

BREAKING the Code of Silence

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The Wood Royal Commission into New South Wales police: a brief overview.

The three-volume Final Report of the Wood inquiry into NSW Police (Royal Commission Into the New South Wales Police Service, 'Final Report, Vol I: Corruption; Vol II: Reform; Vol III: Appendices', May 1997) was publicly released on 15 May 1997, to much media fanfare. The *Sydney Morning Herald* (SMH) devoted an 8-page special report on 1 May to the pending release of the Inquiry Report, headed **The Police Purge**. On the day of the public release of the Report, the SMH five-page 'Special Report' under the banner **The Police Verdict** was headlined **Wood, Carr Split on Drugs**. The *Australian* led with **Call for Drug Law Revamp, Force Overhaul to Fight Corruption, Wood Attacks Culture of Greed**, and the *Daily Telegraph* front page 'Final Verdict' was **True Blue Strategy for an Honest Police Force**.

Initial coverage tended to focus on the recommendations to:

- reform drug laws, including setting up 'shooting galleries' and support for the ACT heroin trial;
- increase the minimum age of recruits to 21 and require tertiary qualifications;
- expand police surveillance powers;
- establish a new agency to replace Special Branch;
- give more power to the Police Commissioner;
- further purge corrupt officers;
- give greater protection to whistleblowers;
- provide for police to use hand held tape recorders;
- use civilian observers in raids where cash and drugs might be expected; and
- transfer all prosecutions to the DPP.

This article will offer an overview of the Royal Commission into the NSW Police Service. Far from being comprehensive, the aim is to offer a brief and partial assessment which may be of interest particularly to readers outside NSW. No reference will be made to the paedophilia section of the inquiry, the report into which was released later in August and deserves separate analysis.

Hatton proved right: 'entrenched and systemic' corruption

The establishment of the Wood Commission was a victory for the former independent member of the NSW Parliament and long time anti-corruption campaigner John Hatton, and a corresponding defeat for the forces of complacency represented by then Commissioner Tony Lauer (who described suggestions of entrenched corruption as 'figments of the political imagination': SMH, 14 May 1994), then NSW premier John Fahey (who described the parliamentary vote establishing the Commission as a 'tragedy': *Daily Telegraph*, 12 May 1994) and former Premier Nick Greiner ('an exercise in self-indul-

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gence which would waste wads of money': *SMH*, 14 May 1994). The findings of the Commission that there was 'entrenched' and 'systemic' corruption in the NSW Police Service was a vindication of John Hatton's position and discredited Lauer, Fahey and Greiner's opposition to its establishment. As early as February 1996 in its 'Interim Report', the Commission was able to state that:

within a short time of commencing its inquiries, the Royal Commission came into possession of intelligence suggesting that there were significant groups of serving police acting in ways which were corrupt

and that

the practices in question were long-standing, having been inherited or copied over many years, and having over that time involved both serving and former members of the Police Service. [p.1]

Lauer's position became (some would say it had been so for some time) untenable and he resigned. Fahey had already been defeated in the March 1995 State election and had resigned from Parliament before standing for Federal Parliament in 1996. He is currently the Finance Minister in the Commonwealth Government.

The Wood Commission was remarkably successful when compared with recent inquiries such as the ICAC Milloo Inquiry (1994) in revealing extensive entrenched corruption in a wide range of areas. These included:

- process corruption;
- gratuities and improper associations;
- substance abuse;
- fraudulent practices;
- assaults and abuse of police powers;
- prosecutions — compromise or favourable treatment;
- theft and extortion;
- protection of the drug trade;
- protection of club and vice operators;
- protection of gaming and betting interests;
- drug trafficking;
- interference with internal investigations and the code of silence; and
- other circumstances suggestive of corruption. [Vol. 1, 83-4]

Rather more, it seems, than 'figments of the political imagination'.

Video games

The success in revealing extensive 'entrenched' and 'systemic' corruption was brought about in part by the 'power and resources' accorded the Commission (Vol. 1, p.144), by some innovative and committed investigative techniques, particularly the production of video evidence, and the 'roll-over' of some key police witnesses such as Trevor Haken relatively early in the process. Selective examples of the video surveillance were central in discrediting police witnesses, in the process undermining the notion that if police 'held the line' the usual cover-up would be successful. The video of Head of the Gosford Drug Unit, Detective Sergeant Wayne Eade, engaging in sexual acts, drug use and ordering drugs and child pornography, was widely read as 'breaking the brotherhood' (*SMH*, 1 May 1997), given that Eade had survived numerous complaints and inquiries over the previous decade. But it was the 'crotch-cam' shots of 'Chook Fowler' trousering wads of cash and uttering endless permutations on the F word, which achieved international media cult status.

In a visual age saturated with famous video clips such as the Rodney King amateur video, the world's worst drivers/ stupidest criminals/funniest shots of people falling off buildings or being bitten by a shark, the grainy black and white video shot from below the dashboard of Trevor Haken's wife's Toyota, together with the Nixonian soundtrack was undoubtedly a classic, even if 'Chook' declined to take the credit, demurring to the suggestion that it could have been an actor playing him. This was an interesting reversal of the usual suggestion that real people sometimes mimic or follow the script laid out by actors like Robert De Niro playing fictional characters like Travis Bickle.¹

But unlike the hermeneutic confusion evidently experienced by the jurors in the first Rodney King beating trial (who saw not a brutal and prolonged bashing but a 'lawful use of force'² most television viewers did not seem to require a degree in semiotics or a Thesaurus to divine what was going on. While the participant police officers attempted to neutralise their activities by describing them in jocular terms: 'the joke', 'drink', 'giggle' 'gorilla' 'handshake', or 'laugh', most members of the public thought they recognised corruption when they saw it. As one of the officers who rolled over remarked in a statutory declaration: 'the joke got beyond a joke' (p.172). For those interested in culture and language, the glossary is one of the most interesting sections of the Report.

Such readily understandable and widely conveyed images grabbed public attention, helped build up a strong momentum for further revelation, swept aside the remnants of the 'rotten apple' thesis and created a strong public and political demand for reform. While not making specific published findings against individuals, the Inquiry resulted in a significant number of police (p.92) being dismissed or resigning ('separations' as the Commission puts it), and cleared the ground for later dismissals, and possible prosecutions or internal disciplinary actions.

Process corruption: nothing 'noble'

Direct evidence of police 'on the take' or dealing in drugs, tends to fall within most definitions of corruption. The Commission was suitably alert to concentrating only on the easy cases and broad in its definition of corruption which importantly included process corruption, which it listed as comprising variously:

- perjury;
- planting of evidence;
- verbals in the form of unsigned records of interview and note book confessions;
- denial of basic rights in respect of matters such as the use of a caution, or detention for the purpose of interview;
- assaults and pressure to induce confessions;
- gilding the evidence to present a better case;
- posing as a solicitor to advise suspects to co-operate with police;
- tampering with the product of electronic interception to remove any matter that might prove embarrassing;
- unofficial and unauthorised practices such as putting suspected street drug dealers onto a train and 'banning' them from an area; and
- 'taxing' criminals who are seen as beyond the law. [p.84]

As the Commission notes, process corruption:

is often directed at those members of the community who are least likely or least able to complain, and it is justified by police

on the basis of procuring the conviction of persons suspected of criminal activity or anti-social conduct, or in order to exercise control over sections of the community.

The ambiguous status of process corruption is illustrated by the totally inappropriate term 'noble cause corruption', much favoured by Evan Whitton. There is nothing 'noble' about framing suspects and the Commission usefully noted 'the hypocrisy of the tag of "noble cause corruption"' (p.85). It pointed out that process corruption 'commonly becomes linked with extortion, theft and other forms of corruption' and that it:

- leaves an officer potentially compromised for all time;
- teaches the ease with which a deception and cover-up can be maintained;
- leads to a lack of confidence on the part of the community in the criminal justice system;
- becomes accepted as a rite of passage, a form of thrill seeking, or as a means of releasing sociopathic tendencies; or
- is seen as an easy alternative to skilled detective work. [p.85]

The Reports give numerous examples of various process corruption practices and some useful case studies across a range of different police sections including Kings Cross, a regional crime squad (north-west), a suburban patrol (Marrickville detectives) and an 'elite task force' (the joint Task Force — a combined Federal and NSW State police force). Many of the forms of process corruption were common across these quite different sectors, indicating the entrenched nature of corruption.

Reform

The bulk of 'Volume II: Reform' deals with the mechanisms and processes of reform. There is a strong and to some extent understandable managerialism about these sections, dealing with transforming the Service, the organisational and management structure, employment, educational training and development, promotions and transfers, termination of employment, civilian and administrative support services, salaries and allowances, secondary employment, performance management, the Complaints and Discipline System, Civilian Advisory Councils (after recommending the abolition of the existing Police Board), internal witness support programs and integrity measures. Much of the responsibility for the process of change rests with the new Police Commissioner, Peter Ryan, who has been given extraordinary powers to remove officers:

The Commissioner may, by order in writing, remove a police officer from the Police Service if the Commissioner does not have confidence in the police officer's suitability to continue as a police officer, having regard to the police officer's competence, integrity, performance or conduct. [*Police Service Act 1990* (NSW), s. 181D(1) as amended by the *Police Service Amendment Act 1997* (NSW)]

The key responsibility for the continued 'detection, investigation and corruption of police misconduct and corruption' (at 524) lies with the newly created Police Integrity Commission which was recommended in the 'Interim Report I' and assumed primary responsibility for the investigation of corruption within the Service from 1 January 1997 (*Police Integrity Commission Act 1996* (NSW)).

Failures and omissions

It may be that a textual analysis of the Commission Reports obscures the key value of the Commission which was per-

haps its overall effect (especially through the videos) in building a public and political climate in which reform was squarely on the agenda. However the eventual outcome of the reform process is likely to be weakened by a number of failures in the Commission process.

The hegemony of legal methodology

While there is evidence in the Reports of historical and other research, the Commission followed the familiar pattern of Australian Royal Commissions³ of valorising the eliciting of evidence by way of examination and cross-examination in formal hearings, as the chief source of knowledge about police activities. While evidence adduced in formal hearings has the benefit of public disclosure and more readily generates 'statements which bear the insignia of authoritative-ness',⁴ it is not the only source of knowledge.

Criminological and historical research was commissioned from leading Australian experts, but only a tiny fraction of the Commission's budget, most of which was spent on salaries for lawyers and support staff and infrastructure costs, was allocated to such activity. Further, the research reports received from the consultants are not being published by the Commission, which is a clear indication of the value accorded social science and criminological research. The Runciman Royal Commission into the Criminal Justice System in the UK in 1993 published an excellent set of research papers, which many regard as the chief legacy and benefit of the Commission. A further problem with the Wood Commission's Reports from a research perspective is the lack of an index to any of the Reports, which severely limits their utility as research sources. As leading commentator Evan Whitton remarked: 'for \$64 million, the customers might have expected at least that' (*Australian*, 16 May 1997).

Missing players: the judiciary, prosecution and legal profession

The Reports remarkably fail to confront three key institutional components of the criminal justice system which are central to understanding how and why corruption problems emerge. The judiciary, the DPP and the legal profession are largely missing players in the Reports of the Commission, indicating an inability to be reflexive about institutional conditions conducive to corruption. While there is no doubt much in the Report which hopefully will assist in 'ending the cycle of corruption', this aim is only possible if all the players are involved and take responsibility for the ethical and effective conduct of their roles.

Reflexivity starts at home. I do not wish to be read as excusing the extraordinary range of police misconduct, abuse and corruption revealed at the Inquiry. The Royal Commission was into the Police Service and not the criminal justice system. Police clearly do a lot more than investigate criminal offences and initiate prosecutions. But this is an important dimension of police work, bringing the Service into contact with, and to some extent under the scrutiny of, a range of other agencies with responsibilities for vetting police conduct and evidence and ensuring a fair trial. I do think that the police are entitled to be aggrieved when so much attention is devoted to the pernicious aspects of police culture(s), while at the same time other aspects of the network of legal cultures which connect and overlap with police cultures and practices are ignored or glossed over. The responsibility of powerful players such as the judiciary, prosecutors and the legal profession appears to have been minimised or denied.

Over-reliance on Commissioner Ryan

Other failures include an over-reliance by both the Commission and the NSW Government on the appointment of a new Police Commissioner, Peter Ryan, to ensure the cyclical processes of corruption are broken. This over-reliance is manifest in an over-concentration of power in the hands of the Commissioner in three key respects. First, the Commission recommends that the powers of the Police Commissioner be expanded by reducing the power of the Police Minister to direct the Commissioner. While justified by concerns to enhance the Commissioner's 'independence' from the political process, this recommendation glosses over the blurred nature of the operational/policy distinction and breathes life back into the moribund 'original powers' doctrine of police responsibility. Here the Police Commissioner's power is to be expanded as against the democratically elected government and the notion of ministerial responsibility. The second recommended expansion of the Commissioner's power is at the expense of a role for democratic civilian input in police management decisions, in the form of the abolition of the Police Board. The third expansion is in terms of the employment relation and the powers of dismissal referred to above.

Extensions and concentrations of power should be justified in structural terms as appropriate to the office, not with an eye to the characteristics or personality of the office holder or an assessment of the political conjuncture. The dangers in this concentration of power were shown starkly when, following the disbanding of the Special Branch and before the release of the Commission Report, Mr Ryan announced the establishment of a replacement, the Protective Security Response Group, without consulting the Minister. Ryan claimed this right to act alone in terms of his responsibility for all operational matters. This attempt to foreclose public and political debate on what is clearly a policy matter of some significance was promptly countermanded by Police Minister Paul Whelan (**Whelan kills off Ryan's new branch**: *SMH*, 17 April 1997). So much for the distinction between operational and policy matters which the Commission thought so transparent.

Reducing civilian involvement: the abolition of the Police Board

The 'Immediate Measures Report' released in November 1996 recommended (somewhat out of the blue) the abolition of the NSW Police Board, a civilian body with a range of statutory powers including senior appointments, education and training. Only five weeks earlier in a speech to a conference on civilian oversight of law enforcement bodies in Washington, Justice Wood had anticipated a 'greater advisory role, and a bigger say in training' for the Board. (*SMH*, 16 November 1996). The Police Board had vetted and interviewed candidates for the Commissioner's job and had recommended the appointment of Peter Ryan. A day after the release of the 'Immediate Measures Report', legislation was introduced in the NSW Parliament abolishing the Police Board, indicating the extent to which the Commission, Commissioner and the Government were working hand in glove behind the scenes. However, there was no opportunity for public debate over the merits of this heavily orchestrated move, openly characterised by the media as Ryan rolling the body which appointed him, further consolidating his powers and removing the major mechanism for civilian oversight in NSW policing arrangements.

The section in the 'Immediate Measures Report' giving 'reasons' for the Board's abolition was flimsy and in places inaccurate as to the Board's powers and responsibilities. Following threats of legal action by the Board, Justice Wood was later to issue what the *Sydney Morning Herald* described as an 'abject apology' (*SMH*, 20 December 1996). The Police Board had its inception in the aftermath of the 1981 Lusher inquiry and the concern to prise open the insular culture of the NSW Police Service with its legendary hostility to civilian input. The Board had a somewhat chequered history, with some early weak appointments and a draining struggle with the various police Commissioners and Ministers over its limited, mainly advisory powers which fell short of those recommended by Lusher.

The substitute forms of civilian input recommended by Wood, a two-tier structure of community consultation at patrol level and advisory councils on specific issues, are advisory only and represent a weakening of the principle of democratic civilian oversight. They involve civilians in offering advice instead of playing a role in police governance. The contradiction in the Board's abolition is identified by Delahunty thus:

On the one hand, the Wood Royal Commission was committed to opening an insular, hierarchical Service to civilian influences, by creating an organisational structure akin to other large service-oriented organisations. On the other hand its recommendation to scrap the Board (and the NSW Government's implementation of this recommendation) effectively removed civilians from the governance of the Police Service and further concentrated power in the Commissioner of Police.⁵

Legalise the illegalities

There is a rather obvious slippage between those earlier sections of the Reports, the case studies and discussions of 'entrenched corruption' and the section dealing with criminal investigation procedures. Although this chapter is headed 'Integrity Measures (1) Criminal Investigations' the two aspects are arguably somewhat divorced and a fairly predictable and conventional list of extensions of police powers are recommended such as expanded electronic surveillance, phone tapping, use of undercover operations, without squarely addressing the issue of whether such powers ought to be extended to a force in which corruption was so widespread. The assumption underlying the argument for such extensions of power seems to be that abuses have stemmed from lack of formal powers.

This argument has a familiar ring going back to the Hope report into ASIO and crudely stated seems to amount to a version of 'legalise the illegalities'. The key concern throughout seems to be with sharpening the efficiency and effectiveness of law enforcement. Any concern with the revealed excesses and dangers of law enforcement is muted by comparison, as illustrated in the focus on (favourably) compromised prosecutions, as against those compromised against the accused, and in the complacent attitude to and neglect of the issue of miscarriages of justice and procedures for remedying them.

This general tendency can be illustrated by a series of recommendations for extensions to police powers such as:

- the recommendation for the re-creation of the abolished Special Branch as a Protective Security Group, justified in part by the Sydney 2000 Olympics;
- expanded surveillance powers;

- extended detention powers without comprehensive codes of conduct;
- extended phone tapping powers;
- police immunities undermining the effect of *Ridgeway* (1995) 69 ALJR 484);

which are often at odds with the overwhelming evidence of the misuse by police of existing powers and extensive process corruption.

Miscarriages? No worries

A further failure in the Report is the lack of concern to address the plight of those convicted as a result of process corruption. Those people receive little succour from the Report. The Commission comes out against the establishment of a Criminal Cases Review Committee similar to that created in the UK after the Report of the Royal Commission on Criminal Justice (1993) by a Conservative government. The Commission considers that 'there is now a system available which presents a substantial opportunity for any applicant armed with fresh evidence or material which was insufficiently considered at trial or in an appeal, to have a conviction reviewed on its merits' (p.488). The flaw in this argument is apparent in the list of what are termed 'residual matters' (p.489): the lack of investigators to carry out investigations to produce the fresh evidence, difficulties with legal aid and the lack of a system of statutory compensation.

A Royal Commission Unit has in fact been set up in the Appeals section of the NSW Legal Aid Commission section, staffed by two full-time solicitors, and clearly they will do their best. But this is no substitute for a proactive agency charged with combing through the evidence of discredited police officers (the JTFs, KXs and so on) and reinvestigating cases in which convictions have been obtained on the basis of process corruption. Thirty cases are currently in the pipeline (*SMH*, 3 June 1997). One of the cases which has been overturned by the NSW Court of Criminal Appeal as a result of evidence at the Royal Commission reputedly only came about because a lawyer in a pub overheard someone mentioning the name of one of the coded police witnesses and connected it with a detective involved in the case of one of his clients. Those victims of process corruption, especially those who still languish in prison as a result of it, deserve a better system. So does the NSW public.

Political law and order populism

The favourable climate for reform generated during the Royal Commission is being squandered in the political arena by both government and opposition through populist political responses to law and order issues which ignore or are at odds with the revelations at and the recommendations of the Commission. As the Commission noted, process corruption 'has its roots in community and political demands for law and order' (p.36). The puerile political 'debate' of recent times as to which party would increase police numbers by more, was described by the Commission as 'a disservice' — 'promises to achieve more through increases in police numbers are in fact empty rhetoric' (p.248). Subsequent parliamentary debate on legislation such as the *Crimes Act (Street Safety) Amendment Act 1997* and the *Parental Responsibility Act 1997* (NSW), the first of which increases police powers to coercively break up groups of young people on the streets without requiring any evidence that an offence has been or is about to be committed, and the second giving police powers to remove children and young people from the streets, shows

a commitment to continuing the 'disservice'. Law and order 'commonsense' is evidently well entrenched.⁶

Conclusion

The Commission in its 'Interim Report' (February 1996) provided a clear set of criteria for evaluation against which its future success might be measured. These are worth setting out at length.

If anything has been learned from the history of inquiries into the NSW Police Service, commencing with the 1867 Inquiry into Relationships between Police in the Braidwood District and Bushrangers, extending through the Studley-Ruxton, and Maxwell Royal Commissions of the 1950s, the Moffitt and Lusher Inquiries of the 1970s, to the more recent ICAC inquiries, it is that the simple public disclosure of serious misconduct and corruption, accompanied by policy recommendations specific to the matters unearthed, will not guarantee any long-term remedy. What is needed is attention to:

- the reasons for the emergence of these problems;
- the mechanisms which failed, or permitted their occurrence;
- the change to the structures and procedures needed to inhibit their re-emergence, and to act as an early warning signal; and
- most importantly, the processes by which those changes should be implemented.

The Commission continued:

This will be the approach taken for the remainder of this Inquiry. It is one which calls for the study, from an historical perspective, of the environment in which the Service works and of the forces from both within and without, which affect its behaviour and responsiveness to change. It is also one which calls for examination of the structure of the Service as a whole, to ensure that every possible area of vulnerability is shored up and an integrated, effective and manageable system left. ['Interim Report', February 1996, p.131]

This is an admirable statement of aims and a benchmark by which the subsequent performance and Report of the Commission might be judged. The Commission performed a valuable service in breaking the police code of silence, authoritatively and publicly revealing the extent of 'systemic and entrenched' corruption and providing favourable political conditions for significant reform in the organisation, structure and conduct of policing in NSW. However, the Commission Reports fall short of meeting its own criteria in a number of ways, including some of those identified briefly above. In particular, the over-concentration of power in the hands of the Police Commissioner and the failure to examine the judiciary, the DPP and the legal profession as key components of the 'environment in which the Service works' and as key institutional 'mechanisms which failed', result in us being left in exactly the situation the Interim Report describes as not guaranteeing any long-term remedy. If the history of policing in NSW teaches us anything it is that the Commission inquiry process will need to be repeated some years down the track.

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