption of PACE type legislation to regulate the interview process, under which the police have a reasonable opportunity to complete their investigations and the rights of suspects or prisoners are preserved (Crimes Act 1900 (NSW) Part 10A)
· the use of ERISP or audio recordings of confessions (Crimes Act S424A) and of dealings between police and motorists;
· the video recording of the execution of search warrants;
· the adoption of procedures for controlled operations in which police are permitted, for investigative purposes and subject to strict control, to carry out activities in the course of undercover activities which might otherwise constitute a breach of the criminal law (Law Enforcement (Controlled Operations) Act 1997;
· the development of revised and tight procedures for criminal informant management; and
· the review of failed prosecutions of any significant kind.

Commissioner's Confidence

The Royal Commission considered it essential that the Police Commissioner have the power to dismiss an officer in whom confidence has been lost. It was intended that this occur only after appropriate investigation in which the officer had a fair chance to be heard, and to be subject to limited review on administrative law grounds.

Legislation along these lines has been introduced (Police Service Act 1900(NSW) Part 9 Div 1B) and a number of officers have had their careers terminated as the result of an exercise of this power. This recommendation was perhaps the most controversial of all of the recommendations and attracted stern resistance from the Police Association.

A combination of Internal and External Vigilance

The approach taken by the Royal Commission was to establish a combination of internal and external supervision, comprising four independent components:
· an enhanced Office of Internal Affairs;
· an external Police Integrity Commission
· an Inspector General
· the Ombudsman

The Office of Internal Affairs

It is essential that the Service retain a real role in self regulation. That is an indicator of a profession, and it that ensures that the Service continues to own the problem. What was recommended, however, was the creation of an office staffed with able and respected officers, resourced with its own covert and intelligence capacity, authorised to conduct proactive and controlled operations, including integrity and substance abuse testing, and not confined to narrow complaint reactive investigations.

Associated with this approach necessarily is a change to a more remedial form of discipline, in which minor or technical breaches of discipline and matters of customer service can be addressed by local managers, without the need for the lengthy and confrontational disciplinary proceedings that used to be the norm. An officer caught up in any such procedure was inevitably left resentful, and damaged in circumstances where a remedial approach would have preserved, and most probably improved, future performance.

The line between disciplinary infractions and corrupt conduct can be, at times, uncertain. This makes all the more important the need for the Office of Internal Affairs to be staffed by officers with broad experience, common sense and management skills. It also calls for the establishment of good communications between the Office and Local Commanders. Subject to available intelligence, and the need for security in significant operations, there needs to be a real degree of communication and trust between the Office and those commanders, who are often best placed to know the officer in question and to pick up the tell tale signs of unethical or corrupt performance.

To freeze local commanders out of the circuit is to deny a valuable resource, and to dilute the acceptance of personal responsibility. If they cannot know what is taking place, or contribute to the solution of the problem, they cannot be criticised fairly for its existence.

So structured and freed of the time consuming responsibility for matters better left to local management, the Office of Internal Affairs is able to go about its real work both alone, and in partnership with the external Police Integrity Commission. Integral to its effectiveness is the Internal Witness Support Unit which has progressively addressed the problems of the past in providing an appropriate line of support for and assistance to internal witnesses.

The Police Integrity Commission

A key recommendation of the Royal Commission was the formation of an external, focussed and highly trained agency, the Police Integrity Commission (PIC) which would be able to build on its work, take the lead in key matters requiring the investigation of serious corruption, and operate in tandem with the Office of Internal Affairs and with the New South Wales Crime Commission, as appropriate.

This model permits direct involvement of the external agency at the coal face, facilitates the assembly of intelligence and informants, and allows greater awareness of problem areas and of trends in corrupt practices. It is one in which the external agency combines direct and aggressive investigation of the most serious matters, with oversight and review of internal police investigations. It preserves for the Police Service a real role in self regulation, and it is the one that was assessed as most likely to promote public confidence at a time when that confidence had been sorely tested.

The powers vested in this body, currently headed by a District Court Judge on secondment, are similar to those of a Royal Commission. They include powers to:
· intercept telecommunications under warrant;

· utilise listening devices under warrant;
· seek orders for the freezing and confiscation of assets;
· apply for injunctions to restrain conduct which may affect an investigation.

The PIC is able to conduct both reactive and proactive inquires, to carry out audits of high risk areas of police operations, perform integrity assessments, monitor the quality of internal investigations, take over investigations into police shootings and deaths in custody, make recommendations and participate in police corruption education and prevention programmes, and take such measures as are necessary for the protection of persons assisting it.

It has the capacity to carry out public hearings and to require evidence to be given under compulsion, although subject to privilege against subsequent use, save for the prosecution of the witness for perjury associated with the giving of evidence, or for any offence committed under the Act. Its powers to gather evidence are supplemented by its ability to obtain search warrants and to serve notices to produce documents or to provide information. Evidence gathered can be used for criminal prosecutions (subject to the qualification mentioned in relation to information given or documents produced under compulsion) and for disciplinary purposes.

The PIC is subject to a specific restriction not to employ serving or former members of the New South Wales Police Service, although it is empowered to make arrangements with the Service for the establishment of joint task forces, and to co-operate with and co-ordinate their activities. Such task forces are likely to be employed in circumstances where suspicion arises as to the involvement of police in organised crime. It is also empowered to work in co-operation with other investigative and law enforcement agencies, and to disseminate intelligence and information to those agencies as it thinks appropriate.

The Inspector General

The PIC is subject to supervision by an Inspector General, currently a retired Supreme Court Justice, with a duty to investigate complaints made against its staff, to audit its operations, effectiveness and compliance with the law; and to report to a Parliamentary Joint Committee annually, and as required. The PIC is directly answerable to the same Parliamentary Committee, and is required to issue an annual report on its operations. The Inspector General has investigative powers of his own motion, at the request of the Minister, or in response to a formal reference. They include the calling of officers to provide information and documents, access to the records of the PIC and the initiation of inquiries and prosecutions.

The Ombudsman

The ombudsman provides the final plank, in the platform, retaining an important role in dealing with certain categories of complaints, and in exercising an oversight role in relation to the manner in which the Service deals with complaints entrusted to it and with matters of customer service.

The PIC is able to work co-operatively and closely with the Ombudsman in providing a comprehensive opportunity for external review of the Service. The procedures adopted pursuant to the joint working arrangements between the Service, the PIC and the Ombudsman, are designed to ensure that complaints do not slip between the cracks, and that the PIC has the opportunity of taking over any matter of such significance, or of such relevance to other inquiries, that it should fall within its control.

The Fruits of the New Approach

So structured the PIC, the Office of Internal Affairs and the Crime Commission of New South Wales, provide a powerful structure within which corruption might be detected, particularly when operating in tandem. The availability of the coercive powers of the PIC and of the Crime Commission, the presence of a significant physical and electronic surveillance capacity, the use of strategic, operational and financial intelligence, and the combined skills of local investigators and external investigators with no allegiance to serving police or to the Service, is such that substantial inroads can be made both proactively and reactively into any pockets of corruption that emerge.

The experience of the Royal Commission, which was able effectively to roll over corrupt police and to use them in an undercover capacity, was possibly the single most important factor that caused uncertainty in the ranks of the corrupt and led to a progressive disclosure. There is no reason to suppose, as recent investigations have revealed, that there will be any relaxation in that approach, or less uncertainty that a fellow corrupt officer will not be working under cover.

Of considerable importance, so far as public confidence is concerned, is that for the first time there has been realistic annual reporting to Parliament concerning the level of corruption and the effectiveness of the measures taken to combat it, in the form of the Annual Reports of the PIC and of the Inspector General.

Apart from the initiation of criminal charges arising out of PIC inquiries, such reports are of value so far as they identify operational and management deficiencies, and test for the level and nature of any corruption that may persist in the Service, notwithstanding the Royal Commission.

In addition to the Annual Reports, in which the procedures of the PIC are reviewed for their regularity and compliance with the law (for example in relation to listening device and telecommunication interception product) the Inspector General has conducted a review and reported upon the Law Enforcement (Controlled Operations) Act 1997. This identified a number of practical problems which had emerged, consequent upon adoption of the Code developed by the four State law enforcement agencies using such operations (the Police Service, the Independent Commission against Corruption, the NSW Crime Commission and the Police Integrity Commission) and led to a number of recommendations for reform.

CONCLUSION

The climate for change is now favourable. The heightened awareness of the covert capacity available, the backing of the Government, the public rejection of the corrupt practices revealed, and the more critical attitude likely to be brought to bear by Judges and juries in cases where the evidence is suspect, the transparency of high risk activities, and the greater credibility likely to be attached to complaints are all inimical to the continuation of corrupt practices.

It is hardly unexpected that concerns have been expressed by individual police in relation to some of these matters, including in particular, integrity testing and drug and alcohol testing. What is now looked for is an acceptance of the assurances, given by Senior Command, that honest officers have nothing to fear from these measures or from the wider regime that has been adopted.

Not only does the system now in place provide a greater assurance for the honest officer that he or she should not fear the approaches of a dishonest officer, it should also provide a safer work place in which there is no room for an officer affected by drugs or alcohol to be behind the wheel of a police car, or to be placed in a situation which may involve the use of a firearm.

The remaining complaint that the Service is overregulated is entitled to a sympathetic ear. However, given the past record, the size of the Service, and the time needed to effect a profound change in culture and to achieve a new management team, as well as a fundamentally different management philosophy, presented no alternative.

It may well be in the future that there can be some scaling down of the structure presently in place. That may depend on how well the shift to a managerial/remedial approach proceeds, upon the degree of resistance that persists in relation to change, and upon how fast managers and new entrants to the Service embrace a philosophy of integrity above all.

The hope is that the work of the Royal Commission, and of those who have taken up the ball since, from the Commissioner down, will not be lost. One can only reflect, in conclusion, upon the words of Edmund Burke “Among a people generally corrupt, liberty can no longer exist”. May the cycle of corruption never return to a phase in which that becomes apposite.

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